

DORMAN V. SARGENT, 1915-NMSC-049, 20 N.M. 413, 150 P. 1021 (S. Ct. 1915)

**DORMAN
vs.
SARGENT, State Auditor**

No. 1799

SUPREME COURT OF NEW MEXICO

1915-NMSC-049, 20 N.M. 413, 150 P. 1021

July 02, 1915

Appeal from District Court, Santa Fe County; Merritt C. Mechem, Judge.

Injunction by Harry H. Dorman against William G. Sargent, as State Auditor. From a judgment for defendant, plaintiff appeals.

SYLLABUS

SYLLABUS BY THE COURT

1. Earnest v. Sargent (No. 1800) 20 N.M. 427, 150 P. 1018, followed as to the passage of House Bill No. 294, creating the office of state traveling auditor. P. 415
2. Chapter 59, Laws 1915, Appendix Code 1915, creating the office of state traveling auditor, construed in connection with section 2597, Comp. Laws 1897, and sections 2 and 3 of chapter 32, Laws 1889, **held** to constitute a continuing appropriation for the salary of the state traveling auditor. P. 415

COUNSEL

J. H. Crist and E. C. Wade, both of Santa Fe, for appellant.

Frank W. Clancy, Attorney General, and Harry S. Bowman, Assistant Attorney General, for the appellee.

JUDGES

Parker, J. Hanna, J., concurs. Roberts, C. J. (concurring specially).

AUTHOR: PARKER

OPINION

{*414} OPINION OF THE COURT.

{1} This is a proceeding for an injunction brought by the plaintiff against the state auditor. The complaint in the court below alleged, in substance, that the plaintiff is a citizen of the state, and a resident of the city of Santa Fe, county of Santa Fe, and that he is a taxpayer in said county and state, and contributes annually to the treasury of the state as taxes for said purposes a large sum of money; that he brings this action for and on behalf of himself and other taxpayers of the state, all of whom, he alleges, are similarly situated; that the defendant is the state auditor of the state; that heretofore the Legislature passed a bill which is known as House Bill No. 294; that said Legislature convened at noon on the 12th day of January, A. D. 1915, and that said session terminated by law at the hour of 12 o'clock of the 12th day of March, 1915; that on the 8th day of March said bill was presented to the Governor of the state for his approval, and that on the 12th day of March the said Governor returned said bill to the House of Representatives, where it originated, with his objections; that thereafter, in the forenoon of the said 12th day of March, the said bill was approved by two-thirds of the members of and voting in said House of Representatives, the Governor's objections to the contrary notwithstanding; that said bill was thereupon transmitted by the said House to the Senate of said Legislature, and that afterwards, at some time between {*415} the hour of 12:40 p. m. of said day and the hour of 2 p. m. of said day, the said bill was approved by the vote of two-thirds of the persons theretofore constituting the membership of the said Senate, the Governor's objections to the contrary notwithstanding; that there is not now, nor has there been at any time since the close of said session, a journal of the proceedings of said Senate on file with the secretary of state; that on the 1st day of April, 1915, the defendant, the state auditor, under the provisions of said bill pretendedly appointed one A. G. Whittier as state traveling auditor, and one P. A. Hall as assistant traveling auditor, and one Earl Wiley as assistant traveling auditor, and one Edith Wileman as stenographer of the office of state traveling auditor; that the defendant holds out and threatens that he will, on the 30th day of April, 1915, draw warrants upon the treasurer of the state for large sums of money under the alleged authority of said alleged law, as salaries for the payment of said alleged state traveling auditor, his assistants and said stenographer, and will deliver said warrants to said persons; and that the said alleged law is not a valid law in this behalf, in that the subject of said alleged law is not clearly expressed in the title thereof, and in that there is no valid power or authority conferred by said alleged law on the defendant as state auditor for the drawing and delivery of the said warrants for the payment of said pretended salaries. A demurrer was interposed to the amended complaint raising all of the points which will be discussed in the opinion, and was sustained by the trial court, and the plaintiff has appealed.

{2} It is argued that House Bill No. 294 never became a valid act of the Legislature, because it was passed over the Governor's veto after the expiration of the time for the sitting of the Legislature. We have discussed this point in the case of Howell Earnest, as Traveling Auditor and Bank Examiner of the State of New Mexico, v. William G. Sargent, 20 N.M. 427, 150 P. 1018, in an opinion just handed down, and we have held that the act was passed within the time prescribed by the Constitution.

