

SUMMARY
ATTORNEY GENERAL POSITION ON
WHO MAY APPOINT LEGAL COUNSEL FOR
STATE BOARD OF EDUCATION/STATE OFFICE OF EDUCATION

Wednesday, June 20, 2007

Executive Summary

The Attorney General has broad constitutional and statutory powers and duties to provide legal counsel to all state entities and officers unless otherwise provided by the state constitution or statutes. The State Board of Education and State Office of Education are state entities and state officers. They do not have any constitutional or statutory exemption that allows them to hire their own attorney. Therefore, the Attorney General is their sole legal counsel.

CONSTITUTIONAL AND STATUTORY AUTHORITY
OF THE ATTORNEY GENERAL

Utah law provides that the Attorney General is the sole legal counsel for state entities unless otherwise provided in the state constitution or statutes. Article VII, Section 16 of the Utah Constitution mandates that “[t]he Attorney General shall be the legal adviser of the State officers, except as otherwise provided by this Constitution” Likewise, Utah Code Ann. § 67-5-5 states that “[e]xcept where specifically authorized by the Utah Constitution, or statutes, no agency shall hire legal counsel, and the attorney general alone shall have the sole right to hire legal counsel for each such agency.” “Agency” is broadly defined as any “department, division, agency, commission, board, council, committee, authority, institution, or other entity within the state government of Utah.” Utah Code Ann. § 67-5-3 (2004)

CASE LAW HIGHLIGHTING NEED FOR SPECIFIC EXEMPTION IN ORDER TO
UTILIZE LEGAL COUNSEL INDEPENDENT OF ATTORNEY GENERAL

In Estes v. Talbot, the Utah Supreme Court held that the members of the State Board of Education and the State Superintendent of Public Instruction are state officers. 597 P.2d 1324, 1326 (1979).

Hansen v. Retirement Board, (see attached copy), reaffirms that the Attorney General is constitutionally designated as the sole legal advisor to executive branch officers and their agencies. 652 P.2d 1332, 1336-7 (Utah 1982). Moreover, it holds that even independent executive branch state entities, such as the State Retirement Board and the State Insurance Fund, (i.e., ones not under the direct supervision of the Governor or other constitutional officer under Utah Constitution, Art. 7) are to be represented by the Attorney General unless there is a specific statutory or constitutional exemption which allows them to employ outside counsel. Id. at 1340-41. (See also, Beehive Telephone Co. v. Public Serv. Comm’n, 2004 UT 18, ¶ 23, 89 P.3d 131, 139 (Utah 2004) (holding that even after determination that Public Service Commission is an

independent agency, it must still have a “clear statutory foundation upon which to employ independent counsel,” other than the Attorney General.)

RECENT AMENDMENTS TO THE LAW SUPPORT POSITION THAT ATTORNEY GENERAL IS LEGAL COUNSEL FOR BOARD

In 1986, a constitutional amendment was approved which deleted the State Superintendent of Public Instruction as one of the constitutional officers mentioned in Art. 7, Sec. 17. Nonetheless, the Constitution continues to provide for a State Board of Education in Art. 10, Sec. 3: “The general control and supervision of the public education system shall be vested in a State Board of Education. The membership of the board shall be established and elected as provided by statute. The State Board of Education shall appoint a State Superintendent of Public Instruction who shall be the executive officer of the board.”

In 1988, there was a recodification of the education laws. One of laws repealed was Utah Code Ann. § 53-3-4 (1960), an unusual statute which allowed the Superintendent to give legal opinions. It provided that upon request from other school officers, the state superintendent shall answer “all questions concerning the school law” and “[h]is decisions shall be held to be correct and final until set aside by a court of competent jurisdiction.” (See Conover v. Board of Education of Nebo District, 1 Utah 2d 375, 267 P. 2d 768 (Utah 1954) (noting that this was an unusual statute because it allowed a non-attorney to act in this capacity).

In its place the current Utah Code Ann. § 53A-1-303(3) was enacted, which provides: “[u]pon request by the state superintendent, the attorney general shall issue written opinions on questions of law.” Moreover, it clearly mandates that “[o]pinions issued under this section shall be considered to be correct and final unless set aside by a court of competent jurisdiction or by subsequent legislation.” Utah Code Ann. § 53A-1-303(4)(see attached copy). This is the strongest statutory language of which we are aware in establishing not only the authority of the Utah Attorney General to provide legal counsel to a state entity, but also in making the Attorney General’s opinion binding legal authority unless overturned by a court of competent jurisdiction.

ATTORNEY GENERAL’S POSITION AND BOARD’S OWN ACTIONS ARE INDICATIVE OF THE BOARD’S PRIOR RECOGNITION OF THE ATTORNEY GENERAL AS THEIR LEGAL COUNSEL

In 2002, the Attorney General wrote AG Op. 02-003 addressing the issue of whether executive branch agencies are allowed to employ in-house legal counsel rather than through the Office of the Attorney General (see attached copy). It concluded that any agency which hires in-house legal counsel directly, bypassing the Attorney General, violates the Constitution. While this opinion did not directly involve the attorneys in-house at the State Office of Education, the previously cooperative relationship with the State Office and State Board, including when necessary designating their in-house counsel as Special Assistants Attorney General, continued as in the past by acquiescence of the Attorney General.

During all of these years the Board of Education, the Superintendent, and the State Office of Education, have consistently looked to the Attorney General as its legal counsel, and there has been a close and cooperative relationship, including a tradition of the Attorney General allowing in-house attorneys to be deputized as Special Assistants Attorney General. Even the Board's recent request for an opinion on implementation of the voucher program recognized the authority of the Attorney General by referencing Utah Code Ann. § 53A-1-303(3). (See attached copy of the Board of Education request for answers to questions dated May 10, 2007.)

