1979

Utah Public Employees Association; And, Larry Fields v. State of Utah; And, Scott M. Matheson, Governor, State of Utah : Brief of Respondents'

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

UTAH PUBLIC EMPLOYEES' ASSOCIATION and LARRY FIELDS, Plaintiffs-Appellants, -v- STATE OF UTAH and SCOTT M. MATHESON, Governor, State of Utah, Defendants-Respondents.	)	Case No. 16616

BRIEF OF RESPONDENTS

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH, HONORABLE HOMER F. WILKINSON, DISTRICT JUDGE

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-v-	:	
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BRIEF OF RESPONDENTS'

NATURE OF CASE

Appellants filed an action in the Third Judicial District Court, seeking injunctive and declaratory relief that a policy directive issued by the Governor of the State of Utah, prohibiting employees in the Division of Wildlife Resources from participating in an annual drawing for once-in-a-life-time hunting permits, violated the employees' rights. The Third Judicial District Court granted respondents' Motion for Summary Judgment on all issues.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmation of the decision of the Third Judicial District Court, declaring the Governor's policy directive to be lawful and constitutional.

STATEMENT OF FACTS

Respondents generally accept appellants' Statement of Facts, except respondents disagree that there are at least three less burdensome alternative approaches, or that that aspect is even relevant to the present issues.

Appellants fail to mention that in 1978, just prior to the Governor's policy directive being issued, three Division of Wildlife Resources' employees who,submitted applications, were successful in obtaining permits for the hunt. One employee obtained two permits--one for the Big Horn sheep and one for the buffalo. Another employee received only a moose permit, and a third employee received only a Big Horn sheep permit. That year, 3,181 applications (320 Big Horn sheep, 1261 buffalo, 1600 moose) were received for the drawings. Out of the 3,181 applications, only 20 sheep permits, 20 buffalo permits, and 90 moose permits would be issued, of which one employee obtained two permits; another employee received a moose permit, and a third employee received a Big Horn sheep permit.

Appellants also fail to mention that, subsequent to the Third Judicial District Court's ruling in this matter, the attorneys for both parties met in chambers with the Honorable Homer F. Wilkinson, District Judge,

regarding the Memorandum Decision issued by Judge Wilkinson on July 18, 1979. The sum and substance of that conversation was that Judge Wilkinson ruled definitively for defendants-respondents in the matter, and plaintiffs' only remedy at that point, according to the Judge, was to seek an appeal to the Utah Supreme Court.

ARGUMENT

POINT I

THE GOVERNOR HAS STATUTORY AND CONSTITUTIONAL AUTHORITY TO ISSUE THE POLICY DIRECTIVE IN QUESTION.

The Governor is statutorily and constitutionally authorized to adopt the policy in question. (See Exhibit A. attached hereto.) Utah Code Ann. Section 67-1-1 (1953), provides, in part:

> "In addition to those prescribed by the Constitution, the governor has the following powers and must perform the following duties:
>
> (1) He shall supervise the official conduct of all executive and ministerial officers."

The mandatory language of the above-cited statute requires the Governor to supervise the conduct of all State employees. The manner in which the drawing for the big hunt permits is carried out is within the scope of "official conduct" of employees and is properly within the supervisory powers of the Governor over ministerial officers.

The Utah Constitution, Article VII, Section 5, prescribes the duties of the Governor and provides, in part:

> "The Governor shall see that the laws are faithfully executed; he shall transact all executive business with the officers of the government, civil and military, and may require information in writing from the officers of the Executive Department, ..."

