

1995

James R. Collins v. The Salt Lake County Fire Civil Service Commission : Brief of Appellee

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

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DOCKET NO. 950836 CA

JAMES R. COLLINS,

Petitioner and
Appellant,

vs.

THE SALT LAKE COUNTY FIRE
CIVIL SERVICE COMMISSION,

Respondent and
Appellee.

Appellate Court No. 950836-CA

Priority No. 15

BRIEF OF THE APPELLEE SALT LAKE COUNTY FIREMEN'S CIVIL SERVICE
COMMISSION

APPEAL FROM A JUDGMENT IN THE THIRD JUDICIAL DISTRICT COURT ON
DATE, 1995
THE HONORABLE GLENN K. IWASAKI, PRESIDING

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Civil Service Commission

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COURT OF APPEALS

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JURISDICTIONAL STATEMENT

Appellee The Salt Lake County Firemen's Civil Service Commission (the "Commission") submits that the proper statement of this Court's jurisdiction over this appeal is found at Utah Code Ann. § 78-2a-3(2)(b) (1996), not at Utah Code Ann. § 78-2a-3(2)(a) (1996) as is alleged by appellant James R. Collins ("Collins").

The section that Collins relies on provides this Court with jurisdiction over "the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies" Utah Code Ann. § 78-2a-3(2)(a) (emphasis added). This section does not apply to the current case. Collins is appealing from district court review of a formal adjudicative proceeding before the Commission, which is not an agency of the state, but rather of Salt Lake County, a political subdivision of the state.

Because the Commission is a County agency and because Collins is appealing from district court review of the Commission's adjudicative proceedings, the proper source for this Court's jurisdiction is found at Utah Code Ann. § 78-2a-3(2)(b) which provides that this Court has jurisdiction over "appeals from the district court review of (i) adjudicative proceedings of

agencies of political subdivisions of the state or other local agencies" The Commission submits that this section describes the proper foundation of this Court's appellate review of this case, rather than the section cited by Collins.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

The Commission does not dispute Collins' characterization of any of the issues on appeal except that in the last issue that he raises, the Commission submits that the wrong standard of review is utilized.

The Commission submits that this issue is governed by the standard of review in *Tolman v. Salt Lake County Attorney*, 818 P.2d 23 (Utah App. 1991). In that case this Court stated that, "under Rule 65B, this court looks at the administrative proceedings as if the petition were brought here directly, even though technically it is the district court's decision that is being appealed." *Id.* at 26 (citing *Erkamn v. Civil Service Comm'n*, 198 P.2d 238, 240 (Utah 1948)). "This court gives no deference to the district court's initial appellate review since it was a review of the record, which this court is just as capable of reviewing as the district court." *Id.* (Citations omitted).

The Commission agrees with Collins that the proper standard under which this court should review the Commission's findings of fact is the substantial evidence test.

RELEVANT STATUTORY AND RULE PROVISIONS

With the exception of Rule 65B of the Utah Rules of Civil Procedure, the Commission agrees that Collins has provided this Court with all the relevant statutory provisions on this appeal. The text of those rules are laid out in the Addendum to this brief.

STATEMENT OF THE CASE

A. Nature of the case:

The Commission agrees with the bulk of Collins' statement of the nature of this case. It must be noted however, that this case was before the district court pursuant to Rule 65B of the Utah Rules of Civil Procedure.

B. Course of Proceedings Below.

On or about July 5, 1988, Appellant James R. Collins ("Collins") filed a grievance with the Salt Lake County Firemen's Civil Service Commission ("Commission"). (R. 673). In this grievance Collins challenged three specific sections of an examination that the Commission had given in January of that year to establish the promotion register for the position of Battalion Chief within the Salt Lake County Fire Department. (R. 00675). A hearing was held before the Commission on July 20, 1988. (R. 678). Collins was represented by legal counsel, Duane R. Smith, Esq. represented Collins at that hearing. (R. 679).

After the hearing (R. 680-839), the Commission issued its Findings of Fact, Conclusions of Law and Decision, on August 18, 1988. (R. 886-899). In its decision, the Commission found that there was no "reasonable basis for overturning the results of the examination and . . . [held] that the examination results and promotability register be affirmed." (R. 898).

Collins then filed a verified Complaint in district court on September 16, 1988. (R. 1-10). In this complaint, Collins asserted that jurisdiction in the district court was pursuant to Utah Code Ann. § 17-28-13. (R. 2). In response, the Commission filed a Motion to Dismiss the action on September 23, 1988. This motion was based on the Commission's belief that Utah Code Ann. § 17-28-13 did not provide any basis for district court review of the Commission hearing. (R. 30-37).

In a Minute Entry dated October 7, 1988, the district court, per Judge Scott Daniels, denied the defendant's Motion to Dismiss. (R. 62). This Minute Entry was more fully explained in an order dated January 12, 1989. In which the district court explained that Collins' remedy was "by way of a writ of Mandamus pursuant to Rule 65B(b)(2)." (R. 85). The court further added: "That pursuant to Rule 65B, the inquiry by this court shall be limited to a determination of whether or not the Fire Civil Service Commission abused its discretion or exceeded its authority." (*Id.*). Collins made no objection to this order. Rather he amended his complaint to assert jurisdiction pursuant to that subdivision of that rule. (R. 65).

