1964

Gerald Gundry and Bryce Taylor v. State of Utah et al : Brief of Defendants and Respondents

Utah Supreme Court

Kenneth M. Hisatake; Attorney for Appellants;
A. Pratt Kesler; Attorney for Respondents;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

GERALD GUNDRY and BRYCE TAYLOR,

Plaintiffs and Appellants,

vs.

STATE OF UTAH; LOUIS DOMENKO, Fiscal Officer, Utah Highway Patrol; LYLE HYATT, Commander, Utah Highway Patrol; and CLAIR R. HOPKINS, Chairman, Utah Commissioner of Finance,

Defendants and Respondents.

Case No.

10090

BRIEF OF DEFENDANTS AND RESPONDENTS

A. PRATT KESLER,
Attorney General,

RONALD N. SPRATLING, JR.,
Assistant Attorney General,
Attorneys for Respondents.

KENNETH M. HISATAKE,
445 East Second South, No. 7,
Salt Lake City, Utah,
Attorney for Appellants.

TABLE OF CONTENTS

AUTHORITIES CITED

CASES CITED

TABLE OF CONTENTS—Continued

STATUTES CITED

TABLE OF CONTENTS—Continued

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

GERALD GUNDRY and BRYCE TAYLOR,

Plaintiffs and Appellants,

vs.

STATE OF UTAH; LOUIS DOMENKO, Fiscal Officer, Utah Highway Patrol; LYLE HYATT, Commander, Utah Highway Patrol; and CLAIR R. HOPKINS, Chairman, Utah Commissioner of Finance,

Defendants and Respondents.

Case No. 10090

BRIEF OF DEFENDANTS AND RESPONDENTS

STATEMENT OF NATURE OF THE CASE

The plaintiffs-appellants filed an action for declaratory judgment in the Third District Court of the State of Utah, regarding interpretation of 49-8-1 to 49-8-5, Utah Code Annotated 1953, as amended.

DISPOSITION IN THE LOWER COURT

The matter was heard on the 10th day of January, 1964, before the Honorable Stewart M. Hanson, and at that time the plaintiffs-appellants were denied any recovery of contributions made to the Retirement System of the Utah Highway Patrol.

RELIEF SOUGHT ON APPEAL

The defendants-respondents seek affirmance of the judgment of the trial court.

STATEMENT OF FACTS

Defendants-respondents accept the statement of facts as set forth in the appellants' brief. The amounts in contest are $1,048.12 for appellant Gerald Gundry and $884.25 for appellant Bryce Taylor, which represent the amounts of their contributions to the Utah Highway Patrol Retirement Fund. There is no dispute as to these amounts, and the only questions to be resolved are the interpretation and intent of Title 49, Chapter 8, Sections 1-5, of the Utah Code Annotated 1953, and whether or not the appellants did agree to the deduction on the basis that they would not be refundable unless retirement age was reached.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN ITS INTERPRETATION OF TITLE 49, CHAPTER

8, UTAH CODE ANNOTATED 1953, DENYING THE APPELLANTS ANY REFUND OF THEIR CONTRIBUTIONS TO THE HIGHWAY PATROL RETIREMENT FUND.

In Section 49-8-4, U. C. A. 1953, as amended, the qualifications and exemptions are set forth as the *only exclusive manner* in which any benefits or payments from the Highway Patrol Retirement Fund may be made. Furthermore, the last sentence of the first paragraph of that section states:

> "* * * *The highway patrol must keep this fund intact and in the amount necessary to meet the payments as determined by the actuarial system.*" (Emphasis added.)

It must be concluded, therefore, that the Legislature did not intend for any contributions to be returned or payments made, other than those specified in this section, to any employee or his legal representative who did not satisfy the qualifications of the section heretofore mentioned.