COMMENTS REGARDING ATTORNEY GENERAL'S ROLE AS LEGAL ADVISOR TO THE BOARD

The Board of Education has never provided any formal legal analysis in support of its recent suggestion that it may appoint its own legal counsel because it is an "independent constitutional entity." In a recent board meeting, one board member suggested that the board is not part of the executive branch but rather a quasi-executive, legislative and judicial entity, and as such is akin to a fourth branch of government. However, the state constitution is clear that in Utah there are only three branches of government, the legislative, executive and judicial. (See Utah Constitution, Art. 5, Sec. 1) That there are some executive offices not directly under the supervision of the governor it is true. For example, the Office of the Attorney General itself (Art. 7, Sec. 16), or the Board of Pardons (Art 7, Sec. 12) are not under the governor's direct supervision. Nevertheless, the constitution, the applicable statutes, and Utah Supreme Court case authority all make it clear that without explicit constitutional or statutory authority, no such state agency may hire it own legal counsel without the approval of the Attorney General.

CONCLUSION

The State Board of Education may not hire its own legal counsel without either: (a) a constitutional or statutory exception which allows them to do so, or (b) the approval of the Attorney General. Until one of those conditions it met, the Attorney General is the sole legal counsel for that agency.

Attachment 1

Hansen v. Utah State Retirement Board Fund, et al.

Robert B. HANSEN, Attorney General, Plaintiff and Appellant, v. UTAH STATE RETIREMENT BOARD and Utah State Retirement Fund, et al., Defendants and Respondents. Robert B. HANSEN, Attorney General, Plaintiff and Appellant, v. UTAH STATE RETIREMENT BOARD and Utah State Retirement Fund; Utah State Industrial Commission and Utah State Insurance Fund; University of Utah, for and in behalf of the University of Utah Hospital for the University Medical Center; University Medical Center Trust Fund, First Security Bank of Utah, Trustee, Defendants and Respondents

**Supreme Court of Utah
652 P.2d 1332; 1982 Utah LEXIS 1044
Nos. 16714, 16560, 16851
August 27, 1982, Filed**

Counsel

Plaintiff.	Bernard M. Tanner, Asst. Atty. Gen., Salt Lake City, Utah. William G. Gibbs, Asst. Atty. Gen., Salt Lake City, Utah. Richard L. Dewsnup, Asst. Atty. Gen., Salt Lake City, Utah for
City, Utah.	William T. Evans, Asst. Atty. Gen., (for Univ. of Utah), Salt Lake
City, Utah.	Mark A. Madsen, Asst. Atty. Gen., (for Retirement Bd.), Salt Lake
City, Utah.	Frank V. Nelson, Asst. Atty. Gen., (for Ind. Comm.), Salt Lake
Defendant.	James R. Black (for State Ins. Fund), Salt Lake City, Utah. Merlin Lybbert (for Medical Center), Salt Lake City, Utah for

Judges: Stewart, Justice, wrote the opinion. Gordon R. Hall, Chief Justice, Richard C. Howe, Justice concurring. Crockett, Retired Justice concurring with comments. Oaks and Durham, Justices, do not participate herein.

Opinion

Opinion by: STEWART

{652 P.2d 1334} The Utah Attorney General filed this suit seeking 1) a declaratory judgment that the Utah Constitution has conferred exclusive authority on him to act as legal adviser to the defendants, and 2) an injunction prohibiting defendants from employing counsel pursuant to various statutory provisions. The complaint alleges that the defendants are state agencies, state funds, quasi-state agencies, and trust and insurance funds. The Attorney General appeals adverse summary judgments.

The complaint characterizes the defendants as follows: Utah State Retirement Board, an independent state agency; Utah State Retirement Fund, a quasi-state agency fund; the Utah State Industrial Commission, a state agency; Utah State Insurance Fund, a quasi-state agency fund; the University of Utah Hospital, a state agency that established the Medical Center Trust Fund, which is administered by First Security Bank as Trustee, to provide medical malpractice insurance.

The Attorney General contends that he has exclusive constitutional authority to act as legal adviser to the defendants. The defendants contend to the contrary and assert that the Legislature has

constitutionally authorized each agency to hire its own counsel. In addition, the Retirement Fund, Insurance Fund, and Medical Center Trust Fund affirmatively contend that they are in effect private trusts administering private trust funds, not public monies.

The basic issue to be resolved on this appeal is the meaning of the term "state officers" as used in Article VII, § 16.

I. THE POWERS OF THE ATTORNEY GENERAL

At statehood the office of Attorney General was established as an office within the executive branch of government by Article VII, § 1 of the Constitution. *Meyers v. Second Judicial District Court*, 108 Utah 32, 156 P.2d 711 (1945). As originally written, Article VII, § 1 stated: "The Executive Department shall consist of Governor, Secretary of State, State Auditor, State Treasurer, and Attorney General"1

The executive article, Article VII, was drafted to give effect to the fundamental principle that the organic law establishing the basic framework of government for this State should provide sufficient flexibility and latitude, within the limitations of certain fundamental restrictions, so that government could be organized to cope with the inevitable and unforeseeable exigencies that would arise. In part, the powers conferred on the constitutional executive officials were constitutionally based. However, the framers also conferred on the Legislature broad authority to shape the powers and authority of those officials as the needs of the times dictated. The 1980 amendments {652 P.2d 1335} to the executive article reaffirmed, and to some extent extended, the same general principle setting forth the powers and duties of the constitutionally established executive officers.2

Thus, except for the powers of the Governor,3 the executive article tersely states in one section certain basic or core duties of each constitutional officer, and in addition, provides that the Legislature may add thereto certain powers and responsibilities. See, e.g., § 14, specifying the duties of the Lieutenant Governor;4 § 15, specifying the duties of the Auditor and Treasurer;5 and § 17, specifying the duties of the Superintendent of Public Instruction.6 Section 16 establishes the powers of the Attorney General in the following language:

The Attorney General shall be the legal adviser of the State officers, except as otherwise provided by this Constitution, and shall perform such other duties as provided by law.

The Attorney General contends that the term "state officers" as used in § 16 encompasses all state employees. The defendants rely on *Hansen v. Legal Services Committee of the Utah State Legislature*, 19 Utah 2d 231, 429 P.2d 979 (1967), in support of the argument that the term "state officers" should be narrowly construed.

