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Lamont F. Toronto v. George D. Clyde, A. Pratt Kesler, Clair R. Hopkins and State of Utah : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

LAMONT F. TORONTO,
Plaintiff-Respondent,

- vs. -

GEORGE D. CLYDE, A. PRATT KES-
LER, CLAIR R. HOPKINS and THE
STATE OF UTAH,
Defendants-Appellants.

FILED
APR 30 1964

Case No.
10069

UNIVERSITY

BRIEF OF RESPONDENT

JUN 30

Appeal from the Judgment of the
Third District Court for Salt Lake County
Hon. A. H. Ellett, Judge

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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action for a declaratory judgment to determine the constitutionality of certain portions of Chapter 148, Laws of Utah 1963, codified as Chapter 2 of Title 63, Utah Code Annotated 1953, as amended, commonly known as Senate Bill 48 of the 35th Legislature. The action was also brought for a determination that the payment to the defendant Clair R. Hopkins, Director of Finance of the State of Utah, of his salary for the period July 1 through July 15, 1963 was unlawful. The portions of the act sought to be declared unconstitutional relate to the payment of expenditures of state funds without the approval prior to payment of the Board of Examiners of the State of Utah.

DISPOSITION IN THE LOWER COURT

The judgment and decree of the lower court (R. 35-38) determined:

1. The Board of Examiners has the duty to examine all claims against the state with the sole exception of salaries or compensation fixed by law but including claims for which an appropriation has been made as well as claims for which no appropriation has been made. The payment of any such claim against the State of Utah prior to the examination and approval of the same by the Board of Examiners is unlawful except where such claim has previously been denied by the Board of Examiners and appealed to and approved by the Legislature.

2. Insofar as Senate Bill 48 of the 35th Legislature authorized the Director of Finance to process and pay claims against the state (other than salaries or compensation fixed by law) without the examination and approval of the Board of Examiners of the State of Utah prior to the payment thereof, such authority is void, unconstitutional and unlawful and in particular the following portions of Section 63-2-13, 63-2-15 and 63-2-20, Utah Code Annotated 1953 are unconstitutional:

“63-2-13. The director of finance shall prescribe and fix a schedule of salaries for the officers, clerks, stenographers and employees of all state offices, departments, boards and commissions, except where such salaries are fixed by statute, by appropriation or where agency governing boards are authorized by statute to fix the salary of certain officers. . . . The board of

examiners in conducting any examination of claims shall not have authority to fix, reset or arbitrarily refuse to pay salaries set by the director of finance or officer's salaries as determined by agency governing boards. Such schedule of salaries shall have the force of law in all state offices, departments, boards and commissions, and shall in no case be exceeded without the express approval of the director of finance. No salary schedule shall be put into effect until approved by the governor.

"63-2-15. The director of finance shall establish mileage and travel expense schedules and set up rules and regulations for travel of all state officers, employees and part-time officials; and such schedules shall have the force of law in all departments and no voucher for travel expense shall be paid until the same has been approved by the director. No obligation shall be incurred for travel outside of the state without the advance approval of the governor through the director of finance. Such approval shall consist of a certification as to the availability of funds as well as a review of the necessity and desirability of such travel. This provision shall not apply to the legislature, legislative committees or members and employees of the legislative council.

"63-2-20. . . . The director shall examine and approve or disapprove all requisitions and requests for proposed expenditures of the several departments, except salaries or compensation of officers fixed by law in which case the director shall certify only the availability of funds, and no requisitions of any of the departments shall be allowed nor shall any obligation be created without the approval and the certification of the director. . . . It is the intent of the legislature

that the department of finance shall examine and pass upon all proposed expenditures. Any examination of claims as may be conducted by the board of examiners shall be made prior to payment but only after the obligation has been incurred and an account has been submitted and audited by the state's accounting officer."

3. The Board of Examiners may not delegate its ultimate duty to determine the validity of claims against the State of Utah but may make reasonable rules concerning its methods of examining claims and should hold regular meetings of such Board for the proper execution of its constitutional duties.

4. The payment of the salary claim of Clair R. Hopkins for the pay period July 1 through July 15, 1963 was unlawful, invalid and void and constituted an illegal expenditure of public funds since this claim was paid without the prior approval of the Board of Examiners.

RELIEF SOUGHT ON APPEAL

Plaintiff and Respondent seeks affirmance of the judgment and decree of the court below.

