1969

Deputy Sheriffs Mutual Aid Association Of Salt Lake County, A Utah Nonprofit Corporation, and Parley W. Blight v. Salt Lake County Deputy Sheriffs Merit System Commission and Frank W. Pennock, Joseph Mazuran and Leslie B. White, M.D., Members Of The Said Commission : Brief of Appellants

THE SUPREME COUR
THE STATE OF UTA

UTY SHERIFFS MUTUAL AID
OCIATION OF SALT LAKE
NTY, a Utah nonprofit Corpora-
and PARLEY W. BLIGHT,

Plaintiffs and Respodnents,

vs.

T LAKE COUNTY DEPUTY
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ION and FRANK W. PENNOCK
PH MAZURAN and LESLIE
TE, M.D., members of said C
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Defendants and Appellants

BRIEF OF APPEL

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STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

DEPUTY SHERIFFS MUTUAL AID ASSOCIATION OF SALT LAKE COUNTY, a Utah nonprofit Corporation, and PARLEY W. BLIGHT, *Plaintiffs and Respodnents,* vs. SALT LAKE COUNTY DEPUTY SHERIFFS MERIT SYSTEM COMMISSION and FRANK W. PENNOCK, JOSEPH MAZURAN and LESLIE B. WHITE, M.D., members of said Commission, *Defendants and Appellants.*	Case No. 11856

BRIEF OF APPELLANTS

STATEMENT OF KIND OF CASE

This is an action for declaratory relief brought by the individually named plaintiff as a citizen and deputy sheriff in Salt Lake County and by the Deputy Sheriffs Mutual Aid Association of Salt Lake County, a nonprofit corporation on behalf of its members who hereafter will be collectively referred to as respondents,

seeking an Order of the Third District Court to compel the defendant, Deputy Sheriffs Merit System Commission and the individually named defendants who are the three commissioners comprising said commission, hereafter collectively referred to as appellants, to furnish certain "registers" to respondents for their inspection. (R. 1-4).

DISPOSITION BEFORE THE TRIAL COURT

Following responsive pleadings (R. 5 & 6) a Request for Admissions (R. 7 &8) and Response thereto (R. 15 & 16) respondents moved for Judgment on the Pleadings on the ground that the issue was largely a matter of law (R. 13 & 14). The Motion for Judgment on the Pleadings was heard before the Honorable Merrill C. Faux on July 10, 1969, and the Motion was on the 12th of August, 1969, denied (R. 19 & R. 31). Subsequently, the matter having been placed on the regular trial calendar, was reheard and reargued before the Honorable Aldon J. Anderson on September 26, 1969, and Judge Anderson Ordered on September 29, 1969, the appellants to produce the registers for inspection and on the same day issued a Writ of Mandamus (R. 22 through 24 and R. 34). On the 2nd of October, 1969, appellants filed a Notice of Appeal to this Court (R. 17).

RELIEF SOUGHT ON APPEAL

Appellants seek by this appeal to clarify the inconsistent rulings of the two District Judges noted above on the ground that the registers in question are

not "public documents." That was a view Judge Faux took. Judge Anderson, on the other hand, considered them to be public documents and Ordered their disclosure. Appellants maintain the latter rule, which constituted judgment in the case on its merits, was error and should be reversed.

STATEMENT OF FACTS

Since as noted above this matter was largely an issue of law rather than facts, no evidence was taken before the Court below. The only facts, therefore, in the record are embodied in the Response to the Request for Admissions furnished and verified by appellants in response to respondents' Request. (R. 15 & 16)

ARGUMENT

Appellants submit that the registers in question are not public documents open to the citizenry for inspection for at least three specific reasons. At the outset, however, a foundational look at the Merit System Act, Chapter 30, Title 17, Utah Code Annotated, 1953, is necessary. The law was adopted as an initiative measure voted by the citizenry and formally adopted November 8, 1960, its over-riding purpose being to remove from political patronage the appointment and promotion of deputy sheriffs in each of the State's 29 counties by creating commissions whose duties are, among others, by competitive examination to create a qualified list of candidates for the office of deputy sheriff as well as lists for promotion within the sheriff's department on

a basis of merit. Said lists are referred to in the Statute as "registers." There are two types: "eligible registers" (17-30-9) and "promotional registers" (17-30-12). The eligible register is a list of candidates for the office of deputy sheriff. The promotional registers are a list of candidates eligible for promotion to sergeant, lieutenant or captain within the department as the case may be.