In *Hansen* the Court held that the Legislature, by appointing its own legal adviser to assist in the performance of the Legislature's constitutional duties, had invaded the constitutional authority of the Attorney General. The Court defined the term "state officers" as used in Article VII, § 16 (then Article VII, § 18) to mean the same as it means in Article XXIV, § 12 of the Constitution.7 The Court therefore held that since Senate and House members are referred to in Article XXIV, § 12 as "state officers," the Attorney General had exclusive constitutional power under Article VII, § 16 to act as legal adviser to the Legislature.

After a careful reanalysis, we are of the view that *Hansen* does not provide a sound basis for defining the term "state officers." Article XXIV, § 12, the lynchpin of the *Hansen* opinion, provides:

The State Officers to be voted for at the time of the adoption of this Constitution, shall be a Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, Superintendent of Public Instruction, Members of the Senate and House of Representatives, three Supreme Judges, nine District Judges, and a Representative to Congress.

Clearly, Article XXIV, § 12 was not intended to define the term "state officers" wherever it appeared in the Constitution. On its face, Article XXIV, § 12 was intended only to provide for launching the new state government by specifying those "state officers" who were initially to stand for election. To construe Article XXIV, § 12 to {652 P.2d 1336} define the term "state officers" as used in other constitutional provisions and in entirely different contexts would violate basic rules of constitutional interpretation and would produce anomalous consequences violative of such basic principles as the doctrine of separation of powers. See Article V, § 1. Clearly, it is as impermissible for the Attorney General to act as legal adviser to the judiciary in the performance of the judicial function,⁸ as it is for him to act as legal adviser to the Legislature. Furthermore, the term "state officers" as used in Article XXIV, § 12, includes the "Representative to Congress." That officer, however, is not an officer of state government at all, but of the federal government.

Finally, the specific holding in *Hansen* was overturned by a constitutional amendment ratified in 1972 that amended Article VI, § 32 expressly to authorize the Legislature to employ its own legal counsel to assist in performing its legislative duties.

Although the constitutional power of the Attorney General is to act as "legal adviser" to "state officers," the text of Section 16 does not permit the term "state officers" to be read in its most expansive meaning to include all employees of state government. In the first place, the office of Attorney General is by virtue of specific constitutional language an executive department office. Article VII, § 1. As such, it naturally follows that its constitutional duties should be limited to rendering advice to executive department officials. Furthermore, to interpret the phrase "state officers" to vest plenary authority in the Attorney General to act as legal adviser to all state officers and agencies would effectively nullify the power conferred by Section 16 on the Legislature to add to and shape the powers of the Attorney General. The result would be to undermine the intended flexibility accorded the Legislature to provide legal counsel to various state agencies whose functions may require special legal counsel or whose duties could result in conflicts of interest. The construction contended for by the Attorney General would also require the inadmissible conclusion that the Attorney General is to act as legal adviser to officials of both the legislative and the judicial branches of government.

Other provisions in the Constitution also use the term "state officer," but they do not require a more expansive definition of that term than is used in Article VII, § 16. The term "state officers" is used in a variety of contexts, each for a different purpose and each requiring a construction in accord with that purpose. *Cf. State v. Yelle*, 52 Wash. 2d 856, 329 P.2d 841 (1958). Thus, for example, Article VII, § 18 uses the term broadly to provide that compensation should be paid those executive branch officers enumerated in Article VII, § 1, as well as "such other State and District officers as provided for by law . . ." ⁹ The terms "state officers" or "state office" are used in still another context with a much narrower meaning in Article VII, § 9, which provides for interim appointments by the Governor under certain conditions. The term is also used with a restricted meaning in Article VII, § 10, which provides for senatorial confirmation of certain state officers appointed by the Governor. In sum, the term "state officers" has been used in the Constitution to specify different groups of state officers, and there is no textual basis for choosing one meaning over another to resolve the issue in this case.

Therefore, in light of the constitutional language, as well as the nature and history of the office of Attorney General, see 7A C.J.S. *Attorney General* § 7 (1980), we conclude that the framers intended to confer constitutional power on the Attorney General only with respect to executive department offices. Thus, the *constitutional* authority of the Attorney General is to act as legal adviser to the constitutional executive officers referred to in Article VII, i.e., {652 P.2d 1337} the Governor, Lt. Governor, Auditor, Treasurer, and the Superintendent of Public Instruction, the departments over which they have direct supervisory control, and to the other state executive offices referred to in Article VII, insofar as the officers of those offices act within the scope of the duties of such office.

Our conclusion as to the constitutional power of the Attorney General with respect to state officers is

consistent with precedents from other jurisdictions. The Washington Supreme Court in *State v. Yelle*, 52 Wash. 2d 856, 329 P.2d 841 (1958), in construing a virtually identical constitutional provision describing the powers of the Attorney General, has reached a conclusion similar to the one we reach. See also *Watson v. Caldwell*, 158 Fla. 1, 27 So. 2d 524 (1946); *Holland v. Watson*, 153 Fla. 178, 14 So. 2d 200 (1943); *Saint v. Allen*, 172 La. 350, 134 So. 246 (1931).

In addition to the power conferred by the Constitution, the Attorney General also enjoys other broad powers conferred pursuant to Article VII, § 16 by the Legislature. U.C.A., 1953, § 67-5-3 confers sweeping authority on the Attorney General to perform "legal services for any agency of state government." In pertinent part that provision states:

The attorney general may assign his legal assistants to perform legal services for any agency of state government As used in this act "agency" means any department, division, agency, commission, board, council, committee, authority, institution, or other entity within the state government of Utah.

The Attorney General also has broad litigating authority. Section 67-5-1 provides:

It is the duty of the attorney general: (1) To prosecute or defend all causes to which the state or any officer, board or commission thereof in an official capacity is a party; and he shall have charge as attorney of all civil legal matters in which the state is in anywise interested.

However, the broad powers conferred by Section 67-5-3 must be read in juxtaposition with statutes authorizing certain agencies to employ independent counsel and the implied limitation provided in Section 67-5-5 which states:

Except where specifically authorized by the Utah Constitution, or statutes, no agency shall hire legal counsel, and the attorney general alone shall have the sole right to hire legal counsel for each such agency. (Emphasis added.)