STATEMENT OF FACTS

The statement of facts set forth in the brief of appellants is accurate and correctly quotes the stipulation of facts entered into by the parties which are a part of the record on appeal. The court's attention is called to Exhibits "A," "B," "C" and "D," referred to in the stipulation and included in the record, but which are not quoted at length in Appellants' brief.

ARGUMENT

POINT I.

THE BOARD OF EXAMINERS HAS THE DUTY TO EXAMINE ALL CLAIMS AGAINST THE STATE EXCEPT SALARIES OR COMPENSATION OF OFFICERS FIXED BY LAW.

It is well settled by a long line of decisions of this court that the Board of Examiners of the State of Utah has the quasi-judicial authority granted by the Utah Constitution (Article VII, Section 13) to examine and approve or disapprove all claims against the state except salaries or compensation fixed by law. This authority applies not only to claims for which no appropriation has been made (the typical tort claim or contract claim not within the scope of an appropriation, often referred to as "unliquidated" claims) but also to claims for which an appropriation has been made (ordinary expenditures of funds appropriated by the Legislature, sometimes referred to as "liquidated" claims). *Uintah State Bank v. Ajax*, 77 Utah 455, 297 Pac. 434 (1931); *Bateman v. Board of Examiners*, 7 U.2d 221, 322 P.2d 381 (1958). The constitutional provision itself provides an appeal to the Legislature from a denial of the claim. *Wood v. Budge*, 13 U.2d 359, 374 P.2d 516 (1962). Also, the prior decisions of this court have indicated that any arbitrary action by the Board of Examiners would be subject to court review. *Bateman v. Board of Examiners*, supra; *State ex rel. Davis v. Cutler*, 34 Utah 99, 95 Pac. 1071 (1908); *Thoreson v. State Board of Examiners*, 19 Utah 18, 57 Pac. 175 (1899); 21 Utah 187, 60 Pac. 982 (1900).

The term *claim* within the meaning of the constitutional language is an extremely broad one and comprehends all requests for expenditures of public funds. This court defined “claim” in *Bateman v. Board of Examiners*, 7 U.2d at 226, as follows:

“In the first place, we think that the word ‘*claim*’ was used in its broadest connotation and we recognize that it is susceptible of a variety of meanings: ranging from a moral claim; or the seeking of legislative largesse; or asserting a privilege; to asserting rights to compensation for property or materials furnished, or salary for services rendered, to the state.”

The Board of Examiners clearly has the duty to exercise its constitutional authority and this must be considered more than a mere power to exercise or not exercise this authority as determined by majority vote of the Board. The concept of a constitutional duty to examine claims is the holding in the landmark case of *Uintah State Bank v. Ajax*, *supra*, and is also the basis of the holding in *State ex rel. Davis v. Edwards*, 33 Utah 243, 93 Pac. 720 (1908).

This is consistent with general constitutional and statutory rules of interpretation. Powers conferred on public officers are generally construed as mandatory even where the authority is couched in permissive language. In *Supervisors of Rock Island County v. United States*, 4 Wall. 435, 18 L.Ed. 419, the court held that a statute providing that county officials “may, if deemed advisable” levy a special tax to pay certain debts, was mandatory and not permissive.

“The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the act before us, or in equivalent language, — whenever the public interest or individual rights call for its exercise, — the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose ‘a positive and absolute duty.’”

Similarly, in *Palmcroft Development Company v. City of Phoenix*, 46 Ariz. 200, 49 P.2d 626, the language “authorized and empowered” to pay certain indebtedness was held to impose a mandatory duty to pay such indebtedness. See also 43 *Am. Jur.* 76, Public Officers, Section 259 and annotation at 103 A.L.R. 812 for cases involving constitutional or statutory provisions relating to payments of public debts.

These general principles were enunciated by this court in *Deseret Savings Bank v. Francis*, 62 Utah 85, 217 Pac. 114, where it was stated:

“When power is given by statute to public officers, in permissive language, the language used will be regarded as peremptory where the public interest or individual rights require that it should be.”

Recognition that this principle applies to Article VII, Section 13, Utah Constitution, is evidenced by the statement in *Uintah State Bank v. Ajax*, 297 Pac. at 438, that the Legislature may not, within the limits of the Constitution, “exclude the Board of Examiners from its duty and responsibility with respect to claims.” Also note that while the section grants the Board of Examiners “power” to examine claims, it requires the Board to “perform such other duties as may be prescribed by law.” Certainly our Utah Constitution would be a meaningless document if the powers granted to public officers were construed as permissive — government by whim, not by law.

POINT II.