On April 21, 1989, the Commission filed a general objection to Collins' Request for Interrogatories. (R. 92-96). The Commission stated that all the documents requested by Collins were beyond the scope of review of an action pursued through Utah R.Civ. P. 65B(b)(2). (R. 92-93). On May 22, 1989, Collins filed a Motion to Compel Discovery. (R. 102-113). Accompanied by a Memorandum of Support. (R. 97-101). In that Memorandum, Collins acknowledged that the jurisdiction of the district court was pursuant to U.R.C.P. 65B(b)(2). (R. 97-98). However, Collins also declared that the "position taken by Plaintiff is that Defendants in administering a promotional examination which is blatantly discriminatory and biased, have thereby exceeded their jurisdiction and have not 'regularly pursued [their] authority.'" (R. 98).

On May 25, 1989, Defendants filed a Motion to Dismiss defendant Larry Hinman. (R. 135). On this same date, the Commission also filed a Motion to Define the Scope of Review. (R. 137). The Commission again argued that the district court's scope of review in the case was "limited to an examination of the certified record of the proceedings below." (R. 138). By Minute Entry on June 23, 1989, the Court granted the Motion to Dismiss Defendant Hinman and took under advisement the other motions. (R. 145). In another Minute Entry dated November 7, 1989, the judge ruled that "Plaintiff is entitled to prove that the decision of the Salt Lake County Firemen's Civil Service Commission was capricious, arbitrary, or beyond its

jurisdiction." (R. 146). The court therefore granted Collins' motion to compel. (*Id.*)

The next entry on the record was recorded almost two years later on October 31, 1991. On that date, the district court issued, sua sponte, an Order to Show Cause why the matter should not be dismissed for failure to prosecute. (R. 152). A second show cause order was issued from the district court on January 8, 1992. (R. 156). On January 22, 1992 a Notice of Entry of Appearance of Counsel was filed for Collins. (R. 158). On January 29, 1992 the Commission filed a Motion to Dismiss for Failure to Prosecute, accompanied by supporting memorandum. (R. 160-171). This motion was opposed by Collins. (R. 174-234).

About this time, the continuing disagreement between the parties concerning discovery and the scope of review began again on March 26, 1992. On that date, Collins filed another Motion to Compel discovery accompanied by a Memorandum of Points and Authorities in support thereof. (R. 238-246). In that Memorandum, Collins characterized the issue before the court as "whether or not [the Commission] acted arbitrarily and capriciously in the examination of James R. Collins for Battalion Chief." (R. 244).

On July 10, 1992 the Commission filed a Motion to Set Aside and Objection to the Order (R. 273-274) and an accompanying Memorandum in support thereof. (R. 275-285). In that Memorandum, the Commission asserted that the Order to Compel Discover should not have been granted without the court having

ruled on the Commission's Motion to Dismiss. (R. 278-279). The Commission again argued that the case should have been dismissed for failure to prosecute. (R. 279-282). Collins opposed this motion. (R. 286-289). In his Memorandum Collins characterized his action as one "to seek a declaration of this Court that the Salt Lake County Firemen's Civil Service Commission abused its discretion and/or exceeded its authority in the creation of and administration of a Battalion Chief promotional examination (sic) administered in January, 1988." (R. 286). In a Minute Entry dated September 24, 1992, the court, per Judge Iwasaki, denied the Commission's Motion to Set Aside the Discovery Order. (R. 300).

The next significant entry in the record is a Motion, accompanied by a memorandum, filed by the Commission on July 29, 1994, to Limit the Court's Review. (R. 349-362). The Commission argued that the proper scope of the court's review on a Rule 65B action such as Collins' was limited to an examination of the record in the hearing below. (*Id.*) In Collins' opposition memorandum to this motion (R. 363-393), he argued that he was entitled to de novo review before the district court (R. 367-371), and that the interests of justice so demanded. (R. 371-374). The Commission replied, again asserting its argument that Rule 65B limited the review to one on the record. (R. 394-399). The district court entered the following order after considering the motion:

1. The July 20, 1988 hearing before the Salt

Lake County Firemen's Civil Service Commission is considered to be a formal proceeding by the Court.

2. Rule 65(b) [sic] of the Rules of Civil Procedure, however, provides the Court with the opportunity to provide equitable remedies to an aggrieved party and although the Court will, for the most part, conduct the review of the Firemen's Civil Service Commission proceedings as an appellate Court, it will examine issues of due process violations, and will allow some de novo testimony regarding facts in dispute.

3. Those facts in dispute are the authorship and administration of the Battalion Chief exam in controversy, as well as the statements of Defendant Larry Hinman and the Salt Lake County Personnel Director J.D. Johnson regarding exams as set forth and contained in a video tape which was transmitted to Firefighter's in Salt Lake County.

4. As a consequence, the Court will examine such statements when considering issued of proper administration of the test, abuse of discretion, and whether or not the Civil Service Commission failed to act as required by statute.

(R. 407).

On August 28, 1995, the Commission filed a Motion to Dismiss with accompanying memorandum. (R. 438-480). The Commission argued that Collins had failed to name necessary and indispensable parties to the action. (R. 444-450). The basis of this argument was that the other candidates to the exam who had been promoted from the certified register established by the 1988 exam had due process rights that would be affected by any decision of the Court affecting the 1988 exam. (*Id.*).

Collins filed an Opposition Memorandum to this motion on September 8, 1995. (R. 481-508). In that Memorandum, Collins contended that the other parties were not necessary because complete relief could be granted Collins without the other candidates being named. Specifically, Collins asserted that any action decertifying the results of the exam, or demoting any current Battalion Chiefs was mooted by the January 12, 1989 decision of Judge Daniels. (R. 486). Collins acknowledged that the remedy he sought from the Commission was promotion to the rank of Battalion Chief and back pay from 1988. (*Id.*).

