Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1970

Jim Fisher, for and on Behalf of Himself And Other Persons Similarly Situated v. Lynn J. Marsh, Salt Lake City Personnel Director, Grant Walker, Chief, Salt Lake City Fire Department, Salt Lake City, A Municipal Corporation, by and Through Its Honorable Board Of City Commissioners, J. Bracken Lee, Conrad B. Harrison, E. J. Garn, James L. Barker, Jr., And George B. Catmull : Brief of Plaintiffs - Respondents

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.A. Wally Sandack; Attorney for Respondent

Recommended Citation
Brief of Respondent, *Fisher v. Marsh*, No. 12034 (1970).
https://digitalcommons.law.byu.edu/uofu_sc2/5225

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

JIM FISHER, for and on behalf of himself and other persons similarly situated,
Plaintiffs-Respondents,

vs.

LYNN J. MARSH, Salt Lake City Personnel Director, GRANT WALKER, Chief, Salt Lake City Fire Department, SALT LAKE CITY, a municipal corporation, by and through its Honorable Board of City Commissioners, J. BRACKEN LEE, CONRAD B. HARRISON, E. J. GARN, JAMES L. BARKER, JR., and GEORGE B. CATMULL,
Defendants-Appellants.

Case No. 12034

Brief of Plaintiffs - Respondents

Appeal from Permanent Injunction Order of the District Court of Salt Lake County, Utah
Honorable Gordon R. Hall, Judge

A. WALLY SANDACK
Draper, Sandack & Saperstein
606 El Paso Natural Gas Bldg.
Salt Lake City, Utah 84111
Attorneys for
Plaintiffs-Respondents

JACK L. CRELLIN
Salt Lake City Attorney
ROGER F. CUTLER
Assistant City Attorney
101 City & County Building
Salt Lake City, Utah 84111
Attorneys for
Defendants-Appellants

FILED
JUN 2 3 1970
Clerk, Supreme Court, Utah

TABLE OF CONTENTS

Page

NATURE OF THE CASE 1

DISPOSITION IN THE LOWER COURT.... 2

RELIEF SOUGHT ON APPEAL 2

FACTS 2

ARGUMENT 2

POINT I

THE SOLE AND OSTENSIBLE PURPOSE OF THE CITY'S QUESTIONNAIRE WAS TO DISCOVER "CONFLICTS OF INTEREST" AMONG ITS EMPLOYEES, IN A MANNER PROHIBITED BY LAW. 2

POINT II

BY REQUIRING EMPLOYEES TO ANSWER THE QUESTIONNAIRE, THE CITY VIOLATES DUE PROCESS OF LAW. 8

CONCLUSION 11

CASES CITED

Gardner v. Broderick, 392 US 273, 20 LEd. 2d 1082 88 SCt 1913 9

Garrity v. New Jersey, 385 US 493, 17 LEd. 2d 562, 87 SCt. 616 (1967) 10

Page

Gord v. Salt Lake City, 434 P 2d 449, 20 U 2d, 138 6

Horman v. Liquor Control Commission, 445 P 2d 4, 21 U 2d 294 7

Lisenba v. California, 314 US 219, 86 LEd 166, 62 SCt 280 10

Malloy v. Hogan, 378 US 1, 12 LEd 2d 653, 84 SCt. 1489 (1964) 10

Metropolitan Water District of Salt Lake City v. Salt Lake City, 380 P 2d 721, 14 U 2d 171 7

Totorica v. Thomas, 397 P 2d 984, 16 U 2d 175 7

STATUTES

Utah Code Annotated (1953), as Amended

Section 67-16-6 8
Section 67-16-7 8
Section 67-16-8 8
Section 67-16-11 .... 2, 6
Section 67-16-13 4

Repealed Sections

10-6-38 6
10-6-39 6
17-5-10 6
17-5-11 6
53-6-9 6
63-6-15 6
64-10-3 6
11-15-12 6
11-15-23 6

IN THE SUPREME COURT OF THE STATE OF UTAH

JIM FISHER, for and on behalf of himself and other persons similarly situated, *Plaintiffs-Respondents,*

vs.