Section 17-30-10 requires that the sheriff, as a vacancy occurs, request from the Merit System Commission the names of the highest three candidates presently appearing on the eligible register from which the sheriff or "appointing authority" shall select one of those certified.

Section 17-30-12 (3) requires that certification from promotional registers shall be made "in the same manner" as appointment from an eligible register. The appointing process, therefore, is the same for all registers.

Registers pursuant to the terms of 17-30-6, 7, 8 and 12, are prepared pursuant to the giving of competitive exams with these distinctions: Examinations for candidates who wish to qualify for the eligible register for the office of deputy sheriff take an open competitive examination which is advertised and open to the public; Candidates for promotion are also given a competitive exam but said exam is only open to merit system officers. The commission has, by its rules and regulations, required a three year in-rank additional qualification.

The promotional register and exam further differs from the eligible register exam in that the candidate's

seniority and "service rating" are added to the exam results. (17-30-12 (2)).

Section 17-30-8 provides in part "examination papers *shall not be open to public inspection* without court order, but an applicant may inspect his own papers at any time within 30 days after the mailing of notice of his grade." (Emphasis added) Clearly therefore the examinations themselves are not "public documents."

In the lower court respondents relied on provisions of Section 78-26-1 and 2 which describe "public documents" and provide "every citizen" has a right to inspect and copy any public writings. In addition, respondents cited the case of *Conover et al.* vs. *Board of Education of Nebo School District et al.*, 1 Utah 2d 375, 267 Pacific 2nd 768 (1954). That case construed the above two noted sections of our code. It is to be borne in mind, however, that the *Conover* case dealt with untranscribed minutes made by the secretary of the Board of Education of Nebo School District. The issue in that case was not whether said minutes were or were not "public documents" nor with whether the meetings of the school board were properly public meetings open to the citizenry, but rather *at what stage* such minutes became public documents. That is, plaintiffs in that action wished to inspect the untranscribed minutes of the board before they had been subsequently presented for approval and adopted formally by the board. All parties conceded that such minutes were indeed public records or public documents. That ruling accordingly, is not directly in point here.

There is some language, however, in the *Conover* case which does shed light on our present controversy. Speaking for the Court Justice Henriod observed:

> "It would seem that, unless matters were of such delicate nature *or of the type where public policy dictates non-dissemination,* the meeting itself should be open to the public and press and information concerning what transpired there should be made available at least in a general way, to both at any time thereafter, by him whose duty requires its recordation." (Emphasis added)

In that instance the court was discussing the proceedings in a public meeting, but suggested that public policy might in a given instance suggest or dictate "non-dissemination."

As the first of the three arguments appellants wish to forward in support of their position that the registers in question were not properly ordered to be made public, it is submitted that the information from which the registers are prepared, i.e. competitive examinations are statutorily declared not to be open to public inspection as provided in Section 17-30-8 as noted above. As it relates to the eligibility register for new deputies the competitive examination results directly dictate and provide the order in which the eligible register for new deputies is to be composed. With regard to the promotional registers Section 17-30-12 (2) provides in part "The combined weights of service rating and seniority shall not be more than forty percent of the whole examination." Which means that the competitive examination with regard to promotional registers comprises at

least 60% of the information and order from which said registers are to be composed.

Since the test scores predominantly effect the standing on the registers, to make public the register is to reveal comparative success on the examination. The actual score is all that would not be made public.

It would seem therefore almost axiomatic that to disclose the registers would by indirection be making public information, which by statute is expressly declared not to be publicly disclosed without court order. In that connection the statute has built in it the opportunity for application to court for inspection by any deputy or other party thought to be aggrieved in the examination and register-composing process. Specifically Section 17-30-20 provides:

> "A person aggrieved by an act or failure to act of any merit system commission under this act may appeal to the district court, if he has exhausted his remedies of appeal to the commission. The courts may review questions of law and fact and may affirm, set aside or modify the ruling complained of."