In its Reply Memorandum on this motion filed on September 13, 1995, the Commission argued that the relief requested by Collins could not be granted by the Commission. (R. 509-512). The Commission contended that it could not be ordered to promote Collins or give him back pay because both of those remedies were beyond the statutory authority of the Commission. (R. 509-511).

The Court in an Order dated October 11, 1995, denied the Commission's Motion to Dismiss. (R. 516). The Court further

ordered that "Collins' requested remedies of promotion and back pay shall not be considered at trial, but the court may remand these issues with directions to the Fire Civil Service Commission." (*Id.*). The Court then ordered that Collins was limited to calling two witnesses at trial. (R. 517).

The case came on for hearing before Judge Iwasaki on October 13, 1995. (R. 564-590). At the hearing, the Court indicated that it was familiar with the record below. (R. 565-566). The court allowed the testimony of two witnesses, Larry Hinman, the former Chief of the Salt Lake County Fire Department, (R. 568-578); and Clare Rasmussen, a former member of the Commission (R. 578-581). After hearing argument and the testimony, the district court denied Collins' appeal in its Findings of Fact and Decision, dated November 17, 1995. (R. 550-556).

Specifically, the Court found:

16. The Court finds "[T]hat its review is of the record with additional testimony for a limited purpose and not a trial de novo. The record below is reviewed to determine if the Fire Civil Service Commission abused its discretion or exceeded its jurisdiction. The Court finds that the decision of the Fire Civil Service Commission of August 18, 1988 was rational and reasonable.

17. The Court, in its review of the record, gives great deference to the findings of fact contained in the decision of August 18, 1985. The decision contained substantial facts that were supported by the record and the Court finds no abuse of discretion by the Fire Civil Service Commission in reaching its decision.

18. The Court finds that the Administrative Hearing process conducted by the Fire Civil Service Commission, although not perfect, was fair and not unconstitutional.

• • • •

20. The Court finds that the Fire Civil Service

Commission decision on May 25, 1995 concerning discovery requests by the plaintiff were rational and reasonable."

(R. 554).

Collins then filed this appeal.

C. Statement of the Facts.

1. Appellant Collins is currently and was in 1988, a Captain with the Salt Lake County Fire Department.

2. In January of 1988, then Chief Larry Hinman requested, pursuant to statute and policy that the Salt Lake County Firemen's Civil Service Commission prepare a promotional register for the position of Battalion Chief (R. 30).

3. In response to that request, the Commission administered an examination to eight candidates seeking promotion to that rank. (R. 31).

4. The exam consisted of five competitive portions. (R. 887).

5. The exam also considered the seniority of the candidates. (*Id.*).

6. The five competitive portions of the exam were as follows: (1) a written exercise, worth 20% of the weight of the exam; (2) a Department Promotability rating, worth 30% of the total weight of the exam; (3) Fire Simulation Problem, worth 20%; (4) an individual oral interview worth 15%; and (5) a leaderless group discussion, worth 15%. (R. 887-888). The final possible 10% of the exam was from the seniority rating. (R. 588).

7. Collins grieved three specific portions (the promotability,

fire simulation and written exercise) to the Commission. He felt those sections "did not comply with § 17-28-7, Utah Code Annotated, which requires that such examination shall be 'public, competitive and fair' and that such examination 'shall fairly test the fitness in every respect of persons examined'". (R. 675).

The specific allegations that Collins made regarding the examination were as follows.

8. He challenged that because the evaluators of these three sections were members of the fire department they were biased. Collins contended that they were especially biased against him because none of the evaluators had "specific, first hand and current knowledge regarding [Collins'] performance." (R. 675).

9. He challenged the promotability section of the exam, claiming that the personnel file used by the evaluators did not include evidence of the periodic merit ratings he was given during his years of employment. (R. 675).

10. Collins further alleged that irregularities had taken place in the fact sheets which candidates had filled out for inclusion in their files and were improperly received. (*Id.*) (R.675).

11. Because of these supposed irregularities, Collins felt that the promotability portion of the exam was based on "subjective and irrelevant criteria which prevented a competitive test fairly evaluating the skills of the participants." (*Id.*) (R. 675).

12. Collins believed that his score on the fire simulation exercise was lowered because he failed to completely fill out an

organizational structure for the simulated incident. He further claimed that his score should not have been lowered because Salt Lake County Fire Department Policy expressly stated that filling out such charts in a fire incident was optional. (R. 675-6).

13. Collins objected to the written section of the exam on three distinct grounds:

a. First, Collins charged that the problem was not new and, therefore, five of the candidates had prior exposure to the question, whereas Collins had not been exposed to it.

b. Second, Collins challenged that the exercise was not hypothetical, but rather was based on actual events within the Fire Department. Collins asserted that this resulted in two of the evaluators not being able to objectively review Collins solution to the problem because they were biased by their own handling of the situation. (*Id.*).

c. Finally, Collins complained that "the guidelines given the evaluators [do] not match the criteria given to the participants for the exercise." (R. 676).

14. Collins believed that some of the candidates had been improperly "prepped" for the exam. (*Id.*).

15. A hearing on this grievance was heard before the Commission on July 20, 1988. (R. 678).

16. At this hearing, Collins was represented by legal counsel,

Duane P. Smith.

17. Collins' counsel specifically stated in the hearing that "we appeal not the entire test, but we appeal only from certain sections of the test." (R. 683).

18. Collins' attorney also stated that "we will limit our appeal today and our discussion today to only those [sections discussed above]." (*Id.*).