LYNN J. MARSH, Salt Lake City Personnel Director, GRANT WALKER, Chief, Salt Lake City Fire Department, SALT LAKE CITY, a municipal corporation, by and through its Honorable Board of City Commissioners, J. BRACKEN LEE, CONRAD B. HARRISON, E. J. GARN, JAMES L. BARKER, JR., and GEORGE B. CATMULL, *Defendants-Appellants.*

Case No. 12034

Brief of Plaintiffs - Respondents

NATURE OF THE CASE

This Appeal is limited to the question, whether or not the Court below correctly held, that the "conflict of interest questionnaire" promulgated by Defendant-Appellants was illegal, unreasonable and invalid in the

light of 67-16-11, Utah Code Annotated, 1953, as amended (Laws of Utah 1969, Ch. 128, Sec. 11).

DISPOSITION IN THE LOWER COURT

The Third District Court issued a permanent injunction barring the Defendants-Appellants from requiring Plaintiffs to answer the "conflict of interest questionnaire".

RELIEF SOUGHT ON APPEAL

The Plaintiffs-Respondents seek affirmance of the lower Court's Order and Judgment.

FACTS

Plaintiffs-Respondents concede the events which took place prior to and after October 26, 1969, but do not agree with editorialized conclusions of appellants concerning the events.

ARGUMENT

POINT I

THE SOLE AND OSTENSIBLE PURPOSE OF THE CITY'S QUESTIONNAIRE WAS TO DISCOVER "CONFLICTS OF INTEREST" AMONG ITS EMPLOYEES, IN A MANNER PROHIBITED BY LAW.

It seems unnecessary to engage in argument over the inherent power of investigation of a city government. Concedely, cities have been given powers which are based upon recognition of the fact that legislative bodies have the power to investigate and that they may impose reasonable conditions upon holding office.

The point in this case is narrow and limited, however, namely, that Salt Lake City has neither statutory nor inherent power to require its employees to respond to the questionnaire promulgated here, where the real purpose was to determine a question of conflict of interest of its employees in a manner prohibited by law.

That there may be other apparent purposes or motives intended did not authorize the city to require respondents to answer the conflict of interest questionnaire promulgated.

If the Fire Department elects to prohibit outside employment among its employees, it has the power to do so, but not on the basis of the questionnaire. The rules of the Department (R 22, 23, 24) seem ample to meet any emergency. (R 75)

After passage of the Public Officers & Employees Ethics Act, hereinafter referred to as the Act, in March, 1969, the City Commission decided to become the tribunal to determine conflicts of interest between City employees and the City. City Recorder's letter dated October 26, 1969, to Commissioner Catmull noted the approval of his Motion, reciting:

> "I move that the City Personnel Department prepare forms to be filled out by all City employees who have employment other than with the City, certifying the type of work, which is being done, for whom they work, the hours spent in such work, and any other information determined necessary, and that these forms be returned to the Department Heads who are to advise the City Commission, *who in turn will determine any conflict of interest*". (Emphasis supplied) (R 27)

Assuming that such forms, as returned, did not amount to voluntary compulsory self-incrimination and objectionable upon constitutional reasons as will hereinafter be discussed, there is no proviso or caveat in the act requiring a public employee, as defined in the Act, to fill out such a questionnaire and certainly the Act does not grant City Commission power to render a decision determinative of a conflict of interest.

In the case of a city fireman, the matter must be filed and processed in accordance with the 'merit system" which must refer to the Civil Service Commission or in the alternative his agency head (Fire Chief) subject to review by the Board of Examiners.

67-16-13 specifically spells out the manner of filing and investigating complaints.

The Plaintiffs are apprehensive that the City Commission might, indeed, turn these questionnaires into the kind of inquisition that Commissioner Catmull's Motion intended and this is particularly true from the language of the Notice dated December 2, 1969, (Ex.

P-1) warning of criminal sanctions imposed by the new law. The letter and questionnaire are set forth in the Appendix as Exhibits "A" and "B".

After the questionnaire was prepared, Commissioner James L. Barker, Jr., requested the City Attorney to review the City's questionnaire and advise if its present form was authorized by law, calling the City Attorney's attention to the Attorney General's opinion regarding personnel questionnaires generally, (R 40). Attached to Commissioner Barker's letter were the inquiries of the Utah State Employee's Association and the answer of the Utah Attorney General (R 41, 42, 43, 44, 45).