A California precedent which appellants maintain is directly in point here is of some interest. It is the case of *City and County of San Francisco et. al* vs. *Superior Court in and for the City and County of San Francisco* 238 Pacific 2nd 581 (1951). California's "public records" statute is much the same as Utah's. That case was a mandamus action brought by a selective group of city employees of the City of San Fran-

cisco wishing to inspect some records of the City Civil Service Commission. By statute the Commission was obliged to adopt a wage scale program for use by the city. Said scale was to be based upon the Commission's findings derived from salaries paid comparable professions and skills in private industry. In order to get the comparable salary information from selected private employers the City Civil Service Commission promised confidentiality to said employers regarding information received. The court there said in part:

> "In this proceeding we are concerned with the question of the propriety of the respondent court's exercise of its power in granting the motion for inspection of the data relating to the source of the information agreed to be treated as confidential. There is no conflict in the evidence as to the adverse effect of the disclosure on the public interest. On the evidence and the law it is concluded that the petitioners are entitled to have the confidential matter deemed privileged under Section 1881 (5) of the Code of Civil procedure and that the respondent court misapplied and therefore exceeded its jurisdiction in granting the motion for inspection. What may be the relation of the agreements of confidence to the alleged cause of action or defense is not a matter for consideration at this time. Questions of compliance by the commission and the board of supervisors with the charter requirements are deemed not to be involved in this proceeding. They are more properly to be treated with the larger issues presented in the pending mandamus proceeding."

In a separate concurring opinion, Justice Carter adds the following language:

"This is an indirect approach for which I see no reason. The charter is clear and specifies that all the data obtained by the Commission shall be set forth in its official records, and it should be so held at this time. If it is believed that data obtained by a promise of secrecy should not be used in this case even though the Commission had no authority to give such a pledge, the more pertinent basis for such is estoppel. That is to say, that one giving the information, having done so on the assurance that it was confidential, may now claim that the city cannot reverse its position and betray that confidence. If it thus will not be permitted to comply with the law, it follows that the wage scale cannot stand, for it is not based upon the public record of the data obtained. The result is that the scale fixed is invalid on that ground alone and the trial court should be so advised to guide its decision in the mandamus action . . .

"My view is that the city is estopped from disclosing the data obtained in confidence, but the ordinance fixing the wage scale, which is based upon said data, is invalid, and we should so hold. However, because of the pledge of secrecy the Commission should not be required to divulge the information and therefore its order to the contrary should be made ineffective by prohibition, as is done by the majority opinion."

In the situation that confronted the court in the *San Francisco* case where in order for a wage scale ordinance to be valid "all data" relating to the same was by statute required to be published, even in that instance, the court held that where the information was derived on a promise of confidentiality the same should not be disclosed, even though as Justice Carter suggested

that logically meant the ordinance derived from such information would necessarily as well be invalid.

There is no provision in our Merit Act declaring the Commission's records to be public or that "data" from which registers are prepared, wage scales determined, etc. is open to inspection.

If public policy prohibits the disclosure, as in the *San Francisco* case, of information in part confidential by virtue of a promise of confidentiality, then clearly public policy should more emphatically require that a register, whose principle component is statutorily declared confidential, should as well remain non-public.

As it relates to the case before the bar, there is an additional public policy argument that would indicate such registers are not public documents. It is indicated in the language of *Conover vs. Board of Education of Nebo School District* 110 Utah 454, 175 Pacific 2nd 209. This case was an earlier ruling between the same two principle parties involved in the citation noted above. In this earlier *Conover* case this court said:

> "It is one of the cardinal rules of construction that a statute must be construed with reference to the objects sought to be accomplished by it."

Reading the Merit System Act as a whole one inevitably concludes that its purpose is to require the hiring and promoting of officers in the sheriff's department on a basis of merit. Equally permeating the statute is the undercurrent that the records of individual deputies shall be maintained inviolate and con-

fidential. In addition to 17-30-8 relating to examinations is some interesting language at 17-30-19 which provides that upon disciplinary action, demotion, reduction in pay, etc., such penalized officers may petition for a hearing by the Merit Commission and continues *"if the officer so desires,* the hearing shall be public, and the parties may be represented by counsel," (emphasis added) indicating that it is the aggrieved officer's discretion as to whether or not the hearing shall be public.