In addition to constitutional and statutory authority, the Utah Attorney General, like attorneys general of numerous other states, has common law powers.¹⁰ *State v. Jiminez*, Utah, 588 P.2d 707 (1978); *Hansen v. Barlow*, 23 Utah 2d 47, 456 P.2d 177 (1969). However, those powers are not constitutionally rooted and therefore do not expand the power conferred by Article VII, § 16. *Meyers v. Second Judicial District Court*, 108 Utah 32, 156 P.2d 711 (1945). The source of the common law power lies in the State's statutory adoption of the common law which has been in effect, except as modified by statute, since statehood. 1898 Revised Statutes § 2488; 1907 Compiled Laws of Utah § 2488. The present provision is found in § 68-3-1.¹¹ See also *Hilton v. Thatcher*, 31 Utah 360, 88 P. 20 (1907); *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 34 L. Ed. 478, 10 S. Ct. 792 (1890).

Of course, where a conflict arises between the common law and a statute or constitutional law, the common law must yield. Utah Code Ann., 1953, § 68-3-2 ;¹² *Rio Grande Western Railway Co. v. Salt Lake Investment Co.*, 35 Utah 528, 101 P. {652 P.2d 1338} 586 (1909); *In re Garr's Estate*, 31 Utah 57, 86 P. 757 (1906). The principle has been applied specifically with respect to the common law powers of the Attorney General. *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976).

The exact extent of the Attorney General's common law powers need not now, however, be decided because the issues in this case turn on constitutional and statutory provisions.¹³ Whether the Attorney General has the power to represent the defendants in this case depends on whether the defendants are executive department officials, and if not, whether the Legislature has authorized defendants to employ independent counsel.

II. THE POWERS AND FUNCTIONS OF DEFENDANTS

A. Utah State Retirement Board and Trust Fund

The Utah State Retirement Office is "administered under the general direction of the retirement board." § 49-9-2. The board consists of six persons to be appointed on a nonpartisan basis and the State Treasurer as an ex officio member. However, the Retirement Office is specifically established as an "independent state agency and not a division within any other department." § 49-9-2. The Board members "serve as investment trustees of the Utah state retirement fund" and have general direction over the Retirement Office. § 49-9-3.

The Retirement Board administers the 1) Utah State Retirement Act, § 49-10-1 *et seq.*; 2) Utah Judges' Retirement Act, § 49-7a-1 *et seq.*; 3) Utah Firemen's Retirement Act, § 49-6a-1 *et seq.*; and 4) Utah Public Safety Retirement Act, § 49-11-1 *et seq.* Each system has different retirement standards, contribution rates, withdrawal rates, and pension benefits. The various funds are administered as a common trust fund, known as the Utah State Retirement Fund, solely for the benefit of the beneficiaries and not for the public at large. Some 80 percent of the beneficiaries are not state employees, but employees of municipalities or counties. Each fund is required by statute to pay its proportional share of the administrative costs. § 49-9-5. No state funds are appropriated to meet any administrative costs.

Investments are not subject to control of the Board of Examiners. § 49-9-12(2). Section 49-9-4 authorizes the executive director of the Retirement Board to employ attorneys to assist in the administration of the retirement systems. Legal fees and other general administrative costs are to be paid from the various funds on a prorated, cost-of-service basis. § 49-9-5.

In a formal opinion, No. 78-007, the Attorney General has ruled that the Retirement Fund was not a state fund but a public trust fund and that as such the fiduciary responsibilities of the Board "would be in conflict with control exercised by the state auditor or other public official."

B. Industrial Commission and State Insurance Fund

The Industrial Commission administers the Workmen's Compensation Act, the Occupational Disease Disability Law, and the Employment Security Act, among other responsibilities. The Commission is an administrative agency, *Aetna Life Ins. Co. v. Industrial Commission of Utah*, 73 Utah 366, 274 P. 139 (1929), with administrative, quasi-judicial, and quasi-legislative powers. It can sue and be sued in its own name. § 35-1-2; *Industrial Commission v. Evans*, 52 Utah 394, 174 P. 825 (1918). It is not a body within the executive branch of government, but rather an independent agency.

Section 35-1-32 authorizes the Commission to appoint independent legal counsel to prosecute or defend any legal action within or concerning its jurisdiction. Section 35-1-32 states:

The commission may with the approval of the governor appoint a representative to act as special prosecutor or to defend {652 P.2d 1339} in any suit, action, proceeding, investigation, hearing or trial relating to matters within or concerning its jurisdiction. Upon the request of the commission, the attorney general or the county attorney of the county in which any investigation, hearing or trial had under the provisions of this title is pending, shall aid therein and prosecute, under the supervision of the commission, all necessary actions or proceedings for the enforcement of this title.

See also § 35-2-49 and § 35-4-20.

Closely associated with the State's workmen's compensation scheme is the State Insurance Fund. Section 35-3-1 authorizes the creation of the State Insurance Fund to provide workmen's compensation insurance to employers for the protection of their employees. The Director of the Department of Administrative Services¹⁴ now administers the Fund, and the State Treasurer, also an executive department official, is the custodian of all monies in the State Insurance Fund, § 35-3-13. The Director is authorized by statute to hire attorneys and other professional experts to assist in the administration of the Fund. § 35-3-1.15 All administrative costs of the Fund are borne by the Fund

itself, including attorney's fees. *Id.* The Department of Administrative Service is an office within the executive branch of government.

The Insurance Fund resembles a private insurance company that collects insurance premiums from employees and pays out to employees insurance benefits pursuant to the Workmen's Compensation Act and the Occupational Disease Act. See *State Tax Commission v. Department of Finance*, Utah, 576 P.2d 1297 (1978); *Gronning v. Smart*, Utah, 561 P.2d 690 (1977); *Chez v. Industrial Commission of Utah*, 90 Utah 447, 62 P.2d 549 (1936). In *State Tax Commission v. Department of Finance*, *supra*, this Court recognized that the Fund may enter into contracts and has the legal capacity to sue and be sued.