19. Collins' attorney admitted that they were "guessing" about his allegation that the command organizational chart was a factor in his receiving a low score on the fire simulation exercise.

20. In sworn testimony before the Commission, Assistant Chief Robert Swenson testified that the reason the merit ratings were removed from every candidates' personnel file for the promotability portion of the exam was that the experience in the department was that such ratings were unreliable. (R. 753-754).

21. The Commission also heard testimony from Mr. Swenson that he wrote the fire simulation problem and that Mr. Jim Christiansen wrote the grading guidelines for that problem after the two had a meeting to discuss the problem. Moreover, Mr. Swenson testified that those two also met with the full evaluation panel to review the grading criteria. (R. 755-758).

22. Mr. Swenson also testified that if a candidate did not fill out the organizational chart the candidate's score would not suffer. (R. 758-760).

23. Mr. Swenson, on cross examination, testified that he believed that the evaluators had sufficient knowledge to fairly

judge all the candidates on the promotability portion of the exam. (R. 765). Mr. Swenson believed this because of the length of service all the candidates had with the department, and the relatively small number of captains and battalion chiefs in the department. (R. 765-66).

Mr. Jim Christiansen testified under sworn testimony as follows:

24. He testified that there was a long standing policy of not using any candidates' merit ratings in determining that candidates' promotability score. This was due to the unreliability of such ratings. (R. 770-771).

25. He testified that he believed, given all the factors, that the composition of the promotability board was fair. (R. 772-775).

26. He testified that under the evaluation guide for the fire simulation exercise, whether or not a candidate filled out an organizational chart was irrelevant to that candidate's rating. (R. 781-782).

27. He testified that the written problem was the same problem from 1986, and that indeed, five of the eight participants had seen the problem before. (R. 783).

28. However, he also testified that both the County Fire Department and the Sheriff's Office had often used the same questions on subsequent exams. There was no perceived bias in this practice. (R. 784).

29. Moreover, Mr. Christiansen testified that the scores on the written exam for the five repeat candidates, on a whole, were

lower the second time they were exposed to the question. (R. 785).

30. The first time candidates, as a whole, scored higher than the repeat candidates on the written exercise. (R. 784-788).

31. He testified that the exam was designed to test as many areas of knowledge and skill as possible and that it is not uncommon in these exams for a candidate to do well in certain areas of the test and poorly in others. (R. 788-790).

32. This would explain the relatively minor differences between Collins' scores on the portions of the exam graded by evaluators from outside the department, which were both oral interviews, with his lower scores on inside evaluated portions, which tested different skills. (R. 790).

33. Mr. Christiansen testified that the written exercise problem from the exam had originally been developed for a California police department's sergeant exam. (R. 790-791).

34. He testified that any similarity between the problem and any incident in the Fire Department was purely coincidental. (R. 791).

35. Mr. Christiansen expressed his opinion that the scoring guidelines for the written exercise were fair because "it was the kind of problem that alternate solutions or conclusions may have been equally good." (R. 797-798). Commission's findings of fact, conclusions of law and decision dated August 18, 1988. (R. 886-898).

36. After hearing all this testimony, the Commission ruled that

there was competent evidence to "conclude that each separate phase, and the examination in its entirety, meets the statutory requirement that it shall be 'public, competitive and free' and 'shall fairly test the fitness in every respect of the persons examined.'" (R. 897-898).

SUMMARY OF THE ARGUMENT

The Commission asserts that there has been no error in the disposition of this case. From the record of both the district court and the Commission hearing itself, it is clear that the 1988 Battalion Chief's Examination was given in complete accordance with statutory and constitutional requirements. It is also clear that the hearing afforded Collins on his grievance of the exam was fair, constitutional, and should be upheld.

The District Court properly concluded that the Commission acted properly in having Jim Christiansen prepare the Battalion Chief's exam. There was no statutory provision against this practice. Indeed Utah Code Ann. §§ 17-28-3 & -4 allowed for the Commission to have a secretary who could provide any service that the Commission might require. The District Court correctly ruled that Jim Christiansen performed the duties contemplated by that statute. Changes to the Fire Civil Service statutes in 1992 offer Collins no grounds to challenge the role of Jim Christiansen in preparing the exam.

The district court committed no error in finding that the Commission fulfilled its statutory obligations in administering

the exam. Collins has presented no evidence whatsoever that the exam was not a fair test of the requisite skills of the candidates to the exam. In fact the record of the hearing at the Commission provides ample evidence to support the conclusion that the exam was fair.

Furthermore, there was no due process violation in the Commission hearing Collins' grievance. Collins never specifically points to any particular bias of the Commission towards his appeal. To the contrary, when the due process protections afforded Collins are considered, it is apparent that there was no bias to Collins in the hearing before the Commission, and that that hearing complied with all due process requirements.

Finally, the district court correctly upheld the decision of the Commission that the examination was fair. The district court correctly ruled that the Commission had substantial evidence on which to base its decision, and ptherefore the decision should be upheld.

ARGUMENT

- I. The district court correctly determined that the Commission could properly have Jim Christiansen prepare the exam.

The testimony was undisputed that Jim Christiansen prepared the 1988 Battalion Chief's examination on the behalf of the Commission. Collins charges that there was no authority for the

Commission to allow Christiansen to prepare the exam for them.