CHAPTER 2 OF TITLE 63, UTAH CODE ANNOTATED 1953, IS UNCONSTITUTIONAL INsofar AS IT AUTHORIZED PAYMENT OF CLAIMS AGAINST THE STATE WITHOUT THE EXAMINATION AND APPROVAL OF THE BOARD OF EXAMINERS.

Turning now to the statute involved, it is apparent that the Legislature intended to deprive the Board of Examiners of any statutory authority to examine liquidated claims against the State. See the statements in 63-2-1 and the amendments to Chapter 6 of Title 63, Utah Code Annotated 1953, effected by one of the companion bills to Senate Bill 48 - Chapter 150, Laws of Utah 1963. To this we do not and of course could not object, but the essential authority of the Board of Examiners is dependent upon the Constitution itself which has been held to be a self-executing provision granting

authority independent of any statutes. *Utah State Bank v. Ajax*, supra. This was made particularly clear in *State ex rel. Davis v. Edwards*, supra, in which this court stated "The attempt by the Legislature to require the Auditor to allow a claim which by the Constitution must first be approved by the Board of Examiners can avail nothing. The Auditor is bound by the constitutional provision, the Legislature is so bound and so are we."

Section 63-2-13 authorizes the Director of Finance to prescribe salaries and the Legislature has purported to prohibit the Board of Examiners from fixing, resetting or "arbitrarily" refusing to pay salaries so fixed. While we do not contend that the Constitution specifically permits the Board of Examiners to adopt salary schedules, it certainly has constitutional authority to disapprove a salary claim and refuse to permit payment of the same even though the salary has been fixed by the Director of Finance or, for that matter, any other State officer or agency. *Bateman v. Board of Examiners*, supra. A salary not fixed by the Legislature is a claim against the State (*State ex rel. Davis v. Edwards*, supra) and regardless of how the amount of the salary is arrived at and the method of determining how much should be included in the salary claim, the Board of Examiners has the authority under the Constitution to exercise its constitutional authority with respect to that particular claim.

Respondent agrees with the Legislature that the Board of Examiners has no right to act arbitrarily, but we fail to see how the Legislature can prohibit the fixing

or resetting of a salary based on a Director of Finance approved salary schedule and thus prevent the Board of Examiners from acting effectively at all. Such a result would make meaningless and perfunctory any examination of a salary claim by the Board of Examiners. Paraphrasing the *Edwards* case, the Director of Finance is bound by the constitutional provision, the Legislature is so bound and so is this court.

In Section 63-2-15, similar authority in another field, travel expense, is granted to the Director of Finance and for similar reasons the constitutional authority of the Board of Examiners is interfered with. Note particularly that according to this section it is the Director of Finance rather than the Board of Examiners who has authority to review "the necessity and desirability of such travel." Furthermore, by stating that the travel expense schedules shall have "the force of law" and that "no voucher for travel expenses shall be paid until the same have been approved by the director," the Legislature is apparently attempting to completely by-pass any review by the Board of Examiners. While the statute does not refer to the Board of Examiners specifically, under the literal language a travel expense claim, even if examined and approved by the Board of Examiners, could not be paid if the Director of Finance disapproved.

Finally, the Legislature in Section 63-2-20 has taken a broad swipe at the authority of the Board of Examiners by purporting to vest authority in the Director of Finance to review the necessity and desirability of all expenditures of funds and limiting the Board of

Examiners to a review only after the Director of Finance has acted. The sweeping authority granted to the Director of Finance by this section is particularly objectionable and clearly unconstitutional, for whether the Board of Examiner's authority is considered a duty or merely a power, the Legislature has purported to limit the authority of the Board of Examiners to examination of claims "only after the obligation has been incurred and an account has been submitted and audited by the state's accounting officer." This is a limitation not only as to when the Board can act, but also as to what the Board can act upon, for if a requested expenditure should be turned down or reduced by the Director of Finance, to that extent the Board of Examiners would be denied any effective examination of that claim.

In other words, the Legislature may not vest authority in the Director of Finance, the Governor, or any other agency to increase, decrease or otherwise alter requests for expenditures of public funds so as to limit or prevent the examination of such requests by the Board of Examiners.

Appellants' contention that the Legislature can define the constitutional meaning of the word "claim" is most unique. As previously pointed out, this court has determined that the constitutional provision is self-executing and that the term "claim" means all demands for payment of state funds. To permit the Legislature to say that there is no claim until after the Director of Finance has reviewed the necessity and desirability of

the expenditure and approved the same, is not only contrary to these prior decisions, but in conflict with the fundamental principle that a constitutional provision may not be modified or amended by the Legislature. The term "claim" as used in the Constitution is broad and unlimited with the single exception of salaries or compensation fixed by law. The fact that this one exception and no others are made, is indicative of the broad scope of the term and also the fact that no other exception pertaining to the Director of Finance or any other administrative agency was intended.