{3} It is contended by plaintiff that the act in question {*416} is not sufficient to confer authority upon the state auditor to pay the salaries for the officers holding the offices created thereby. He argued that the act fails to disclose a legislative intent to make an appropriation: First, on account of the language used therein; and, second, because an item in the general appropriation bill passed at the same session of the Legislature, but vetoed by the Governor, of which he asks the court to take judicial notice, negatives an intent on the part of the Legislature to have made such an appropriation in House Bill No. 294. The language used in House Bill No. 294 (Laws 1915, c. 59) is:

"The state traveling auditor shall receive an annual salary of \$ 2,400 and his actual and necessary traveling expenses while in the discharge of his duties."

{4} The plaintiff does not contend, as we understand the argument, that we might not, under some acts creating offices, fixing salaries, and providing the time and manner of payment, and specifying the fund out of which the salary is to be paid, properly hold that such acts would constitute a continuing appropriation, and that no general appropriation would be required. Counsel argue, however, that this act, merely creating the office, and declaring the amount of salary which the officers shall receive, and failing to specify the fund out of which the salary is to be paid and the manner and time of payment, fails to indicate a legislative intent to make the appropriation for the salaries in the same act. The argument has much force. If this act had provided that the salary of the state traveling auditor and his assistants and clerks should be paid monthly out of the general salary fund in the same manner as other public officers, there could be no doubt that the Legislature intended then and there to make the appropriation for the payment of the salaries. The absence of such a provision in the act throws much doubt upon the legislative intent. But it is a cardinal rule that all legislation is to be construed in connection with the general body of the law, and in this case we find several sections of the statute which greatly aid and add to the {*417} words of House Bill No. 294. By section 2597, C. L. 1897, it is provided that the salaries of all officers provided by law shall be paid out by the treasurer of the territory upon the warrant of the auditor. This is an old statute, having been passed in 1852, and has been upon the statute books ever since, and was re-enacted in the Code of 1915 as section 5338. In 1889 an act was passed establishing the fiscal year for the territory. Section 1 of that act is compiled as section 4015, C. L. 1897. The original act was chapter 32, Laws of 1889. Section 2 of that act provides for the establishment of certain funds, among which is the salary fund. In section 3 of the act it is provided that the salary fund shall be used only for the purpose of paying all salaries provided by law. For some reason, which we do not understand, the compilers of the Compiled Laws of 1897 saw fit to regard these sections 2 and 3 of chapter 32 of the Laws of 1889 as either obsolete or repealed, but we have searched in vain for any repeal of the same, and know of no reason why they should be regarded as obsolete. Constant reference is made in subsequent legislation to this salary fund, and it is preserved and maintained by the auditor and treasurer down to the present time. We therefore treat them as still in full force and effect. That being the case, when House Bill No. 294 was passed, it was passed in view of these two sections, and they should be construed in connection with the provisions of House Bill No. 294 under consideration. This act then, in legal effect, is to be read as follows:

"The state traveling auditor shall receive an annual salary of \$ 2,400.00 and his actual and necessary traveling expenses while in the discharge of his duties, and shall be paid his said salary out of the salary fund, upon the warrant of the state auditor, by the state treasurer."

{5} It is true that no provision exists as to just when this salary shall be paid, whether monthly, quarterly, or at the end of the year, but we regard this circumstance as entirely immaterial. If the state traveling auditor is entitled to an annual salary of \$ 2,400, it is a mere matter of administration of the auditor's and treasurer's offices as to {*418} whether they shall pay him monthly or quarterly, or at the end of the year. A taxpayer has no interest as to just when his salary shall be paid, so long as the officer is not overpaid, or paid prior to the rendition of his services. In view of this situation, it seems clear that House Bill No. 294, construed in connection with the former statutes as above pointed out, amounts to a continuing appropriation for the salary of the state traveling auditor.