On December 9, 1969, the City Attorney replied to Commissioner Barker (R 47, 48, 49) justifying the questionnaire on the basis of the City's interest in the general fitness of its employees, the amount of rest, mental alertness, etc. After citing general law, the City Attorney alluded to the Act in addition to the foregoing, for the purpose of preventing actual or potential conflicts of interest and stated, "the requirement that employees submit information as to their outside employment would seem to be consistent to the general intent and purposes of the Act *although not specifically required therein*". (Emphasis supplied) (R 49)

No requirement of the Act provides that the employees submit such advance information nor did the Attorney General of Utah, in his opinion, support the requirement of a questionnaire, in any form.

67-16-11 of the Act provides:

> "Notwithstanding the provisions of any other law, charter or ordinance, the provisions of this Act shall be exclusively applicable to all public employees and public officers and shall supersede the provisions of any such other law, charter or ordinance."

The Act repealed Sections 10-6-38, 10-6-39, 17-5-10, 17-5-11, 53-6-9, 63-6-15, 63-10-3, 11-15-12, and 11-15-23, Utah Code Annotated, 1953, as amended. The prior laws thus amended prevented the City Commissioners and employees, School Board Agencies and employees, Board of Examiners, Boards of Education, the Utah State Building Board, Boards created under the Utah Community Development Act and others, from directly or indirectly dealing in, or having an interest in, any contract, transaction or property in which they have a personal interest.

The Thirty-Eighth State Legislature swept aside every conflict of interest statute under Utah law for this new and all-embracing Act, leaving immunity only for "legislators, legislative employees and special employees". It is crystal clear that the Legislature intended to supersede any other provisions of the law. In *Gord v. Salt Lake City,* 434 P 2d 449, 20 U 2d, 138, the Utah Supreme Court held:

> "It carries with it the presumptions that it is valid, and that the words and phrases were chosen advisely to express the legislative intent. The statute should not be stricken down nor applied

other than in accordance with its literal wording unless it is so unclear or confused as to be wholly beyond reason, or inoperable, or it contravenes some basic constitutional right. If it meets these tests it is not the court's perogative to consider its wisdom, or its effectiveness, nor even the reasonableness or orderliness of the procedure as set forth, but it has a duty to let it operate as the legislature has provided."

We must assume that all words in the statute were placed there advisedly and all of them should be given meaning. *Metropolitan Water District of Salt Lake City v. Salt Lake City,* 380 P 2d 721, 14 U 2d 171, *Horman v. Liquor Control Commission,* 445 P 2d 4, 21 U 2d 294, *Totorica v. Thomas,* 397 P 2d 984, 16 U2d 175, wherever possible effect should be given to every part of the statute.

The purpose of the statute expressly obstructed and prevented a city government from passing ordinances, rules, charters or regulations superseding the provisions of the Act. The public standards established by the law are statutory standards not determinations made by a City Commission. The lower Court Judge clearly limited his ruling by declaring the particular questionnaire null and void and in no way purporting "to determine or limit the Defendant's authority to qualify its employees for suitability of employment or otherwise control, regulate or supervise them" (**R** 51). The Plaintiffs-Respondents sought no broader order.

The Act carefully describes the responsibility and

duty of a public employee who receives compensation for assistance in a transaction involving a political subdivision or holds substantial interest in a business regulated by the Act. Under these situations, a public employee may not receive the compensation nor hold the interest in such business unless he files with the Agency a sworn written statement concerning the transaction or business as required by Sections 67-16-6, 7 and 8 of the Act. The statement is required to be filed within ten days *after* the date of any regulated agreement and constitutes public information. A violation of the Act is a misdemeanor and the public employee shall be dismissed from employment or removed from office. In addition, the political subdivision has the right to rescind or void such transaction.

It is at once apparent why local laws enacted by cities, counties or boards must be pre-empted and prohibited in favor of uniform criteria and guidelines established by the State in this sensitive area of legislation.

POINT II

BY REQUIRING EMPLOYEES TO ANSWER THE QUESTIONNAIRE, THE CITY VIOLATES DUE PROCESS OF LAW.

The protection of public employees under the Fourteenth Amendment and the Fifth Amendment to the Constitution of the United States, against coerced

statements would seem to prohibit use of this questionnaire in cases designed to unearth conflicts or potential conflicts of interest.