The Industrial Commission also administers the Unemployment Compensation Act for which there is "a special fund, separate and apart from all public moneys or funds of this state . . ." § 35-4-9(a). The State Treasurer is the treasurer and custodian of the Fund and administers the Fund "in accordance with the directions of the commission . . ." § 35-4-9(b). The Security Administration Fund is essentially a trust fund. To assist in the administration of the Unemployment Compensation Act, the Legislature has authorized the Commissioner to appoint attorneys. Section 35-4-11(d) provides:

The commission shall appoint on a nonpartisan merit basis, fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other personnel as may be necessary in the performance of its duties.

C. University of Utah and University of Utah Medical Center

The University of Utah has constitutional status and is a legal entity with the status of a body corporate. *State v. Candland*, 36 Utah 406, 104 P. 285 (1909). Article X, § 4 of the Constitution provides:

The location and establishment by existing laws of the University of Utah . . . are hereby confirmed, and all the rights, immunities, franchises and endowments heretofore granted or conferred, are hereby perpetuated unto said University . . .

The University operates the University of Utah Hospital at the University of Utah Medical Center. The Medical Center provides educational services to the University of Utah and receives some State funding, but it is primarily funded through receipts from patient care and federal funds.

{652 P.2d 1340} A trust fund was established by the University of Utah, on behalf of the Medical Center, with First Security Bank of Utah as trustee, to provide self-insurance for the Medical Center against malpractice and other casualty claims. The purpose of establishing the Fund was to avoid the cost of commercial malpractice insurance. The Fund is financed solely from a portion of patient care revenues. The Medical Center, because it participates in several federal assistance programs for which it receives federal funds, is subject to various federal rules and regulations, and the trust was established pursuant to certain of those regulations. Those regulations require that the trustee have legal title to the Fund and that it cannot be related to the health care provider either through ownership or control. No State funds are appropriated to the trust.

The trust agreement between the University and the bank authorizes the bank, as trustee, to employ and pay from the trust fund, attorneys and others as may be necessary for the effective administration of the self-insurance program, consistent with applicable regulations of pertinent federal agencies and to pay from the trust fund all costs, expenses, or other liabilities that may be incurred by the trustee in connection with the trust.

III. AUTHORITY OF DEFENDANTS TO EMPLOY COUNSEL

None of the defendant agencies as such is an executive department agency. For various reasons the Legislature has established the Industrial Commission, the State Retirement Board and the retirement funds it administers, and the State Insurance Fund as independent agencies. Likewise, the University

of Utah, which enjoys a degree of constitutionally rooted independence, is not an executive department agency.¹⁶

As to each defendant, the Legislature has conferred specific statutory authority authorizing the employment of independent counsel. Section 35-1-32 authorizes the Industrial Commission to appoint counsel, with the approval of the Governor, and § 35-4-11 authorizes the Commission to appoint attorneys to assist in the administration of the Unemployment Compensation Act. The Utah State Insurance Fund is authorized to employ independent counsel pursuant to § 35-3-1. The Retirement Board is empowered to hire legal counsel pursuant to § 49-9-4. Under the authority of § 63-30-28 (Supp. 1981), the University of Utah is authorized to purchase insurance "by establishing a trust account under the management of an independent private trustee having authority . . . to expend both principal and earnings of the trust account solely to pay the costs of investigation, discovery, and other pretrial and litigation expenses including attorneys' fees."

Thus, the authority for each defendant to hire independent counsel has a clear statutory foundation. The statutes providing such authorizations fall within the exception, see § 67-5-5, to the general authority of the Attorney General to perform legal services for "any agency of state government." § 62-5-3.

It is, however, readily apparent that the Director of the Department of Administrative Services is an executive department official acting under the general supervision and control of the Governor, and that the State Treasurer is a constitutional executive officer. Thus, they are state officers within the meaning of Article VII, § 16. Therefore, as a general proposition, it is within the constitutional power of the Attorney General to act as legal adviser to {652 P.2d 1341} those officers when they perform executive department functions. Nevertheless, we do not think the functions performed by the Director and the Treasurer with respect to the Insurance Fund and by the Treasurer with respect to the Retirement Board and the Unemployment Compensation Fund require us to hold unconstitutional those statutes authorizing the employment of independent counsel for the benefit of those entities.

The State Insurance Fund operates essentially as a private insurance company; it receives no public moneys and pays its own administrative expenses from the premiums received. The moneys paid into the Fund do not belong to the State but in effect to contributing employers. *Gronning v. Smart*, Utah, 561 P.2d 690 (1977). The funds are in effect held as trust funds for an insurance program which is designed to protect private persons. The same is true of the Unemployment Compensation Fund. As for the Treasurer's participation on the Retirement Board, it is clear that the Legislature intended that the agency be independent from the executive branch. The Treasurer's participation does not transform that agency into an executive branch agency. Thus, the Director and the Treasurer, in performing the assigned duties, do not perform responsibilities that properly belong to the executive department. Rather, they perform duties for essentially independent state entities. Hence, the Constitution does not require that the Attorney General act as legal adviser to the entities in question.

Affirmed. No costs.

WE CONCUR: Gordon R. Hall, Chief Justice, Richard C. Howe, Justice.

Concur

Concur by: CROCKETT

CROCKETT, Retired Justice: (Concurring with Comments)

Attachment 2

§53A-1-401

Administrative of State Public Education

Administrative Code References

Pupil accounting, see Utah Admin. Code 277-419.

Library References

Schools ⇨47.
Westlaw Key Number Search: 345k47.

C.J.S. Schools and School Districts §§ 81 to
92, 174.

§ 53A-1-302. Compensation of state superintendent—Other board employees

(1) The board shall establish the compensation of the state superintendent.

(2) The board may appoint other employees as necessary for the proper administration and supervision of the public school system. The compensation and duties of these other employees shall be established by the board and paid from money appropriated for that purpose.

Laws 1988, c. 2, § 16; Laws 1990, c. 261, § 3.

Library References

Schools ⇨47.
Westlaw Key Number Search: 345k47.

C.J.S. Schools and School Districts §§ 81 to
92, 174.

§ 53A-1-303. Advice by superintendent—Written opinions

(1) The state superintendent shall advise superintendents, school boards, and other school officers upon all matters involving the welfare of the schools.