The district court found that Christiansen was acting for the Commission in the role of secretary in 1988. (R.). This position was a statutorily defined role, with responsibility for clerical duties and "such other service as may be required by such civil service commission." Utah Code Ann. §17-28-4 (1987). Collins challenges the court's finding on this point based upon testimony from a retired Civil Service board member, Clare Rasmussen who stated that Mr. Christiansen did not perform the secretarial duties for the board. However, it also must be remembered that Mr. Rasmussen also believed that Jim Christiansen was a member of the Board of Commissioners, which he was not. It is fair from the record, to assume that the district court took the clarity of Mr. Rasmussen's memory into consideration when evaluating his testimony. The trial court's determination of fact that it appeared that Mr. Christiansen performed the duties of secretary is entitled to deference by this court. *Dall v. State* 888 P.2d 680, 685. (Utah Ct. App. 1994).

In short, the district court, after hearing evidence and reviewing the record of the administrative proceeding, found that Mr. Christiansen performed the duties of secretary to the Commission in 1988. Moreover, the language found in Section §17-28-4 provided ample support for the trial court's decision that one of the duties contemplated in that section was the preparation of an exam. Therefore, this court should uphold that decision.

II. The district court correctly ruled that the Commission had fulfilled its statutory duty to conduct a fair exam.

The district court considered evidence from both witnesses and from the record of the proceeding below in determining that the Commission properly fulfilled its statutory obligations under the statute. The statute requires that the test be fair. The district court found, based on the facts presented, that the exam was fair. This finding is entitled to deference by this court. In particular, this finding is entitled to be upheld because Collins' has not marshalled any evidence to indicate why the exam itself was not fair.

The main assertion that Collins makes regarding the fairness of the exam is restating his first argument concerning the role of Jim Christiansen in preparing the exam. He intimates that this impacts on the fairness of the exam. However, there is not one citation to the record that this somehow made the exam unfair. Without some nexus, there is no logical connection between the two factors.

It is impossible to ascertain any relationship between the fairness of the exam and the person who prepared it. Indeed Collins asserts no evidence on this point whatsoever.

His second assertion under this argument again stems from his concerns about Jim Christiansen's role in the exam. Essentially the argument is made that the Commission did not "give" the exam as required by Utah Code Ann. §78-28-7 (1987).

The district court however, found that the Commission did indeed give the exam. The fact that Mr. Christiansen actually prepared the exam does not indicate in any way that anyone other than the Commission actually administered it. Particularly illuminating on this point is the fact that the Commission retained responsibility for the exam, including the determinations of its adequacy and fairness. This interpretation is consistent with what the statutes required the Commission to do. Its role was to insure the fairness of the examinations. See Utah Code Ann. § 17-28-7 (1987). There was no statutory requirement that the members of the Commission be in any way experts in the administration of a technical promotion exam.

III. The trial court correctly ruled that there were no due process violations in the proceedings before the Commission.

Collins asks this Court to overrule the trial court's decision that the proceeding before the Commission were fair and constitutional. He cites no evidence of any particular instances of bias or prejudice on the part of the Commission that would warrant such action.

It is axiomatic that "every person who brings a claim . . . at a hearing held before an administrative agency has a due process right to receive a fair trial in front of a fair tribunal. *Bunnell v. Industrial Comm'n.*, 740 P.2d 1331 (Utah 1987). What Collins neglects to provide this court is any particular evidence of unfairness or deprivation of due process. In fact, review of the record indicates that he was afforded the

full panoply of due process protections. He had assistance of counsel and was entitled to call and cross examine witnesses.

Collins now challenges that the hearing denied him due process because the Commission responsible for the exam was the same Commission that heard his grievance. He makes this argument "in the abstract, and without specificity, and without any record citation in support thereof." *Thomas J. Peck & Sons v. Pub. Serv. Comm'n*, 700 P.2d 119, 1123 (Utah 1985) (declining to find due process violations simply because the administrative law judge who denied a grievant's application also heard the grievance). Without any evidence that the proceeding before the Commission was in fact unfair to Collins, then this Court should not disturb the decision of the trial court on this issue.

IV. The district court correctly upheld the decision of the Commission.

Collins argues that the district court should have overturned the Commission's finding that the 1988 Battalion Chief's examination was fair. However, Collins cites no compelling support for this argument. As outlined in the fact section above, the Commission had ample, reliable evidence upon which to base its conclusion that the examination was fair. All of Collins' allegations were specifically answered by the Commission with citation to credible evidence in support thereof.

This Court should uphold the Commission's finding that the exam was fair upheld that decision rests on "substantial

evidence." See *Hercules Inc. v. Utah State Tax Comm'n*, 877 P.2d 169 (Utah Ct. App. 1994). "'Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Grace Drilling v. Board of Review*, 776 P.2d 63, 68 Utah Ct. App. 1989) (quoting *Idaho State Ins. Fund v. Hunnicutt*, 715 P.2d 927, 930 (Idaho 1985)). Moreover, if there is conflicting evidence, the job of resolving that conflict is left to the administrative body, not the appellate court. *Id.* (Citing *Board of Educ. of Montgomery County v. Paynter*, 491 A.2d 1186, 1193 (Md. 1985)).

In this case, it is apparent that the Commission had substantial evidence upon which to rely in issuing its finding that the examination was fair.


Because Collins cannot carry his burden of demonstrating that there were not substantial facts to support the Commission's finding that the exam was fair, that decision must be upheld.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court uphold the decision of the district court dismissing Collins' petition.

DATED this ____ day of January 1997.

DOUGLAS R. SHORT
SALT LAKE COUNTY ATTORNEY



BRENDAN P. McCULLAGH
SPECIAL DEPUTY COUNTY ATTORNEY

ADDENDUM

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—Trespass.