The protection of the Fourteenth and Fifth Amendments extends to all whether they are firemen, city employees, members of our body politic, city commissioners, or judges.

Candidly, the City's bulletin Exhibit P-1, warned that criminal sanctions were imposed under the new law and in addition, public employees who knowingly violated the Act were guilty of a misdemeanor and could be dismissed from employment. The privilege against compulsory self-incrimination exercised by the Plaintiff on behalf of himself and all other members of the class, should bar the questionnaire. If this is an inquiry which is permitted, a public employee could be discharged, not for his failure to answer relevant questions, but for a refusal to waive a constitutional right.

In *Gardner v. Broderick,* 392 US 273, 20 L Ed 2d 1082, 88 S Ct 1913, the Supreme Court held in 1968:

> "The mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment."

Proper regard for the history and meaning of the privilege against self-incrimination is applicable to the states under decisions of the Supreme Court in ***Malloy***

v. Hogan 378 US 1, 12 L Ed 2d 653, 84 SCt. 1489 (1964).

The traditional due process concepts of the Fourteenth Amendment and the self-incrimination concepts of the Fifth Amendment coalesce in the enforcement of the constitutional grant respecting the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty for such silence. *Lisenba v. California,* 314 US 219, 86 L Ed 166, 62 SCt. 280.

The Plaintiffs-Respondents status as firefighters would make inadmissable incriminating statements obtained under threat of employment forfeiture. *Garrity v. New Jersey,* 385 US 493, 17 LEd 2d 562, 87 SCt. 616 (1967).

The Defendants-Appellants appears to give Plaintiffs "a choice between the rock and the whirlpool". The fear of being discharged for refusal to answer on the one hand and the fear of self-incrimination on the other hand. Such a procedure violates the Fourteenth Amendment. Defendants-Appellants' counsel recognizes the choice on Page 12 of his Brief.

> "It is the writer's opinion that a municipal officer asking such questions, which may tend to incriminate someone, owed to the respondents of that questionnaire a duty to thus inform them. cf. Intent, reasoning and purpose of *Miranda v. Arizona,* 384 US 436, 16 L Ed 2d 694, 86 SCt. 1602."

This is the protection the lower Court had in mind. If counsel concedes such questions may tend to incriminate, why should he complain that the lower Court committed error.

Clearly the City's questionnaire not only conflicts with the purpose, contemplation and intent of the Utah Act, it also violates Fifth Amendment and Fourteenth Amendment rights of the Plaintiffs-Respondents. The Plaintiffs-Respondents should have a better choice than forfeit their jobs or incriminate themselves.

CONCLUSION

Salt Lake City Municipal Corporation is preempted by law from promulgating the conflict of interest questionnaire. The rules of the Fire Department now in effect meet all of the requirements and emergencies for the purpose of making employee job assignments.

The questionnaire was improper and the Court should affirm the lower Court's Judgment and Order.

Respectfully submitted,

A. Wally Sandack,
Draper, Sandack & Saperstein

606 El Paso Natural Gas Building
Salt Lake City, Utah 84111

Attorneys for Plaintiffs-Respondents

APPENDIX

APPENDIX

EXHIBIT "A" .... (i)
EXHIBIT "B" .... (iii)
R-27 .... (iv)
R-40 .... (v)
R-41 .... (vi)
R-42 .... (vi)
R-43 .... (ix)
R-44 .... (ix)
R-45 .... (ix)
R-47 .... (xii)
R-48 .... (xii)
R-49 .... (xii)

EXHIBIT "A"

SALT LAKE CITY CORPORATION
PERSONNEL DEPARTMENT

Room 312 City and County Building
Salt Lake City, Utah 84111

December 2, 1969

TO: All City Employees

SUBJECT: Conflict of Interest

The Board of City Commissioners has directed the Personnel Department to prepare a form to be filled out by all city employees who have employment other than that with the city. The forms require information certifying the type of work being done, hours spent in such work, for whom the work is being done, and any other information deemed necessray. These forms are to be reviewed by the department heads who will advise the City Commission, who in turn will determine any conflict of interest.

The 1969 Legislature enacted a new Public Officers' and Employees' Ethics act found in Title 67, Chapter 16, Utah Code Annotated, 1953, as amended.