(2) The superintendent shall, when requested by district superintendents or other school officers, provide written opinions on questions of public education, administrative policy, and procedure, but not upon questions of law.

(3) Upon request by the state superintendent, the attorney general shall issue written opinions on questions of law.

(4) Opinions issued under this section shall be considered to be correct and final unless set aside by a court of competent jurisdiction or by subsequent legislation.

Laws 1988, c. 2, § 17.

Library References

Schools ⇨47.
Westlaw Key Number Search: 345k47.

C.J.S. Schools and School Districts §§ 81 to
92, 174.

PART 4. POWERS AND DUTIES

§ 53A-1-401. Powers of State Board of Education—Adoption of rules—Enforcement

(1)(a) The State Board of Education has general control and supervision of the state's public education system.

(b) "General control and supervision" as used in Article X, Sec. 3, of the Utah Constitution means directed to the whole system.

Attachment 3

AG Opinion Number 02-003

AG Opinion Number 02-003

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October 25, 2002

ISSUE: Whether the Utah Constitution permits executive branch agencies to employ in-house legal counsel from sources other than through the Office of the Attorney General.

BACKGROUND: State executive branch agencies which are subject to Article VII § 16 of the Utah Constitution, employ attorneys, hired without Attorney General approval, paid with agency funds, to perform legal advisor duties. These attorneys do not work under the supervision and control of the Attorney General. In some cases agencies have redefined or renamed positions in an attempt to avoid legal ramifications. The Office of Legislative Research and General Counsel has issued a formal legal opinion finding that these practice violate Utah Code § 67-5-5. *Memorandum Formal Legal Opinion 01-001*, attached at Appendix 1.

CONCLUSION: Agencies subject to Article VII § 16 of the Utah Constitution violate the Constitution when they hire in-house legal counsel directly, bypassing the Attorney General, regardless of the official position or title given to the legal advisor, if the attorney provides legal advice to the Agency or its officers and staff.

DISCUSSION:

1. Methodology

Courts have developed well established rules for Constitutional interpretation. The Utah Supreme Court has explained that parties wishing to interpret constitutional language should use textual and historical evidence, sister state law, and policy arguments, including sociological materials to arrive at a proper interpretation. *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, (Utah 1993). This Opinion relies on textual and historical evidence and Utah Supreme Court decisions.

2. Constitutional text

Article VII of the Utah Constitution contains three sections pertinent to the analysis of legal counsel for the executive branch.

a. The Office of Attorney General, like the other Executive Branch Officers is constitutionally established in Article VII § 1. "The elective constitutional officers of the Executive Department shall consist of Governor, Lieutenant Governor, State Auditor, State Treasurer, and Attorney General. Each officer shall ... perform such duties as are prescribed by this Constitution and as provided by statute."

b. The Constitution prescribes the duties of the Attorney General in Article VII § 16. "The Attorney General shall be the legal adviser of the state officers, except

as otherwise provided by this Constitution, and shall perform such other duties as provided by law.”

c. In 1992, Article VII § 5(4) of the Constitution was amended to allow the governor to appoint his own counsel. “The Governor may appoint legal counsel to advise the Governor.”

3. Supreme Court interpretation

The Utah Supreme Court has had occasions to analyze and interpret some of these textual provisions. In *Hansen v. Utah State Retirement Board*, 652 P.2d 1332 (Utah 1982) the Court concluded that “the constitutional authority of the Attorney General is to act as legal adviser to the constitutional executive officers referred to in Article VII, i.e., the Governor, Lt. Governor, Auditor, Treasurer, ... the departments over which they have direct supervisory control, and to the other state executive offices referred to in Article VII, insofar as the office of those offices act within the scope of the duties of such offices.” The Hansen decision rule that agencies not subject to Article VII § 16 could constitutionally employ legal advisers other than the Attorney General.

The Court in *Hansen* explained how to determine whether an agency is subject to the dictates of Article VII § 16. Essentially, constitutionally created agencies or agencies created as independent entities by the Legislature, which administer no public moneys, and are not under the direct supervision or control of an executive department agency or officer, are exempt from the limitation of Article VII § 16. *Hansen* held that executive department agencies and entities within any executive department agency are not independent, and are thus under the direct supervisory control of an Article VII officer. *Hansen*, 652 P.2d at 1338.

The Utah Supreme Court reaffirmed *Hansen’s* holding in *U. T. F. C. v Wilkinson*, 723 P.2 406, 415 (Utah 1986). The court explained that legislative intent controls when determining whether an entity is independent or part of the Executive Branch. If the legislature creates an entity as an executive department agency, or a sub-entity within an executive department agency, it is under the direct supervisory control of an Article VII officer, and is subject to § 16’s authority. Only if the Legislature defines the agencies as an independent entity does it escape the jurisdiction of Article VII § 16.

4. Plain meaning and historical evidence

a. The meaning of “legal adviser”.

The debates of the original framers of the Utah Constitution reveal that they understood the term “legal adviser” to mean all duties encompassed in the practice of law. They described the duties of the Attorney General to include “all of the legal business” of the state. “The duties of the attorney general, Mr. Chairman, would be as suggested, to advise the State officers, attend to all business, criminal or otherwise...” In occasional cases, he might be invited to “go out into a county to assist in the prosecution of some important matter.” In addition, “If there are any civil cases to which the State would be a party, it would be his duty to bring them or defend them,” *Official Report of the Proceedings and Debates of the Constitutional Convention for the State of Utah*, Vol. II, p. 1027 (15 April 1895).

The term “legal adviser” is generally synonymous with the word “lawyer” or “attorney” as “one who gives legal advice and assistance to clients and represents them in court or in other legal matters.” *The American Heritage Dictionary, 4th Ed. Houghton Mifflin, 2000*. See also *Webster’s Revised Unabridged Dictionary, MICRA, Inc. 19983*, “one whose profession is to conduct lawsuits for clients, or to advise as to prosecution or defense of lawsuits, or as to legal rights and obligation in other matters.”