{6} Similar statutes have been held in some of the states to amount to an appropriation. Thus in *Nichols v. Comptroller*, 4 Stew. & P. 154, the statute allowed an annual salary of \$ 1,749, payable quarter yearly out of any money in the treasury not otherwise appropriated to the superintendent of the building of the State Capitol of the state of Alabama. The Supreme Court of Alabama conceded that no money could be drawn from the treasury but in pursuance of an appropriation made by law, but it held that, there being a general law fixing the salary of the superintendent, and requiring it to be paid out of the treasury annually or quarter annually, the statute amounted to a continuing appropriation. This case was cited with approval and followed in *Reynolds v. Taylor*, 43 Ala. 420. In that case the salary provided by law was \$ 2,000 per annum, and the Legislature attempted by an appropriation bill to cut down the salary to \$ 1,000 per annum. The court held that the Legislature had no power by an appropriation of a smaller amount to deprive the officer of his full salary as provided by the act creating his office, and that it is not necessary that there should be a special annual appropriation by act of the Legislature where there is a general law fixing the amount of the salary and prescribing its payment at particular periods.

{7} In *People ex rel. Hegwer v. Goodykoontz*, 22 Colo. 507, 45 P. 414, it was held that an act establishing the office of steam boiler inspector, and providing that such inspector should receive a stated amount as salary "payable as other state officers," taken in connection with the act making the salaries of other state officers payable in monthly installments at the end of each month, constituted an appropriation within the constitutional provision that no {*419} money should be drawn from the treasury except upon appropriations made by law.

{8} In *State ex rel. Hawes v. Mason*, 153 Mo. 23, 54 S.W. 524, it was held that an act of the Legislature providing for cities of over 300,000 a board of police commissioners, and investing it with power to employ and appoint a police force, as well as the amount of the officers' salaries, which were to be payable monthly, constituted an appropriation authorizing the auditor to draw his warrant for pay rolls certified to him.

{9} In State ex rel. Maddox v. Kenney, 11 Mont. 553, 29 P. 89, it was held that a statute prescribing a certain standard of compensation for the work of reporter for the Supreme Court, and authorizing the auditor upon its completion, to draw his warrant for the amount due, constituted an appropriation of money.

{10} In State ex rel. Henderson v. Burdick, 4 Wyo. 272, 33 P. 125, 24 L. R. A. 266, the Constitution provided that a state examiner should be appointed by the Governor and confirmed by the Senate, and that his compensation should be fixed by law. A subsequent statute was passed to the effect that the state examiner should receive an annual salary of \$ 2,000, which same was to be paid by the treasurer of the state in the same manner as other salaries are paid. The first state Legislature made an appropriation for the state examiner, but the second state Legislature failed to make an appropriation for his salary and expenses for the years 1893 and 1894. The Constitution of Wyoming, like ours, provided that no money should be paid from the treasury of the state except upon appropriations. Const. N.M. art 4, § 30. It also contained a provision that the salaries of officers could be neither increased nor diminished during their term of office as ours does. Article 4, § 27. The court said:

"In our state Constitution salaries provided for certain state officers, the Governor, secretary of state, auditor, and treasurer, are temporarily fixed 'until otherwise provided by law,' with the rule -- repeated in almost every instance where salaries are mentioned -- that such salaries shall {*420} not be increased or diminished during the period for which such officers were elected or appointed, and, in addition to this, there is a general rule prescribed that no law shall increase or diminish the salary of any public officer after his election or appointment. This was intended to secure official independence, and to prevent the Legislature from being assailed by the demands of importunate officials, to the detriment of public business. The stability and permanence of the salaries of public officials were guaranteed by the Constitution, after once fixed, secure during the official term from legislative control. * * * Although some courts seem to distinguish between the salaries fixed by the Constitution and those fixed by an unrepealed statute, it seems that this is a distinction more nice than wise. In either case the people have given their assent to the measure -- in one method by their organic law, which they have accepted, adopted, and ratified by their votes; and in the other by their representatives in the Legislature. The salaries are to be fixed by law, and all such officers, whether of the state, county, city, town, or school, 'shall be paid fixed and definite salaries.' * * * The law relating to the state examiner provides that he 'shall receive' an annual salary of \$ 2,000, and the Constitution requires that his compensation shall be fixed by law, and shall be a fixed and definite salary, which shall not be increased or diminished after his election or appointment. It will be conceded that the second Legislature could not have reduced his salary during his term, either by a direct act for that purpose or in an appropriation bill. It is equally clear that they could not take it away directly or indirectly. * * * It is true that no time of payment of the salary of the examiner is provided in the act, but I do not think this is material. It has been the custom to pay state officers in this state {*421} monthly, where there is no

particular time prescribed by statute when they shall be paid, or at what intervals payments may be made on account of their salaries. This was conceded on argument, and is so alleged in the petition, which must be taken as true on demurrer. It can make no difference to the state that this method is pursued, and it may be left to the auditing department to fix such a rule of monthly payments, when there is no provision of the law to the contrary. There being no statutory or constitutional provision fixing the time of payment of certain state officers, including the examiner, the auditor and treasurer may very properly make a rule that the salaries of such officers may be paid monthly."