The authority purportedly granted to the Director of Finance is more than "preliminary administrative handling." (Appellants' Brief, p. 18) If the function of the Director of Finance was limited to a determination that funds were available and that the claim is mathematically correct, Respondent would have no objection to a preliminary processing of the claim by the Director of Finance and agree that such handling is necessary and desirable. This was the procedure followed prior to the effective date of Senate Bill 48. (Stipulation of Facts, para. H(4)(c); R. p. 14) Since that time the Director of Finance has done more and approved or rejected proposed expenditures as to their propriety, a function the Constitution vests solely in the Board of Examiners. Furthermore, as is evidenced by the payment of the salary claim of defendant Clair L. Hopkins, the Department of Finance apparently has little compunction in paying out state funds even though the Board of Examiners has made no examination of the claim.

POINT III.

THE BOARD OF EXAMINERS CANNOT
DELEGATE ITS CONSTITUTIONAL DUTY
TO EXAMINE CLAIMS.

The lower court determined that the Board of Examiners cannot delegate its constitutional duty to examine claims. This is of concern to plaintiff and an issue in this case because it is apparent that if unlimited delegation is possible a majority of the Board of Examiners could at any time delegate all of its authority to the Director of Finance or any other person or agency, leaving the Board of Examiners, as a board, without any functions.

Appellants apparently concede that a delegation of authority by the Board of Examiners is permissible and must be based upon adequate standards. Respondent agrees.

We call the court's attention to Exhibits "B" (R. 19-20), "C" (R. 21-22) and "D" (R. 23-24). These exhibits indicate the delegation of authority made to the Department of Finance in 1941 and thereafter following the creation of the Department of Finance by Chapter 10, Laws of Utah 1941 (1st Special Session). For further background, see the opinions of the Attorney General of Utah dated August 6, 1941 and August 20, 1941. (Biennial Report of Attorney General for Biennium ending June 30, 1942, pages 83 and 135, respectively). Such delegation was not only workable, but a close examination indicates that it should be considered lawful and valid in all respects for at all times the Board of Examiners retained (and from time to time exercised)

the ultimate authority to examine and approve or disapprove claims of all types and, furthermore, required the Department of Finance in its processing of claims to notify the Board of Examiners of any major changes in the expenditure policy of a particular department or agency of the state. A delegation of this sort permits the processing of routine claims without requiring members of the Board of Examiners to make a detailed study of each and every claim.

There would be nothing improper in the Board of Examiners determining that claims under a certain dollar amount could be approved and paid by the Department of Finance without a detailed review by the Board of Examiners. With respect to salaries, salary schedules formulated by the Director of Finance and approved by the Board of Examiners could be established as an indication that the salary claims conforming to these schedules would be approved by the Board of Examiners thereafter and could be paid by the Department of Finance without detailed review of each salary claim by the Board of Examiners.

In exercising these functions, it appears necessary that the Board of Examiners meet regularly or at least frequently to make such examination of individual claims as may be determined necessary and to formulate policy and the standards by which claims could be approved without detailed examination. This does not mean, as Appellant contends, that the Board of Examiners must necessarily meet to approve each IBM "run" of warrants to be paid for if it chooses to delegate authority

to the Department of Finance it ought to be able to rely on the Department to act properly within the delegated authority. The practice of the individual members of the Board signing their names to a summary sheet listing these warrants could still be followed, if desirable, as evidence of the Board's approval of a specific claim, but this should not be considered a substitute for meetings of the Board at which a quorum is present where through the interchange of ideas intelligent policy to govern state expenditures can be formulated.

In other words, so long as the ultimate authority is retained by the Board of Examiners and standards are set up for the administrative agency to process routine claims, there is no interference with the constitutional duties of the Board of Examiners. However, if the Board of Examiners by majority vote or through mere inaction permits all claims to be processed and paid by the Department of Finance, the delegation has become an abdication of the responsibility vested by the Constitution in the Board of Examiners. The lower court made this distinction by stating in its opinion (R. 33-34) that the Board of Examiners "cannot delegate its ultimate duty to determine the validity of claims to the Governor or to anybody else, but it may use agents in determining the existence or non-existence of certain facts and may by its rules determine that certain matters may be approved as matters of course." This determination should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be affirmed.

Respectfully submitted,

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