This understanding of the term “legal adviser” is commonly accepted. In all three cases in which the Utah Supreme Court has addressed the issue of legal adviser, all parties

understood the term “legal adviser” to mean a lawyer performing legal services for the state agency. See *Briefs for Hansen v. Legal Services*, 429 P.2d 979 (Utah 1967), *Hansen v. Utah State Retirement Board*, supra, and *UTFC v. Wilkinson*, supra, in *Supreme Court of Utah Abstracts and Briefs*; Vol. 792, No. 10784; Vol. 1313, No. 860097; and Vol. 1052, No. 16560 respectively. Additionally, during the Legislature’s 1992 floor debate concerning a proposed amendment which would have made the Attorney General the “chief” legal adviser – a debate which revolved around how to remedy the then existing problem of in-house counsel employed by executive department agencies, both sides of the debate characterized lawyer carrying out legal business for executive departments as legal advisers under § 16. See *Floor Debates S. J. R. No. 8, 49th Leg. State Senate Audio Log, Tape 14, 28 January 1992*).

Given the plain meaning and historical understanding of the term “legal adviser” as encompassing the practice of law, the Utah Supreme Court’s definition of the practice of law can properly inform this discussion.

The practice of law, although difficult to define precisely, is generally acknowledged to involve the rendering of services that require the knowledge and application of legal principles to serve the interests of another with his consent. It not only consists of performing legal services in the courts of justice throughout the various stages of a matter, but in a larger sense involves counseling, advising, and assisting others in connection with their legal rights, duties, and liabilities. It also includes the preparation of contracts and other legal instruments by which legal rights and duties are fixed.

Utah State Bar v. Summerhays & Hayden, Public Adjusters, 905 P.2d 867 (Utah 1995). See also *Nelson v. Smith*, 154 P.2d 634 (Utah 1944), “the practice of law, though impossible of exact definition, involves the carrying on of the calling of an attorney usually for gain,” and involves “the rendering of legal services or the giving of legal advice to another.”

b. 1992 Amendment creating governor’s counsel position.

This amendment resulted in a limitation on the Attorney General’s role as legal counsel for the governor, consistent with Article VII § 16’s “except as provided by this constitution” language. The amendment does not, however, limit the constitutional duty of the Attorney General to act as legal adviser to the departments over which the governor has supervisory control.

The history of the 1992 amendment bears out this conclusion. The amendment has its genesis in the Constitutional Revision Commission (C.R.C.), which originally studied three alternatives: 1) allowing state agencies to hire in-house counsel with the Attorney General handling all litigation; 2) allowing the governor to appoint counsel for the governor independent of the Office of the Attorney General; and 3) creating a separate category of attorneys under the control of the governor to act as in-house counsel to the governor and state agencies, with the Attorney General handling all litigation. The C.R.C. adopted option two, and specifically rejected the other options which would have allowed agencies to hire in-house counsel, or would have made the governor responsible for executive branch legal advisers. *Report of the Constitutional Revision Commission 1991*, p. 12.

The C.R.C. was particularly concerned with the potential that the proposed legal adviser for the governor might infringe on the Attorney General’s traditional legal adviser duties. *Minutes of the Constitutional Revision Commission, 12 July 1991*, p. 3. When the C.R.C. submitted the proposed language of the amendment to the legislature, it included a statement of intent making clear that “it is the intent of the Legislature that the governor be empowered to appoint legal counsel to advise him on various legal matters. It is intended that such legal counsel serve only to advise the governor.” *Minutes and Materials of the Constitutional Revision Commission, 19 December 1991*. Floor comments from the sponsor of the

legislation, Senator Hillyard, made clear that the governor's counsel was to be a single lawyer who advises only the governor. *Floor Debates S. J. R. No. 8, 49th Leg. State Senate Audio Log, Tape 14, 28 January 1992*).

The Voter Information Pamphlet which explained the proposed constitutional amendment to the electorate read: "Proposition No. 3 authorizes the Governor to appoint legal counsel solely to advise the Governor." *Utah Voter Information Pamphlet General Election Nov. 3, 1992*, p. 19 (September 25, 1992). The pamphlet made clear that the duties of the Attorney General would not otherwise be affected:

This revision allows the Governor to appoint his own legal counsel to advise him. This would provide easier and more immediate access to legal advice when needed without having to wait for more formal opinions from the Attorney General. But it would not empower this legal counsel to supersede the Attorney General's legal advice. The Attorney General would still be the preeminent legal advisor for the Executive Branch." *Id.* at 21 (bold type in original).

5. Summary

The Constitution makes the Attorney General the legal adviser for all Article VII officers, and for the agencies and entities under their supervision and control, unless the Constitution exempts them from the requirements of § 16. The Constitution exempts the governor from § 16 by allowing the appointment of a single attorney solely to advise the governor. The Constitution however does not exempt any agency, or entity subject to the supervision and control of Article VII officers, from the requirements of § 16. Nor does the exemption for the governor's counsel allow the creation of a pool of in-house attorneys, under the control of the governor or his counsel, to serve as legal advisers to executive branch agencies.

The framers of the Utah Constitution understood the term "legal adviser" to mean an attorney who conducts the legal business of the state, its agencies or executive branch officer. The duties of the legal adviser include all the acts normally performed by an attorney including counseling and advising a client in connection with legal rights, duties and liabilities.

Therefore, any executive branch agency or sub-entity subject to Article VII § 16 seeking and receiving legal advice from an attorney not provided, supervised and controlled by the Attorney General is in violation of the Constitution.

DATED this 25th day of October, 2002.