In the book by Crawford, *Interpretation of Law,* Section 195, pages 334 and 335, he states:

> "As a general rule, in the interpretation of statutes, the mention of one thing implies the exclusion of another. It therefore logically follows that if a statute enumerates the things upon which it is to operate, everything else must necessarily, and by implication, be excluded from its operation and effect. * * * If the statute directs that certain acts shall be done in a specified manner, or by a certain person, their performance in any other manner than that specified or by any other person than one of those named, is impliedly prohibited."

This is a general rule of statutory construction and is widely followed throughout the federal and state courts. See *Nelden* v. *Clark,* 20 Utah 382, 59 Pac. 524 (1899); *Havemeyer* v. *Superior Court,* 84 Calif. 327, 24 Pac. 121; *Page* v. *Allen,* 58 Pa. St. 338.

A general maxim of statutory construction is the general presumption that a court gives to the constitutionality and validity of a statute duly passed by a legislature until clear and convincing evidence of its invalidity or unconstitutionality is established. Sutherland, *Statutory Construction,* Vol 2, Sec. 4106, p. 288. Also see *Cravell* v. *Benson,* 285 U. S. 22, 76 L. Ed. 598, 52 Sup. Ct. 285.

It is always incumbent upon any court when called upon to interpret a statute or statutes to strive to avoid a construction or interpretation which will tend to make the statute ineffective or unproductive or not achieve the most good as it is presumed that the Legislature wanted in the passage of the particular act. In this instance, pursuant to a 1960 actuary study which had been accomplished, pursuant to Section 49-8-5, U. C. A. 1953, as amended, by Walter C. Green, Actuary, the Legislature had been advised by the Utah Highway Patrol that it would increase the contribution of the employees to allow and make feasible and make actuarially sound the refunding or paying back of contributions to Utah Highway Patrol employees who quit or did not qualify under the retirement provisions of this act.

The actuary estimated an increase of 1.68% of salary would be required to afford the repayment of contributions

on page 9 of the June 30, 1960 Actuarial Report. This would have increased the Utah Highway Patrol's contribution from 7.26% to 8.94% of salary, which the actuary recommended but the Highway Patrol male employees voted and refused the proposal.

It is also noteworthy that when the 1961 Legislature amended Section 49-8-4, no provision was made for the refund of any contributions other than those specified in the amendment in Section 49-8-4, U. C. A. 1953, as amended, and hence, by clear implication, the Legislature refused to increase any donation by the State for refund of contributions.

Sutherland, *Statutory Construction*, 3rd Ed., Vol. 2, Sec. 4702, page 334, states:

> "There is no safer nor better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses."

There are several Utah cases which hold directly in favor of the position of the defendants. The case of *Hansen* v. *Public Employees Retirement System Board of Administration, et al.*, 122 Utah 44, 246 P. 2d 591, in which it was alleged that the Retirement Act was abrogating the vested rights of the plaintiff Hansen and/or was, in fact, unreasonably discriminatory, the Utah Supreme Court in its decision clearly covered the points as follows:

> "An act is never unconstitutional because of discrimination, so long as there is some reasonable basis for differentiation between classes which is

> related to the purposes to be accomplished by the act, and so long as it applies uniformly to all persons within the class."

See *Utah* v. *Mason*, 94 Utah 501, 78 P. 2d 920, 117 A. L. R. 330; *Slater* v. *Salt Lake City*, 155 Utah 476, 206 P. 2d 153, 9 A. L. R. 2d 712. The court also stated in the Hansen case:

> "A county employee does not acquire vested rights in a pension system prior to fulfillment of the conditions required, but restraint should be placed upon injustice which could eventuate from permitting wholly unreasonable and arbitrary encroachments upon advantages which may have accrued to employees who have worked out subtantially all of necessary conditions prerequisite to qualifying for a pension."

The court went on further to state:

> "The overwhelming weight of authority is that an employee such as Hansen who has neither served the necessary years to qualify for a pension, nor attained the retirement age, has no vested right in the pension or the retirement system."

The court furthermore determined that this was not discriminatory against defendant Hansen because the applicability was justified and stated as follows:

> "* * * Our function is to determine whether an enactment operates equally upon all persons similarly situated. If it does, then the discrimination is within permissive legislative limits."