> "No public officer or public employee shall:
>
> (1) Accept employment or engage in any business or professional activity which might reasonably expect would require or induce him to disclose confidential information which he has gained by reason of his official position.
>
> (2) Disclose confidential information acquired by reason of his official position nor use such information for his or another's private gain or benefit.

(3) Use of attempt to use his official position to secure special privileges or exemptions for himself or others.

(4) Accept other employment which he might expect would impair his independence of judgment in the performance of his public duties."

There are also criminal sanctions imposed by this new law under 67-16-12, Utah Code Annotated, 1953, as amended, which provide as follows:

> "In additoin to any penalty contained in any other provision of law, any public officer or public employee who knowingly and intentionally violates this act shall be guilty of a misdemeanor and shall be dismissed from employment or removed from office as provided by law."

Please fill out the enclosed form in duplicate and return at once to the Personnel Department, Room 312 City and County Building. One (1) copy will be placed in your personnel file, and one (1) copy sent to your department head.

Yours truly,

LYNN J. MARSH
Personnel Director

LJH/pr

EXHIBIT B

SALT LAKE CITY CORPORATION
PERSONNEL DEPARTMENT

Room 312 City and County Building
Salt Lake City, Utah 84111

CONFLICT OF INTEREST

....	....
NAME	ADDRESS
....	....
OCCUPATION TITLE	DEPARTMENT

As an employee of Salt Lake City Corporation, do you perform any outside employment for which you are compensated? Yes........... No...........

If you do perform outside work, please complete the following:

....	....
EMPLOYER*	ADDRESS
....	....
EMPLOYER*	ADDRESS
....	....
No. of Hours per Day	No. of Hours per Week

....

Type of Work Performed

Does the person or business entity do business with Salt Lake City Corporation? Yes........... No...........

I hereby certify the above information is true and correct. Misrepresentation or omission of facts is cause for dismissal.

....	....
DATE	SIGNATURE

*If self employed, use own name.

R-27

October 26, 1969

Honorable George B. Catmull
Commissioner of Streets
and Public Improvements
100 City and County Building
Salt Lake City, Utah

Dear Commissioner Catmull:

The Board of City Commissoners, at its meeting today, approved your motion as follows:

> I move that the City Personnel Department prepare forms to be filled outby all city employees who have employment other than that with the City, certifying the type of working being done, for whom they work, the hours spent in such work, and any other information deemed necessary, and that ~~three~~ these forms be returned to the department heads who are to advise the City Commission, who in turn will determine any conflict of interest.

Yours truly,

/s/ Herman G. Hogensen
City Recorder

cc:
Finance
Public Safety
Water
Parks
Auditor
Mr. Marsh
Files

R-40

SALT LAKE CITY CORPORATION
DEPARTMENT OF PUBLIC SAFETY
Room 313 City and County Building
Salt Lake City, Utah 84111

December 8, 1969

Mr. Jack Crellin
City Attorney
Room 101 - City and County Building
Salt Lake City, Utah

Dear Mr. Crellin:

The Attorney General has issued opinions regarding personnel questionnaires issued by the state pursuant to Title 67, Chapter 16, Utah Code Annotated, 1953, as amended. Would you please review these opinions and consider the questionnaire issued by the City Personnel Department? Would you then please advise if the city questionnaire is in its present form authorized by law?

DEPARTMENT OF PUBLIC SAFETY

Very truly yours,

JAMES L. BARKER, JR.
Commissioner

JLB:nc
Attachments

(R 41, 42)

May 21, 1969

Vernon B. Romney, Attorney General
State of Utah
State Capitol
Salt Lake City, Utah

Dear Mr. Romney:

The recent session of the legislature enacted a bill entitled "An Ethics Bill for Public Employees" - S.B. 135.

Since the enactment of this bill, we have had referred to our office questions from many state and other public employees, concerning the regulations as contained within the bill. We respectfully request your office to render an opinion on the following questions so that we may inform our members of the impact of this bill upon their jobs.

1. Is the law enacted by S.B. 135 constitutional? Does this act show favoritism for one state employee over another, inasmuch as the law enacted excludes, and is not applicable to, legislators or legislative workers, both of which are state employees?

2. Many employees of state government who are licensed under the provisions of the public accounting act of 1969, perform independent audits of records maintained by municipalities, political subdivisions of state government, or commercial businesses without violation of this new act. If so, must each act be reported to the secretary of state and the employing department?