—Sewer.

Evidence of plaintiff's chain of title and of the trespass across his farm by defendant's condominium sewer line was sufficient for the issuance of a permanent injunction, and there was no need to plead or prove that the sewer line was wrongfully installed. *Ferguson v. Christensen*, 531 P.2d 491 (Utah 1975).

Jurisdiction.

—Pending appeal.

Motion for injunction to restrain dissipation of marital assets during the pendency of the appeal of the divorce action should be filed with the district court; any jurisdiction Supreme Court may have in such matters should be invoked only after a party has sought relief in the district court, in all but the most exceptional circumstances. *Warren v. Warren*, 642 P.2d 385 (Utah 1982).

Security.

—Not required.

—Unlikelihood of harm.

The trial judge has wide discretion in the matter of requiring security upon issuance of a restraining order, and if there is an absence of proof showing a likelihood of harm, certainly no bond is necessary. *Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Wallace*, 573 P.2d 1285 (Utah 1978).

—Recovery of damages.

—Demand.

Enjoined party's filing of notice of claim on bond with district court, stating that the party intended to assert at some future time its claim on bond, cannot be deemed to have been a demand on bond upon which the enjoined party failed to take action precluding it from pursuing a separate action. *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258 (Utah 1984).

—Notice.

Fact that this rule eliminates the necessity of an independent action for damages as a result of an injunction, by providing that liability

on the surety bond "may be enforced on motion without the necessity of an independent action on the bond," does not normally eliminate the necessity of giving the adverse party some notice and an opportunity to meet the issue by filing a motion or a counterclaim for relief. *Fillmore City v. Reeve*, 571 P.2d 1316 (Utah 1977).

—Separate action.

Subdivision (c) of this rule does not preclude a separate action on an injunction bond; rather, it allows an action on the bond to be enforced in the action in which it is filed at the option of the enjoined party. *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258 (Utah 1984).

—Wrongfully issued injunction.

If the restraining or enjoinder is not wrongful, the party enjoined has no basis for recovery on the bond; if, however, it is found that the injunction was wrongfully issued, the enjoined party has an action for costs and damages incurred as a result of the wrongfully issued injunction. *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258 (Utah 1984).

Damages incurred as a result of wrongfully issued injunction are limited to the amount of the bond where the injunction was obtained in good faith and may include attorney fees of the party wrongfully enjoined. *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258 (Utah 1984).

The award of attorney fees to be paid from an injunction bond should be limited only to the hours spent by defendants' counsel as a result of the wrongfully issued injunction. *Beard v. Dugdale*, 741 P.2d 968 (Utah Ct. App. 1987).

Showing by party sought to be enjoined.

—Operation of nuisance.

A defendant who wants to operate a plant which has been declared to be a nuisance is required to offer evidence to the court as to how the plant can be used without creating a nuisance before he can complain that the court did not tell him how he could use his plant. *Draper v. J.B. & R.E. Walker, Inc.*, 121 Utah 567, 244 P.2d 360 (1952).

COLLATERAL REFERENCES

Am. Jur. 2d. — 42 Am. Jur. 2d Injunctions §§ 10, 14, 48 to 52, 69 et seq., 265, 296 to 303, 310 to 316.

C.J.S. — 43 C.J.S Injunctions §§ 8, 16, 22 to 24, 36 et seq., 165, 166, 180, 206, 208

A.L.R. — Infant's employment contract, enforceability of covenant not to compete in, 17 A.L.R.3d 863

Appealability of contempt adjudication or conviction, 33 A.L.R.3d 448.

Review other than by appeal or writ of error, contempt adjudication or conviction as subject to, 33 A.L.R.3d 589.

Propriety of permanently enjoining one guilty of unauthorized use of trade secret from engaging in sale or manufacture of device in question, 38 A.L.R.3d 572.

Propriety of injunctive relief against diversion of water by municipal corporation or public utility, 42 A.L.R.3d 426.

Preliminary mandatory injunction to prevent, correct, or reduce effects of polluting practices, 49 A.L.R.3d 1239.

What constitutes fraud or forgery justifying refusal to honor, or injunction against honoring, letter of credit under UCC § 5-114(1), (2), 25 A.L.R.4th 239.

Recovery of damages resulting from wrongful issuance of injunction as limited to amount of bond, 30 A.L.R.4th 273.

Right of employee to injunction preventing employer from exposing employee to tobacco smoke in workplace, 37 A.L.R.4th 480.

Propriety of federal court injunction against suit in foreign country, 78 A.L.R. Fed. 831.

Key Numbers. — Injunction ⇐ 9 et seq., 143, 148, 160, 189, 190, 204, 213.

Rule 65B. Extraordinary writs.

(a) **Special forms of writs abolished.** Special forms of pleadings and of writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, and other extraordinary writs, as heretofore known, are hereby abolished. Where no other plain, speedy and adequate remedy exists, relief may be obtained by appropriate action under these rules, on any one of the grounds set forth in Subdivisions (b) and (f) of this rule.