The court also stated:

> "* * * Length of service is a fair and logical criterion by which to classify employees under retirement systems and the liquidation thereof."

Thus, it will be noted that the Utah Supreme Court definitely ruled that an employee does not acquire vested rights in a pension system prior to fulfillment of the statutory conditions which are set forth for qualification for payment therefrom. Clearly, in the case at hand, neither plaintiff has the statutory requirements to participate and, hence, has no vested interest or right in the pension system or any contribution therein. See *Gall* v. *City of Wheeling, et al.*, 192 S. E. 116. These funds, then, when contributed, were not placed in trust or in a fiduciary capacity for the individual benefit of the plaintiffs herein, but were placed in a specific fund to accomplish certain specific functions for all those who comply and come under Section 49-8-4, U. C. A. 1953, as amended, heretofore mentioned and, therefore, are not personal moneys of the plaintiffs but are, in fact, public moneys to be used as designated by the Legislature in this act. See *Gall* v. *City of Wheeling*, supra.

The Hansen case may be distinguished from a 1943 Utah case, *Driggs* v. *Utah Teachers' Retirement Board*, 105 Utah 417, 142 P. 2d 657, in which the court ruled:

> "A school teacher, who was retired under teachers' retirement act and had made the required contributions and met the *prescribed conditions*, had a 'vested right' in his whole retirement allowance as provided by the act at time of his retire-

> ment, and a subsequent amendment to the act could not be construed as reducing amount to which teacher was entitled." (Emphasis added.)

There is a difference between the Driggs case and the facts of the case at hand. The plaintiffs, unlike the Driggs case, have no vested interest whatsoever because they have not met the prescribed conditions or qualifications as set forth in the Highway Patrol Retirement System in Title 49, Chapter 8 of the Utah Code Annotated. Furthermore, the 1961 amendment to Section 49-8-4, U. C. A. 1953, did not alter the retirement program at all but merely made provision for additional retirement pay, and, did not jeopardize or reduce in any way any retirement and even allowed the contributions of an employee who had not qualified to be refunded to his legal representative.

In a later case, *Backman* v. *Bateman,* 1 U. 2d 153, 263 P. 2d 561 (1953), the Utah Supreme Court further stated:

> "* * * But until a member fulfills all the conditions precedent, he has no vested right to a pension or an annuity and the system may be abolished leaving him without the expectancy of a pension. *Hansen* v. *Public Employees Retirement System,* Utah, 246 P. 2d 591."

Chief Justice Wolfe further went on to state, in a concurring opinion in the Backman case:

> "* * * If a member voluntarily leaves the employ of the district in which the association to which he belongs has been organized; if he leaves because the board of education does not renew his contract; or if he dies while a member but leaves no dependent relatives, *he knows that under the*

> *Act there will be no return of his contributions.* But unless the Legislature impliedly reserved the right to deal in any manner it may choose with a member's contributions, he is assured by the Act that except (1) *if he voluntarily withdraws from employment,* or (2) if the board will not renew his contract, or (3) if he dies before retirement, he cannot be deprived of his interest in the fund." (Emphasis added.)

It is a well-reasoned definite rule that in the case of compulsory contribution pension systems it has been widely held throughout the United States in numerous jurisdictions that there is *no right to a refund of the employee's contributions upon his death, resignation, or dismissal prior to eligibility for pension benefits, absent a provision in the pension statute authorizing a refund* of any of his contributions. 52 A. L. R. 2d, p. 469. The great weight of authority is to the effect that the fact that a person has made compulsory contributions does not give him a vested right in the pension. 54 A. L. R. 945; 98 A. L. R. 505; 112 A. L. R. 1009; 137 A. L. R. 294. See also *Graven* v. *Scott* (1937), App. Div. 514, 292 N. Y. S. 771 (resignation of employee); *Donovan* v. *Rye* (1946), 271 App. Div. 836, 65 N. Y. S. 2d 737 (dismissal of employee); *Richards* v. *Geneva* (1936), 161 Misc. 572, 292 N. Y. S. 397 (resignation of employee); *Genther* v. *Valentine* (1939), 172 Misc. 38, 14 N. Y. S. 2d 935 (death of employee).