In the same vein, the act provides that the sheriff (or "appointing authority") is only permitted to see three names from a register at a time. Section 17-30-10 (1) provides:

> "When a peace officer is to be appointed (and parenthetically it is to be emphasized that the same procedure applies to promotions, as noted above) the appointing authority shall request the Merit System Commission to certify three eligible applicants for the position. The Commission shall thereupon certify to the appointing authority the names of the three applicants standing highest on the eligible register. The appointing authority shall select and appoint one of the persons so certified."

The last cited section brings us to appellants second argument:

If respondents succeed on appeal and the register or registers in question are ruled by this court to be public and open for any citizens inspection, clearly then the sheriff or appointing authority could equally demand and receive not three names of the highest appli-

cants as noted in the above section but each entire register. He would then be free to "go shopping" down the list. That is, he could invent reasons for passing over men standing higher on the register in order, for whatever reasons, political or otherwise, to promote or appoint names appearing downstream. This would, of course, obviously frustrate the overall intent of the statute and would be contrary to the language of the earlier *Conover* case cited above.

Such a situation is not entirely unlike the present practice of the district courts in furnishing jury lists. As this court is doubtless aware, the usage in the Third District is for the jury in a given civil or criminal case to be selected from the overall panel, usually not more than twelve to eighteen hours before the day of trial. Counsel is ordinarily furnished the names of his prospective jurors as of the morning of the trial upon arrival in court, finding the list on counsel table. Indeed, even when a special venire is requested, and the appropriate fee paid, such list of potential names in that event are generally not selected and furnished counsel more than 48 hours or so prior to the day of trial. One obvious and salutory result is that counsel are not thereby afforded extensive time in which to raise objections at the enpaneling of jurors in order to get them excused for cause, thereby impending the orderly progress of the case load and the trial of cases. Given enough time and the names of potential jurors, counsel or their investigators could literally handpick and otherwise disqualify, or at least attempt so to do, undesirable potential jurors.

Returning to the case at bar, if this Court rules that the registers should be made public there would then exist the real possibility that appointment and promotion of deputy sheriffs would once again be made on a patronage and political basis. The appointing authority could continue to give lip service to a merit system by inventing reasons for by-passing men standing higher on the appropriate register.

The third argument of appellants it is submitted to justify this court reversing the order of the court below is that the Merit System Commission itself has a fiduciary duty to maintain the confidence of the deputy sheriffs and applicants themselves. That is, it is reasonable to suppose that some Merit System officer, eligible to take the promotional exam, for example, may have some considerable hesitancy so to do if he were aware that his ultimate standing as a result of the exam is to become public knowledge. It would seem manifestly unfair to all deputies that they on the one hand should be informed that the results of their examination, the test scores themselves, are confidential, while at the same time allowing the resulting registers prepared therefrom to be made public so that their relative standing with regards to other deputies taking the exam is known but the exact number on the test is confidential. Appellants in the past have refused to take such a stand. Indeed, they have felt it incumbent as a duty upon them to keep the registers as well as the examinations scores confidential. They consider the duty imposed upon them by the terms of Section 17-30-23, which in part provides:

> "It shall be the duty of the Merit Service Commission to provide by rule for the operation and functioning of any activity within the purpose *and spirit* of the act which may be or may become necessary and proper and which is not specifcally provided hereby." (emphasis added)

Finally, it is again to be emphasized as is alleged in the uncontroverted Response for Request of Admissions certified by the chairman of the Merit System Commission, which for the purpose of this appeal must be accepted as an admitted fact, as follows:

> "Affiant specifically alleges that each and every deputy sheriff whose name appears on any register in the custody of the Merit Commission is free upon personal inquiry to ascertain his standing on said register and to inspect the contents of his file kept at the office of said Commission. Many such deputy sheriffs have so inquired and been so informed and the Commission will continue to make available such records on an individual basis to the deputies concerned." (R. 15 and 16)

CONCLUSION

In Conclusion, therefore, appellants submit that the registers in question are not public documents because:

1. The principle component i.e. competitive examination results are expressly not public documents.
2. To rule the registers public documents would frustrate the basic intent and purposes of the Merit Systems Act.

3. It may well have an effect of discouraging officers otherwise qualified for promotion from submitting to examination therefor for fear of some public embarrassment.

For the foregoing reasons appellants respectfully request that the decisions of the district court be reversed and that the registers in question be declared not public documents.

Respectfully submitted,

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