(b) **Grounds for relief.** Appropriate relief may be granted:

(1) where any person usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military, or a franchise, or an office in a corporation created by the authority of this state; or any public officer, civil or military, does or permits to be done any act which by the provisions of law works a forfeiture of his office; or an association of persons act as a corporation within this state without being legally incorporated; or any corporation has offended against any provision of the law, as it may have been amended, by or under which law such corporation was created, altered or renewed; or any corporation has forfeited its privileges and franchises by nonuser or has committed an act amounting to a surrender or a forfeiture of its corporate rights, privileges and franchises or has misused a franchise or privilege conferred upon it by law, or exercised a franchise or privilege not so conferred; or

(2) where an inferior tribunal, board or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; or

(3) where the relief sought is to compel any inferior tribunal, or any corporation, board or person to perform an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully excluded by such inferior tribunal or by such corporation, board or person; or

(4) where the relief sought is to arrest the proceedings of any tribunal, corporation, board or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

(c) **Action by attorney general under Subdivision (b)(1) of this rule.** The attorney general may, and when directed so to do by the governor shall, commence any action authorized by the provisions of Subdivision (b)(1) of this rule. Such action shall be brought in the name of the state of Utah.

(d) **Action by private person under Subdivision (b)(1) of this rule.** A person claiming to be entitled to a public or private office unlawfully held and exercised by another may bring an action therefor. A private person may

bring an action upon any other ground set forth in Subdivision (b)(1) of this rule, only if the attorney general fails to do so after notice. Any such action commenced by a private person shall be brought in his own name. Upon filing the complaint, such person shall also file an undertaking with sufficient sureties, in the same form required of bonds on appeal under the provision of Rule 73 and conditioned that such person will pay any judgment for costs or damages recovered against him in such action.

(e) **Nature and extent of relief under Subdivision (b)(2) of this rule.** Upon the filing of a complaint seeking relief under Subdivision (b)(2) of this rule, the court may require notice to be given to the adverse party before issuance of the writ, or may grant an order to show cause why such writ should not be issued, or may grant the writ without notice. If the writ is granted, it shall be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings, commanding such tribunal, board or officer to certify fully to the court issuing the writ, within a specified time, a transcript of the record and proceedings, describing or referring to them with sufficient certainty; and if a stay of proceedings is intended, requiring the party in the meantime to desist from further proceedings in the matter to be reviewed. The review by the court issuing the writ shall not be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.

(f) **Habeas corpus.** Appropriate relief by habeas corpus proceedings shall be granted whenever it appears to the proper court that any person is unjustly imprisoned or otherwise restrained of his liberty. If the person seeking relief is imprisoned in the penitentiary and asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or under the Constitution of the state of Utah, or both, then the person seeking such relief shall proceed in accordance with Rule 65B(i). In all other cases, proceedings under this subdivision shall be conducted in accordance with the following provisions:

(1) The complaint seeking relief shall, among other things, state that the person designated is illegally restrained of his liberty by the defendant and the place where he is so restrained, if known (stating wherein and the cause or pretense thereof, according to the best information of the plaintiff, annexing a copy of any legal process or giving a satisfactory explanation for failing so to do); that the legality of the imprisonment or restraint has not already been adjudged upon a prior proceeding; whether another complaint for the same relief has been filed and relief thereunder denied by any court, and if so attaching a copy of such complaint and stating the reasons for the denial of relief or giving satisfactory reasons for the failure to do so.

(2) The complaint shall be filed in the court most convenient to the plaintiff.

(3) Upon the filing of the complaint the court shall, unless it appears from such complaint or the showing of the plaintiff that he is not entitled to any relief, issue a writ directed to the defendant commanding him to bring the person alleged to be restrained before the court at a time and place therein specified, at which time the court shall proceed in a summary manner to hear the matter and render judgment accordingly. If the writ is not issued the court shall state its reasons therefor in writing and

file the same with the complaint, and shall deliver a copy thereof to the plaintiff.

(4) If the defendant cannot be found, or if he does not have such person in custody, the writ (and any other process issued) may be served upon any one having such person in custody, in the manner and with the same effect as if he had been made defendant in the action.

(5) If the defendant conceals himself, or refuses admittance to the person attempting to serve the writ, or if he attempts wrongfully to carry the person imprisoned or restrained out of the county or state after service of the writ, the person serving the writ shall immediately arrest the defendant, or other person so resisting, and bring him, together with the person designated in the writ, forthwith before the court before which the writ is made returnable.

(6) At the time of the issuance of the writ, the court may, if it appears that the person designated will be carried out of the jurisdiction of the court or will suffer some irreparable injury before compliance with the writ can be enforced, cause a warrant to issue, reciting the facts, and directing the sheriff to take such person and forthwith bring him before the court to be dealt with according to law.

(7) The defendant shall appear at the proper time and place with the person designated or show good cause for not doing so and must answer the complaint within the time allowed. The answer must state plainly and unequivocally whether he then has, or at any time has had, the person designated under his control and restraint, and if so, the cause thereof. If such person has been transferred, the defendant must state that fact, and to whom, when the transfer was made, and the reason or authority therefor. The writ shall not be disobeyed for any defect of form or misdescription of the person restrained or defendant, if enough is stated to show the meaning and intent thereof.

(8) The person restrained may waive his right to be present at the hearing, in which case the writ shall be modified accordingly. Pending a determination of the matter the court may place such person in the custody of such individual or individuals as may be deemed proper.

(g) [Deleted.]

(h) **When writ returnable.** Any alternative writ issued by a court or a judge thereof, may be made returnable, and a hearing thereon may be had, at any time as such court may in its discretion determine.

(i) **Postconviction hearings.**

(1) Any person imprisoned in the penitentiary or county jail under a commitment of any court, whether such imprisonment be under an original commitment or under a commitment for violation of probation or parole, who asserts that in any proceedings which resulted in his commitment there was a substantial denial of his rights under the Constitution of the United States or of the state of Utah, or both, may institute a proceeding under this rule.