Mark L. Shurtleff
Utah Attorney General

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Attachment 4

Letter dated May 20, 2007 from
Patti Harrington, Ed.D., State Superintendent
to Mark Shurtleff, Utah Attorney General

UTAH STATE OFFICE OF EDUCATION

Leadership...Service...Accountability

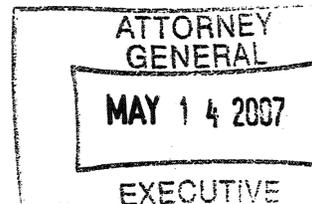
Patti Harrington, Ed.D., State Superintendent of Public Instruction

Voice: (801) 538-7500 Fax: (801) 538-7521 TDD: (801) 538-7876

250 East Cesar E. Chavez Blvd. (500 South) P.O. Box 144200 Salt Lake City, UT 84114-4200

May 10, 2007

Mark Shurtleff
Utah Attorney General
Office of the Attorney General
P.O. Box 142320
Salt Lake City, Utah 84114



Dear Mr. Shurtleff:

At the May 3, 2007 meeting of the Utah State Board of Education, Board members discussed the unexpected events surrounding the successful public Referendum of House Bill 148 Education Vouchers (announced as sufficient by Lieutenant Governor Gary Herbert on April 30, 2007), House Bill 174 Amendments to Education Vouchers, your informal opinion that House Bill 174 could be implemented independent of House Bill 148, the rulewriting directives in both HB 148 and 174, and the funding and implementation complications for the Utah State Board of Education.

The Board members expressed their personal and mutual desire and responsibility to act consistent with the law; they also expressed their constitutional and ethical responsibility to act prudently and with wise stewardship regarding millions of taxpayers' dollars. In keeping with these responsibilities and pursuant to Section 53A-1-303 (3), Utah State Board members directed the Utah State Office of Education staff to ask your office and state financial offices specific questions about the Board's implementation of an education voucher program.

I appreciate your desire to assist the Utah State Board of Education as per your offer when we met last week. Your answers to the questions posed by Board members (enclosed), as well as our own attorneys' further guidance, will help the Utah State Board of Education as it considers how to move forward in fulfilling its constitutional mandate. I personally understand that this request burdens your able attorneys; I trust that you appreciate that a timely response would greatly inform the Utah State Board of Education members and assist the Utah State Office of Education staff.

Sincerely,

A handwritten signature in cursive script, appearing to read "Patti Harrington".

Patti Harrington, Ed.D.
State Superintendent of Public Instruction

cc: Governor Jon Huntsman, Jr., Governor's Office
Christine Kearl, Governor's Office
Kim Burningham, Utah State Board of Education
Patrick Ogden, Utah State Office of Education
Carol Lear, Utah State Office of Education
Jean Hill, Utah State Office of Education

FINAL QUESTIONS for ATTORNEY GENERAL

1. Does the State Board of Education have clear authority to develop and write definitions based on its own expertise on the education voucher issue?
 - A. In developing the rules, could staff use information about successful and unsuccessful voucher programs in other states to develop definitions?
 - B. Legally, could USOE-developed definitions rely on and reference legislative intent of HB 148?
 - C. The definition is missing, but there is some description of “eligible private schools” in Section 53A-1a-805, can and/or should the Board enhance this section with a definition?
 - D. Is the Board in a stronger or weaker legal position if it relies on previous legislative intent (that technically disappears with HB 148) or if it develops definitions consistent with its experience and expertise?
 - E. The following are examples of crucial, but now undefined, terms (references are to line numbers in HB 174):
 - (1) What does “adopt”(line 256) mean?
 - (2) How should “private school” (line 43, line 83) be defined?
 - (3) How should “scholarship student” (line 84) be defined?
 - (4) How should “income” (line 49) be defined?
 - (5) How “parent” (line 54) be defined?
2. Does the State Board of Education have clear constitutional and statutory authority to fill in missing, necessary definitions—some of which were never included in HB 148--including, but not limited to, “eligible student,” “tuition,” “agreed upon procedures,” and “audit?”
3. What are the legal ramifications of a statutory mandate to the Board to create rules for a section of Utah Code that was stayed by the referendum of HB 148? HB 174 requires the Board to make rules implementing 53A-1a-807, which does not exist in HB 174. Can the Board safely ignore the statutory mandate?
4. While trying to resolve the statutory mandate of #3, above, the State Board may miss the statutory requirement of HB 174 “By May 15, 2007, the board shall adopt rules establishing. . .”. What are the legal ramifications of missing this deadline?

of the bill's title, given statutory language that Legislative Research has authority to change a bill title to more accurately reflect the bill's substance?

9. The Board has received threats of lawsuits if it implements HB 174 AND if it does not implement HB 174. Is the Board in a stronger legal position if it is forced to implement HB 174 by a court? Will the State Board be defended by the Attorney General's Office if it implements HB 174 OR if it waits, completing due diligence in developing a revised rule and considering the threat of litigation, to implement until directed by the court?
10. Would the Attorney General be willing, on behalf of the Board, to seek a declaratory judgment that HB 174 is sufficient to implement a voucher program—should the Board desire to resolve the competing advice through the courts? What is the case law, legally encouraging or discouraging, such an action?
 - A. If a district court ruled, would the Attorney General's Office be willing to appeal as the Board's counsel, at the Board's request?
 - B. If a district court found that HB 174 was NOT sufficient, would the Attorney General's Office vigorously resist pressure from the Legislature or Governor to appeal the decision if the Board, as the client, did not want to appeal? What conflicts of interest might arise for the Attorney General that would need to be reviewed and possibly waived by the State Board?
11. Court deference to agency rulemaking is well established. Consistent with this deference and the State Board's independent constitutional status, will the Attorney General's Office provide representation to the USOE and Board member(s) who are summoned to the Administrative Rules Review Committee hearings to defend the Board's actions?
12. Does the State Board have the legal authority to create reasonable enforcement and penalty provisions, provided in HB 148 but missing in HB 174, for willful misrepresentations, omissions or fraudulent actions by parents or eligible schools seeking to participate in a voucher program?
13. If the Board's authority to create reasonable enforcement/penalty provisions is limited, what are the legal consequences, imposed by whom, for parents or schools that misrepresent information or defraud a state program? Will the Attorney General's Office support the Board, both with expertise and resources, in pursuing these parents and schools and pursue legal action independent of the Board?
14. The section on administrative hearings is missing in HB 174. If State Board definitions and procedures deny a school or parent eligibility, would the absence of administrative procedures result in a denial of due process to parents or schools?
15. If HB 148 stands after the referendum vote and HB 174 has been implemented via the rulemaking process (with additional definitions and requirements), which voucher program prevails? How immediately?