3. Will provisions of this act prohibit auditors of the Tax Commission from continuing the practice of preparing state and federal income tax returns during hours other than the regular work day of the tax com-

mission if a fee is charged for such professional services?

It is understood that the employee must comply with prior tax commission requirements and in no case file, process or audit returns prepared by himself, or represent a client in any proceedings before the commission. If such a practice is permitted, must a report be made of each client with the secretary of state and the employing department?

If such a report is required and the names and addresses of each client registered with the secretary of state and employing unit, is this not an invasion of personal privacy? May one statement be filed each year with the two offices that such work is being performed without listing the names and addresses of each client?

4. May state employees accept other part time employment during hours other than the regular workday of the employing department? Such employment may consist of such tasks as office clerk, ticket seller, guard, service station attendant, grocery clerk or truck driver. If so, must such part time employment be registered with the secretary of state and the employing department?

5. May a typist in a state department operate a sectarial service in her home for hire? If so, must she make a report to the secretary of state and the employing department of each individual client? Will it be necessary for this typist to refuse to type letters which will be mailed to the state or one of its political subdivisions?

6. May a professional engineer employed by the state make surveys involving state, county and city lines

for a fee without registering the act with the secretary of state or his employing unit? It is understood that he would not appear in, or advise the parties in any suit involving the state or one of its political subdivisions.

7. Will the act require a school bus driver to register with the secretary of state and his employing unit if he accepted part time employment during the day with a private business concern or full time employment during the summer months on road construction?

8. Must a state employee who owns a 25 per cent interest in a grocery store or other business, with such interest valued in the excess of $5000 divest himself of such interest under the provision of this act inasmuch as the store collects sales tax revenue which is turned over to the state government?

9. May members of the state highway patrol accept part time employment in department stores as house policemen or do patrol work for a municipality? If so, must such other employment be registered?

While there have been many other individual problems brought to our attention, we feel the answers to the above questions would provide a fair guide for employees of the state who are now engaged in part time employment, or are operating individually-owned businesses.

Your cooperation in securing an opinion to these questions will be greatly appreciated.
Respectfully requested,

UTAH STATE EMPLOYEES ASSOCIATION

Richard B. Kinnersley - Manager

(R 43, 44, 45)

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL
Salt Lake City 84114

June 19, 1969

Utah State Employees Association
150 South 6th East, Suite 6B
Salt Lake City, Utah 84102

Re: S. B. 135

Gentlemen:

This is in answer to the questions contained in your letter dated May 21, 1969. We do not repeat the questions but answer them in their numerical order.

1. It is our opinion that S.B. 135 is constitutional. In *State v. Mason,* 94 Utah 501, 78 P.2d 920, 117 A.R. 330, the court states:

> "A denial of the law's equal protection presupposes an unreasonable discrimination between those included and those excluded from the act whether the act confers a privilege or a right or imposes a duty or an obligation. * * *
>
> Of course, every legislative act is in one sense discriminatory. * * * [T]o be unconstitutional the discrimination must be unreasonable or arbitrary. A classification is never unreasonable or arbitrary in its inclusion features so long as there is some basis for the differentiation between classes or subject matters included as compared to those excluded from its operation, provided the differentiation bears a reasonable relation to the purposes to be accomplished by the act."

As to the matter of ethics, the Legislature has adopted a set of rules and principles separately govern-

ing its members, which applies substantially the same code of ethics to members of the Legislature as are embodied in S.B. 135, with respect to other officers and employees of the State. A copy of these rules is attached. In view of this situation we see nothing unreasonable or discriminatory in S.B. 135.

2. In answering the succeeding questions, it must be borne in mind, without repetition in each case, that S.B. 135 provides rules to be followed when a state officer or employee is involved in a transaction which involves the State in some manner or presents some violation of trust and confidence with performance of duty. The officer or employee is not required to file the statements required by the act where the State is not so involved.

Our answer to the first part of question 2 is yes and to the second part, no.

3. Our answer to the first question under number 3 is no; to the second question, yes; to the third question, no; to the fourth question, no. It is understood these answers involve only the tax returns to the State and not the federal government. These returns are the basis of the liability of a taxpayer to the State and so their preparation is a part of a transaction in which the State has an interest adverse to the taxpayer.