The above-cited constitutional provision, requiring the Governor to see that the laws are faithfully executed, contains the inherent constitutional authority to issue policy directives regarding the affairs of State government. (See, generally, 38 Am.Jur. 2d, Governor, Sections 1 and 4, at pages 932-935.) In the case of Kenny v. Byrne, 365 A.2d 211, 144 N.J. Super. 243 (1976), the New Jersey Superior Court upheld an Executive Order of the Governor of New Jersey, requiring high echelon State employees to file financial disclosure statements. The Court in so holding stated:

> "Appellants' brief raises the question of the authority of the Governor to issue the executive order, contending that it is ultra vires and beyond his constitutional powers. This contention is manifestly without merit.
>
> "The Governor is vested with the executive power of the State. N.J. Const. (1947), Art. V, Section 1, par. 1. As the head of the Executive Branch of government he has the duty and power to supervise all employees in each principal department of that branch. Id., Art. V, Section 4, par. 2. Of necessity, this includes the inherent power to issue directives and orders by way of implementation in order to insure efficient and honest performance by those state employees within his jurisdiction. Such power stems from the Governor's responsibility under the foregoing constitutional provisions as well as Art. V, Section 1, par. 11, which requires that he 'take care that the laws be faithfully executed.'" 365 A.2d 211, 215.

There can be no question that the Governor has the legal authority to adopt said policy directive under both the statutes of the State and the Utah Constitution. See, generally, Note, Gubernatorial Executive Orders as Devices for Administrative Direction and Control, 50 Iowa Law Review 78 (1964).

The Utah Legislature has adopted the Utah Public Officers' and Employees' Ethics Act, set forth in Utah Code Ann. Section 67-16-1 (1953), et seq.. Said Act has application to these appellants who are the employees of the Division of Wildlife Resources, Department of Natural Resources, pursuant to Utah Code Ann. Section 67-16-3 (9) (1953), defining a "public employee." Utah Code Ann. Section 67-16-4 (3), provides:

> "... No public officer or public employee shall:
>
> (3) Use or attempt to use his official position to secure special privileges or exemptions for himself or others."

The Governor, being fearful of the appearance of impropriety if State employees participated in a drawing for the 20-to-90 permits to hunt big game animals, adopted a policy prohibiting Division employees and members of the Big Game Board from participating in the drawing. Said policy was adopted in the discretion of the Governor to further the best interests of the people of the State of Utah and to carry out the legislative mandate which would prohibit "actual or potential conflicts of interest." The Legislature

set forth in Utah Code Ann. Section 67-16-2 (1953):

> "Purpose of act.--The purpose of this act is to set forth standards of conduct for officers and employees of the state of Utah and its political subdivisions in areas where there are actual or potential conflicts of interest between their public duties and their private interest. In this manner the legislature intends to promote the public interest and strengthen the faith and confidence of the people of Utah in the integrity of their government. It does not intend to deny any public officer or employee the opportunity available to all other citizens of the state to acquire private economic or other interests so long as this does not interfere with his full and faithful discharge of his public duties." (Emphasis added.)

In the above-cited Kenny v. Byrne, supra, the Court noted in dictum:

> "... By accepting public employment an individual steps from the category of a purely private citizen to that of a public citizen. And in that transition he must of necessity subordinate his private rights to the extent that they may compete or conflict with the superior right of the public to achieve honest and efficient government." 635 A.2d 211, 216.

The Governor's policy, prohibiting Wildlife employees from participating in the big game drawing, was adopted to insure the greatest degree of public confidence in honest and efficient government and to avoid any appearance of impropriety. To rule in appellants' favor that the Governor may not adopt such a policy would severely weaken the Governor's office and thwart his efforts to achieve the highest degree of integrity in government as well as to instill public confidence in honest, efficient, and fair government.

POINT II

THE GOVERNOR'S POLICY DIRECTIVE DOES NOT VIOLATE APPELLANTS' CONSTITUTIONALLY PROTECTED RIGHTS AS PUBLIC EMPLOYEES.

The policy adopted by the Governor does not infringe upon any legally protected rights of appellants' or employees' of the Division of Wildlife Resources. The above-cited Kenny v. Byrne, supra, sets forth the general test regarding constitutional infringement of rights. The New Jersey Superior Court in finding no constitutional impairments under the facts of that case, stated:

> "It is axiomatic that a classification in a statute or executive order does not offend the Equal Protection Clause if it conceivably has some reasonable basis to justify the same. Mere inequality or difference in treatment does not suffice to support a charge of unconstitutional discrimination. See Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1910). And a classification must be upheld under any reasonable set of facts unless there is a showing of invidious discrimination. Morey v. Dowd, 354 U.S. 457, 463, 77 S.Ct. 1344, 1348, 1 L.Ed.2d 1485, 1490 (1957).
>
> "A classification is presumed to be constitutional and the one who attacks it has the burden of showing that it is arbitrary and without a reasonable basis to support it. David v. Vesta Co., 45 N.J. 301, 315, 212 A.2d 345 (1965). Plaintiffs have utterly failed to sustain this burden." 365 A.2d 211, 219.