{11} See, also, *State ex rel. Davis v. Eggers*, 29 Nev. 469, 91 P. 819, 16 L. R. A. (N. S.) 630.

{12} We have recently had occasion to examine this same question in connection with another statute in the case of *State ex rel. Fornoff v. Sargent*, 18 N.M. 272, 136 P. 602, and we have no reason to depart from the holding in that case. In that case we held that a general law fixing the amount of salary of a public officer and prescribing its payment at particular periods amounted to a continuing appropriation. This case was approved in *State ex rel. Jacobo Chaves v. Sargent, State Auditor*, 18 N.M. 627, 139 P. 144. We therefore have concluded that House Bill No. 294, creating the office of state traveling auditor and fixing his salary, in connection with the former statutes mentioned, amounts to a continuing appropriation for such salary.

{13} While many of the statutes under which decisions have been rendered are somewhat more specific than House Bill No. 294, in that they provide specifically that the salaries shall be paid either as other state salaries are paid, or prescribe that they be paid monthly or quarterly, as the case may be, still we regard this omission from our statute as immaterial. It is a curious fact in this connection that we have no statute in the state which provides for the {422} payment of salaries at any specific time. A practice of long standing has grown up to pay all officers monthly, unless either the Constitution or a statute specifically provides otherwise. This officer is upon the same footing as all other state officers not specifically provided for by law, and is entitled to his pay monthly according to this long course of practice and procedure.

{14} The first case on this subject, and which may be considered a leading case, is the case of *Thomas v. Owens*, 4 Md. 189. It arose upon a constitutional provision which established a treasury department of the state, "consisting of a comptroller chosen by the qualified electors of the state at each election of the members of the House of Delegates, who shall receive an annual salary of \$ 2,500; and of a treasurer to be appointed by the two houses of the Legislature at each session thereof on joint ballot, who shall receive an annual salary of \$ 2,500." In commenting on the fact of this constitutional provision, and after pointing out the difference between an arbitrary and a constitutional government, and the reason why the people who contribute to public revenue should be consulted as to the expenditure of the same, as provided in the usual constitutional provision that no money shall be drawn from the treasury except in accordance with an appropriation made by law, it is said:

"These being the purposes and objects of the clause, the question is: Have the people given their consent to the payment of the salary of the comptroller? That they have done so is palpably manifest. They have said he 'shall receive an annual salary of \$ 2,500.' They have not merely said he may claim such a sum, but, emphatically, that he 'shall receive' it. It is impossible for human language to be less ambiguous or more positive. The people, in their organic law, which is paramount to all other law, have not only given their consent, but they have imperatively issued their commands that the particular officer 'shall receive' it. How is their will obeyed if it be within the power of the treasurer, {**423*} or any one else, to withhold it from caprice, unfaithfulness to duty, or from mistaken judgment? To allow of such a power in that officer would be to put him above the Constitution, whose creature he is. It would be to invest him with authority to annul the sovereign will; in fact, to stop the wheels of government and reduce things into the wildest confusion. The Constitution has said the officer 'shall receive' his salary, and this fiat of the supreme will is not to be nullified by the mere ipse dixit of a mere ministerial officer; for such, and none other, is the treasurer.

"In assigning the powers of government to three different departments, the Constitution intended to secure to each its independency of action, and the more certainly and effectually to insure this it has ascertained and appropriated the salary they are severally to receive, and it has inhibited the Legislature from diminishing it. Were it not for such a provision, the whole government would exist only by the permission of the Legislature. It can only be carried on through the instrumentality of individuals, and their services can only be obtained by being paid for. The framers of the Constitution and the people who adopted it, aware of this, determined not to submit the durability of their work to the caprice, passion, or prejudice, which possibly might, at times of great excitement, triumphantly rule the action of the Legislature, and therefore wisely did the work themselves, by ingrafting in the organic law a provision for the protection of those who should be charged with its execution; in other words, they made the appropriation.

"An opposite interpretation would countenance this paradox, that a co-ordinate branch of the government could stop its whole machinery by refusing to pay the salaries of those upon {**424*} whom is devolved the discharge of the duties of the other branches; and this, too, when the Constitution expressly declares that these officers 'shall receive' their salaries, and that they 'shall not be diminished.' 'It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure.' [Marbury v. Madison] 5 U.S. 137, 1 Cranch 137 [2 L. Ed. 60].