4. The answer to the first part is yes, so long as the outside work does not interfere with his duties and obligations to the State. The answer to the second part is no.

5. The answer to the first part is yes, so long as the work does not interfere with the typist's duties and obligations to the State. The answer to the other two parts is no.

(R 43, 44, 45)

6. The answer to this question is yes, so long as this work does not interfere with his duties and obligations to the State.

7. The answer to this question is no.

8. The answer to this question is no.

9. The answer to the first part is yes, so long as such work does not interfere with his duties of the State, and to the second part no.

Very truly yours,

HOMER HOLMGREN
Assistant Attorney General

HH-bt

Attachment

(R 47, 48, 49)

SALT LAKE CITY CORPORATION
LAW DEPARTMENT

101 City and County Building
Salt Lake City, Utah 84111

December 9, 1969

To: Commissioner James L. Barker, Jr.

From: Jack L. Crellin, City Attorney

Question: Is the City authorized to require officers and employees of the city to submit the Conflict of Interest questionnaire as prepared by the Personnel Director and circulated to the various city departments under cover of his letter dated December 2, 1969?

Answer: Yes

Chapter 16 of Title 67, Utah Code Ann., 1953, as enacted by Chapter 128 of the Laws of Utah, 1969, was adopted to set forth standards of conduct for officers and employees of the State of Utah and its political subdivisions with respect to conflicts of interest between their public duties and their private interests. Certain acts are prohibited thereunder and sworn written statements are required of public officers and employees whenever they receive compensation "for assisting any person or business entity in any transaction involving the political subdivision" for whom they are employed. See Sections 67-16-4 and 67-16-6, Utah Code Ann., 1953, as enacted in 1969. The duty to provide such sworn statements is upon the individual officer or employee and not his employer, and his failure to do so subjects him to criminal sanctions, as well as dismissal from employment.

(R 47, 48, 49)

The questionnaire prepared by the Personnel Director, and required by the Board of Commissioners to be executed by each employee and officer of the city, requires the following information:

(1) the names and addresses of employers other than the City,

(2) the number of hours per day engaged in such outside employment,

(3) the number of hours per week engaged in such outside employment,

(4) the type of work performed in such outside ememployment, and

(5) a statement as to whether such employers do business with the City.

It is the opinion of the undersigned that the City may require its employees to submit the information solicited in the above questionnaire. The City certainly has the right to prescribe the powers, duties, and compensation of its officers and employees unless prohibited by law. The courts have indicated a willingness to uphold municipal prohibitions upon outside employment of officers and employees, particularly policemen and firemen. Thus, in *Jurgens v. Davenport Railway, Iowa,* 1958, 88 N.W.2d 797, 801, the Iowa Supreme Court upheld such an ordinance and stated:

> "The purpose of this provision is apparently to insure that the police officers will not have divided loyalties as between their public and private employers; that they will be available in case of emergencies as the ordinance requires, even when they are off duty; and that they will be in condition, both physical and mental, to perform their official functions when and as they should. A policeman who has worked for several hours at manual labor

> for a private employer may not be as efficient or alert in attending to the matters required of him as a peace officer."

It would appear that the same reasons applicable to policemen would apply to other employees of the City. The general fitness of an employee to perform his work efficiently may well depend upon the amount of rest he obtains. In this day of advanced automation, the mental alertness of city employees may be of critical importance when the health and welfare of the entire citizenry is involved. Thus, it would seem entirely appropriate that the City require its officers and employees to submit information as to their outside employment, including the hours and nature thereof.

In addition to the foregoing, the Public Officers' and Employees' Ethics referred to above clearly states as its public purpose the prevention of "actual or potential conflicts of interest" in public employment and the preservation of such employees' private economic interests so long as this does not interfere with full and faithful discharge of public duties. The requirement that employees submit information as to their outside employment would seem to be consistent with the general intent and purpose of the act, although not specifically required therein.

In view of the foregonig, it is the conclusion and opinion of the undersigned that the questionnaire prepared by the City Personnel Director at the direction of the Board of Commissioners of Salt Lake City is lawful and within the power of the City to impose upon its officers and ehployees as a condition of their employment.

Respectfully submitted,

JACK L. CRELLIN
City Attorney

JLC:vt