Respondents particularly cite the leading case of Lindsley v. Natural Carbonic Gas Co., supra, which basically sets forth the "reasonable basis" test. The Court in that case held that:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these:

1. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis and, therefore, is purely arbitrary.

2. The classification having some reasonable basis does not offend against the clause merely because it is not made with mathematical nicety or because in practice it results in some inequity.

3. When a classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." 220 U.S. 61, 78-79.

The Utah cases, setting forth the "reasonable basis for classification" test are legion, and respondents would refer this Court to only a few of those cases: Slater v. Salt Lake City, et al., 115 Utah 476, 206 P.2d 153 (1949); State v. Mason, 94 Utah 501, 78 P.2d 920, 117 A.L.R. 330 (1938).

As contrasted with the "reasonable basis for classification" test is the so-called "strict scrutiny" test whenever a "fundamental interest" is involved or a "suspect" classification may exist. In those circumstances the Court has concluded that any statutory classifications must be justified by showing a "compelling State interest" necessitating the classification,

and that the distinctions are necessary to further the purpose of the statute or regulation. The "strict scrutiny" cases, however, seem to be confined to the violation of fundamentally guaranteed rights. These cases traditionally deal with questions of race distinctions, right-to-vote, right of interstate travel and movement, right to constitutional protections in criminal processes, right of procreation, and other fundamentally guaranteed rights. The cases cited by appellants' seem to rely upon one facet of a "strict scrutiny" test, requiring that "no other less restrictive alternatives" be found available. Appellants extrapolate from this portion of the strict scrutiny test and suggest that the Governor must mandatorily exhaust all other available and possibly less restrictive alternatives before he may take any action regarding the conduct of Executive Branch employees.

Respondents submit that the "strict scrutiny" test should not be applied, because no fundamentally guaranteed rights or interests are at stake. It is very difficult to precisely define "fundamental rights"--yet those terms have conceptual meaning to most everyone hearing them. Respondents believe that the best definition, aside from listing a multitude of specific examples from earlier decisions, is found in 16 Am.Jur.2d, Constitutional Law, at page 635, defining a "constitution":

> "... A constitution is not the beginning of a community, nor does it originate and create institutions of government. Instead, it assumes the existence of an

> established system which is still to continue in force, and it is based on pre-existing rights, laws, and modes of thought. It has been aptly said that written constitutions sanctify and confirm great principles, but do not bring them into existence, and that a constitution is not the cause, but a consequence, of personal and political freedom."

This implies that "fundamental rights" are those "pre-existing rights" which our constitutions and laws protect. These are the "certain unalienable Rights" referred to by Thomas Jefferson in the Declaration of Independence. The "rights" sought to be protected by appellants' to seek a hunting permit or "not to be excluded" by virtue of accepting public employment, under the facts of this case, do not rise to the level of fundamental rights. They are at best permissive rights obtainable only under the State's licensing or franchising power. Hence, the "strict scrutiny" test should have no application.

The cases cited by appellants' all deal with limitations on the political activities of public employees and, as such, are not in point. The "strict scrutiny" test is generally regarded as an exception to the traditional equal protection standards of requiring that a rational basis exist for statutory classifications, in order that the objects or purposes of the legislation may be obtained. Neither this Court nor any other court in similar situations has required that the governor of a state in issuing a policy directive regarding the conduct of public employees make an extensive search for less restrictive alternatives, in order to control the administrative affairs of State government.