"Now it is presumed it would not be contended by any one, however hazardous, that if the Legislature were to pass an act diminishing the salary of the governor, or of any other officer whose salary is fixed by the Constitution, that such an exercise of power would be rightful and constitutional. If it be not competent to

the Legislature to take away a part, by what process of reasoning can it be maintained that they can take away the whole? And yet this is the extent to which the argument addressed to us goes. It seems to us to be but necessary to state the proposition to cause its instantaneous rejection."

{15} It is true that in this case the court was considering a constitutional provision, but we see no reason for a distinction between a case where the salary of a constitutional officer is involved, and one where the salary of a statutory officer is involved. The statutory officer's duties may be as highly important as those of a constitutional officer. He must be in a position of independence. Once in office, he must be free to exercise its functions according to the best of his abilities, and in consonance with his conscience. If he be subservient to either the legislative, executive, or judicial departments of the government, he cannot be expected to render the services to the people which the functions of his office demand.

{16} In the case at bar the state traveling auditor is in office; he must have a salary to maintain himself during his term of office; and the Legislature has declared that he {*425} shall receive that salary. We think the same considerations apply in this case with equal force as are set out in the Maryland opinion supra. We are aware that in several of the states the distinction has been drawn between a constitutional and a statutory officer in this regard. We can see no good reason for such a distinction, and must decline to follow the same.

{17} It is argued in opposition to this conclusion that the legislative intent not to make such an appropriation in House Bill No. 294 is manifested by an item in the appropriation bill, chapter 86 of the same session, whereby there was appropriated money for the payment of the salaries of the traveling auditor and bank examiner and his assistants and clerks, with the proviso that they should not become available in the event that House Bill No. 294 passed and became a law, and in the latter event the items appropriated should become available for the payment of the salaries and necessary expenses of the officers filling the offices created by House Bill No. 294. It is objected by the Attorney General that we have no right to take judicial notice of this item in the appropriation bill for the reason that it was vetoed by the Governor and never became a law. But, assuming that we have the right to notice this item, we do not believe, under all the circumstances attending this legislation, that it shows a legislative construction of House Bill No. 294 contrary to the one which we have above declared. This item was inserted in the form in which it was, evidently for one of two reasons, viz.: Either as a precautionary measure so that in any event money should be available to pay some traveling auditor, be he the old traveling auditor and bank examiner or the new state traveling auditor, so that the interests of the state might not be sacrificed; or it was done as a means of restoring to the salary fund the money which had been diverted to the traveling auditor and bank examiner, who, in case House Bill No. 294 became a law, would be out of office, and no longer entitled to any salary. The section went further, and made the items available for the payment of the state traveling auditor and his assistants. In that sense it was a new appropriation, {*426} but the substance and effect of the section was evidently to restore to the salary fund for the uses the

Legislature desired the amount of money appropriated for the traveling auditor and bank examiner. The passage of House Bill No. 294 indicates a legislative determination to abolish the office of state traveling auditor and to transfer to the latter all of the powers and duties theretofore exercised by the former. If they should fail in this purpose, the Legislature did not wish to see the state left without a traveling auditor, and therefore made the appropriation mentioned in this section. Having succeeded in ousting the old traveling auditor and bank examiner, and creating the office of state traveling auditor, and desiring to provide for either contingency, they inserted the provision that the money appropriated to the traveling auditor and bank examiner should be restored to the treasury.

{18} It clearly appears from what has been heretofore said that the plaintiff has no cause of action for an injunction, and the judgment of the court below will be affirmed; and it is so ordered.

CONCURRENCE

{19} ROBERTS, C. J. (concurring specially). -- Without resorting to the prior statutes quoted and referred to in the main opinion, I am satisfied that the language of House Bill No. 294 amounted to a continuing appropriation of the amounts therein named as salaries for these officials. I do not believe the court can look to the vetoed items in the appropriation bill as an aid in construing House Bill No. 294. It could be said with as much logic that the Governor vetoed these items because he was of the opinion that provision had already been made for the payment of the salaries of these officers as it could be that the two houses of the Legislature attempted to make provision therefor in such method because the act did not appropriate the money.

{20} Therefore I concur in affirming the judgment of the lower court.