There is little doubt, pursuant to the Utah cases heretofore mentioned, that Utah follows the majority rule as to compulsory contributions to a retirement system and will not allow any vesting of any interest in the pension or any

right to contributions unless the statute specifically provides for vesting or return of any contribution.

The Utah Legislature, by implication, is assumed to have knowledge of all similar other acts it has passed in regard to pension plans. The various types of retirement systems within the the State are varied and differ widely as to what becomes of the contributions of the employees, giving a clear indication that the Legislature was aware of the problems of contributions and intended a forfeiture in the Highway Patrol Retirement System.

The policeman's Pension Fund, which was originally enacted in 1945, in Section 49-5-2, U. C. A. 1953, as amended, specifically provides that "he shall be paid back" if he does not qualify for retirement all amounts contributed by the employee.

The Judges' Retirement Act, in Section 49-7-5.6, U. C. A. 1953, as enacted by the 1963 Legislature, provides that a person or his beneficiary who does not qualify or become eligible for retirement will receive his full contributions back, plus interest.

The Public Employees' Retirement System of the State of Utah, in Section 49-1-68, U. C. A. 1953, as amended, which section was passed by the 1961 Legislature, allows the refund of all contributions made by the employee plus regular interest thereon upon his not qualifying for retirement, with the additional provision that the employee may elect to leave his money in the Retirement System and

remain a member of said System and draw interest on his money.

The School Employees' Retirement Act, in Section 53-29-20, U. C. A. 1953, as amended, provides that contributions shall be paid back for any person who does not qualify for retirement less a withdrawal fee, which is to be set by the Retirement Board by regulation.

The Firemen's Pension Fund, in Section 49-6-2, U. C. A. 1953, as amended, is apparently a half-way mark in that it allows that a fireman, after one year's service and upon termination of his employment for any cause, shall be refunded by the State Treasurer 60% of the amount contributed by him.

Then, the opposite end of the above mentioned retirement systems, i.e., Policemen's, Judges', and Public Employees' Retirement System, is that no part of the contribution shall be given back if the employee voluntarily resigns from the Highway Patrol Retirement System.

It should be noted that regardless of whether the plaintiffs were advised or not at the commencement of their employment, any and all amounts contributed to the Highway Patrol Retirement System would be lost or forfeited unless they continued in such employment for a period of 20 years; and regardless of whether the plaintiffs were or were not advised by a later meeting in the 1960 actuary study of an additional charge to change the system in order to allow refund of contributions without qualification for retirement, there is no statutory provision to allow any

such refund and there is no vesting of any interest pursuant to the Utah law and, therefore, the plaintiffs have forfeited any and all amounts paid into the program.

Even though the law generally abhors forfeitures and statutes may be construed strictly to prevent them, the courts must give to statutes that provide for a forfeiture such a construction that will be consistent with justice, reason and the legislative intent to protect the fund and keep it actuarially sound. *Datta* v. *Stabb*, 344 P. 2d 977, 173 C. A. 2d 613.

In a well reasoned Oklahoma case, *Pirkey* v. *State, ex rel. Martin*, 327 P. 2d 463, the Oklahoma Supreme Court stated:

> "Courts will not force on a forfeiture statute a construction which amounts to a reading into the statute of provisions not inserted therein by the Legislature."

CONCLUSION

The Utah statutes do not allow any refund of the Utah Highway Patrol Fund to be made other than those specified in the statutes, as indicated, and the decision of the trial court should be affirmed.

Respectfully submitted,

A. PRATT KESLER,
Attorney General,

RONALD N. SPRATLING, JR.,
Assistant Attorney General,
Attorneys for Respondents.