Such proceedings shall be commenced by filing a complaint, together with a copy thereof, with the clerk of the court in which such relief is sought. The complainant shall also serve a copy of the complaint so filed upon the attorney general of the state of Utah if imprisoned in the state prison, or the county attorney of the county where imprisoned if in a county jail. Such service may be made by any of the methods provided for

service in Rule 4 of the Utah Rules of Civil Procedure, or by mailing such copy to the attorney general or county attorney by United States mail, postage prepaid, and by filing with the clerk of said court a certificate of mailing certifying under oath that a copy was so mailed to the attorney general or county attorney. Upon the filing of such a complaint, the clerk shall promptly bring the same to the attention of the presiding judge of the court in which such complaint is filed.

(2) The complaint shall state that the person seeking relief is illegally restrained of his liberty by the defendant; shall state the place where he is so restrained; shall state the dates of and identify the proceedings in which the complainant was convicted and by which he was subsequently confined and of which he now complains; and shall set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any constitutional rights were violated. The complaint shall have attached thereto affidavits, copies of records, or other evidence supporting such allegations, or shall state why the same are not attached.

The complaint shall also state whether or not the judgment of conviction that resulted in the confinement complained of has been reviewed on appeal, and if so, shall identify such appellate proceedings and state the results thereof.

The complaint shall further state that the legality or constitutionality of his commitment or confinement has not already been adjudged in a prior habeas corpus or other similar proceeding; and if the complainant shall have instituted prior similar proceedings in any court, state or federal, within the state of Utah, he shall so state in his complaint, shall attach a copy of any pleading filed in such court by him to his complaint, and shall set forth the reasons for the denial of relief in such other court. In such case, if it is apparent to the court in which the proceeding under this rule is instituted that the legality or constitutionality of his confinement has already been adjudged in such prior proceedings, the court shall forthwith dismiss such complaint, giving written notice thereof by mail to the complainant, and no further proceedings shall be had on such complaint.

(3) Argument, citations and discussion of authorities shall not be set forth in the complaint, but may be set out in a separate supporting memorandum or brief if the complainant so desires.

(4) All claims of the denial of any of complainant's constitutional rights shall be raised in the postconviction proceeding brought under this rule and may not be raised in another subsequent proceeding except for good cause shown therein.

(5) If the complainant is not represented by counsel when the complaint is filed, he shall advise the court upon filing his complaint whether he intends to employ his own counsel, and if he does not do so, or if he requests the court to appoint counsel, the presiding judge shall forthwith appoint counsel to represent complainant and shall give notice to the complainant and the attorney general or county attorney of such appointment.

(6) Within ten days after service of a copy of the complaint upon him, the attorney general, or the county attorney, as the case may be, shall answer the complaint or otherwise plead thereto. Any further pleadings

or amendments shall be in conformity with the Utah Rules of Civil Procedure.

(7) When an answer is filed, the court shall immediately set the case for a hearing within twenty days thereafter unless the court in its discretion determines that further time is needed. Prior to the hearing, the state or county shall obtain such transcript of proceedings or court records as may be relevant and material to the case. The court, on its own motion, or upon the request of either party, may order a prehearing conference if good reason exists therefor; but such conference shall not be set so as to unreasonably delay the hearing on the merits of the complaint. The complainant shall be brought before the court for any hearing or conference.

If the court in which the complaint is filed determines that in the interest of convenience and economy, the hearing should be transferred to the district court having jurisdiction over the place of confinement of complainant, the court may enter a written order transferring such case and shall set forth in such order its reasons for so doing.

(8) In each case, the court, upon determining the case, shall enter specific findings of fact and conclusions of law and judgment, in writing, and the same shall be made a part of the record in the case.

If the court finds in favor of the complainant, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such further orders with respect to arraignment, retrial, custody, bail or discharge as the court may deem just and proper in the case.

(9) If the complainant is unable to pay the costs of the proceedings, he may proceed in forma pauperis upon the filing of an affidavit to that effect, in which event the court may direct the costs to be paid by the county in which he was originally charged.

(10) Any final judgment entered upon such complaint may be appealed to and reviewed by the Supreme Court of Utah as an appeal in civil cases. (Amended, effective Jan. 1, 1985).

Amendment Notes. — Subdivision (g), relating to proceedings where extraordinary writs are sought in the Supreme Court, was repealed with the adoption of the Utah Rules of Appellate Procedure (now the Rules of the Utah Supreme Court), effective January 1, 1985. For present provisions, see Rules 19 and 20, R. Utah S. Ct. and, particularly, the Committee Note following Rule 20.

Compiler's Notes. — There is no federal rule covering the subject matter contained in this rule, except for Rule 81(a)(2), F.R.C.P.,

which applies the federal rules to proceedings for habeas corpus.

The federal statute governing remedies on motion attacking sentence appears at 28 U.S.C. § 2255.

Cross-References. — Corporations, Title 16.

Statute of limitations for habeas corpus action, § 78-12-31.1.

Statute of limitations for postconviction relief action, § 78-12-31.2.

NOTES TO DECISIONS

ANALYSIS

Abolishment of special forms.

—Mandamus.

—Nature of present remedy.

Grounds

—Certiorari.

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of January, 1997, I caused a true and correct copy of the foregoing to counsel for the Appellant in the U.S. Mails, postage prepaid:

Andrea Nuffer Godfrey
Dennis K. Poole & Associates
Attorney for Appellant
4543 South 700 East, Suite 200
Salt Lake City, Utah 84107

A handwritten signature in dark ink, appearing to be 'AN Godfrey', written over a horizontal line.