The Bagley case (421 P.2d 409 (1966)) is one of three cases from the State of California cited by appellants'. Those cases may be unique to the State of California, but, in any event, they all deal with the deprivation of political and First Amendment rights. This Court expressly rejected the application of the Bagley case in Salt Lake City Firefighters' Local 1645 v. Salt Lake City, 22 Utah 2d 115, 449 P.2d 239 (1979). In the Firefighters' case, the Court unanimously held that Salt Lake City had the power to require employees of the Fire Department to be residents of the city. Respondents submit that seeking less restrictive alternatives is not the current law in the State of Utah and simply has no application to this fact situation.

An examination of the class of employees affected by the policy of the Governor reflects a sound and reasonable basis for the Governor's decision. The affected employees are all those who may have direct contact with those individuals conducting the drawing as well as employees having access to inside information regarding the whereabouts of the big game, the habits and movements of the animals, and access to special radio-sensing devices, which would aid in killing one of the big game animals. Said employees in appellants' class also are charged with the responsibility of wildlife management and conservation within the State of Utah. They personally participate in the decision-making processes regarding wildlife and are most likely to become involved in conflicts of interests, or other improper activities regarding the selection of 20-to-90 resident

permits for shooting the big game animals.

In response to public criticism when 3,181 applications were received in 1978, of which only 20 sheep permits, 20 buffalo permits and 90 moose permits would be issued, with three employees receiving four permits, the Governor in his discretion decided that the public interest would best be served if all employees in Wildlife Resources were excluded from participation in the drawing. While no evidence exists that there was any impropriety on the part of the Division of Wildlife Resources' employees, the Governor issued the directive to "clear up any misunderstanding that may arise about the propriety of Wildlife personnel participating in a drawing of this kind."

Respondents submit that, in order to insure a strong, efficient, and honest government and create the greatest amount of public confidence in our government officials, appellants should be prohibited from participating in the drawing.

CONCLUSION

Respondent, Scott M. Matheson, Governor of the State of Utah, has statutory and constitutional authority to supervise the employees in the Executive Branch of government and to issue policy directives. Said policy statement in question is legally and lawfully adopted and has a sound, rational basis--that being to create public confidence in the honesty and integrity of State government. Said policy does not infringe upon any

constitutional or legally protected right of appellants' and does not discriminate under the Constitution. The District Court's decision should be affirmed.

DATED this 30th day of October, 1979.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

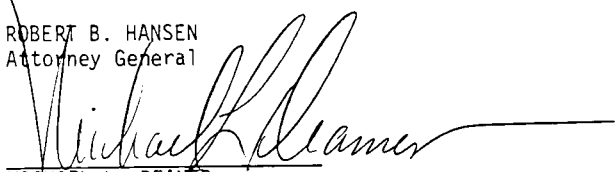

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EXHIBIT (A)

SCOTT M. MATHESON
GOVERNOR

STATE OF UTAH
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NEWS RELEASE
November 7, 1978

GOVERNOR SETS HUNTING POLICY
FOR WILDLIFE RESOURCES PERSONNEL

Governor Scott M. Matheson today issued a policy which prohibits personnel from the Division of Wildlife Resources, the members of the Wildlife Resources Board and the Director of the Department of Natural Resources from participating in special computer draws for once-in-a-lifetime hunt permits.

The special hunts that are involved include the buffalo hunt, for which 20 resident permits were awarded this year, the big-horn sheep hunt, for which 20 resident permits were offered this year, and the moose hunt, for which 90 resident permits were available this year. In addition, there were two non-resident permits available for the buffalo hunt, three non-resident permits for the big-horn sheep hunt and 10 non-resident permits for the moose hunt. These non-resident permits cost $1,000 each.

Those hunters who draw a permit for a particular hunt are then ineligible for future drawings for that hunt, hence the term "once-in-a-lifetime" hunts.

The Governor said that he issued the directive "to clear any misunderstanding that may arise about the propriety of wildlife personnel participating in a draw of this kind."

"Past drawings have been by computer and have been totally legitimate and proper," Governor Matheson said. "This new policy will simply clarify who is eligible and who is ineligible for the drawings."

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