2-27-1984

Colorado General Assembly v. Lamm

SUPREME COURT, STATE OF COLORADO

Case No. 83 SA 381

ANSWER BRIEF ON CROSS-APPEAL
Appeal from the District Court of the City and County of Denver
Case Nos. 81-CV-10058 and 82-CV-5005
Honorable HAROLD D. REED, Judge

THE COLORADO GENERAL ASSEMBLY,

Plaintiff-Appellee,

v.

THE HONORABLE RICHARD D. LAMM, Governor of the State of Colorado,

Defendant-Appellant,

and

THE COLORADO GENERAL ASSEMBLY and the COLORADO GENERAL ASSEMBLY on behalf of THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee and Cross-Appellant,

v.

THE HONORABLE RICHARD D. LAMM, Governor of the State of Colorado,
ROY ROMER, Treasurer of the State of Colorado,
JAMES A. STROUP, Controller of the State of Colorado,
R. GARRETT MITCHELL, Executive Director of the Department of Administration of the State of Colorado, and
LUMBERMANS MUTUAL CASUALTY COMPANY,

Defendants-Appellants and Cross-Appellees.

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I N D E X

CASES

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OTHER AUTHORITIES

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Governor Richard D. Lamm and the other executive branch defendants by their attorney Duane Woodard, attorney general for

the State of Colorado, submit this answer brief responding to the general assembly's cross-appeal.

STATEMENT OF THE CASE ON CROSS-APPEAL

In September of 1981, the executive branch certified a proposed plan for use of specified funds made available to the state under the terms of a federal consent order between Chevron and the United States Department of Energy. This proposed plan was subsequently approved by the U. S. Department of Energy. The amount of $306,783 was remitted to the state conditioned upon the terms of the consent order, and that amount was expended by the executive branch without legislative appropriation. See the statement of facts in appellant's opening brief, pp. 21-22 and joint exhibits VI, VII, VIII, IX and X.

In the district court, the general assembly contended that this executive expenditure was unlawful absent a legislative appropriation. The district court disagreed, concluding that the moneys in question were not subject to the legislative appropriation power.

SUMMARY OF ARGUMENT

The court's conclusion was correct on two alternative

grounds. First, moneys received pursuant to the requirements of a federal agency order constitute federal contributions which are not subject to the appropriation power of the general assembly under this court's ruling in MacManus v. Love, supra. Alternatively, if these moneys did not meet the definition of federal funds, the state received them as a custodian for the beneficiaries and the purposes set forth in the consent order. Consequently these were custodial funds, and not state funds subject to the legislative power of appropriation.

ARGUMENT

I.

FEDERAL FUNDS ARE NOT SUBJECT TO THE LEGISLATIVE APPROPRIATION POWER.

It is not a matter of dispute that the executive branch applied for the Chevron funds and took receipt on behalf of the State of Colorado. Such administrative actions are the constitutional responsibility of the executive branch. The contention of the general assembly that these funds could not be spent without an appropriation overlooks this court's holdings that not all moneys received by Colorado are "state moneys" subject to the legislative power of appropriation.

In MacManus v. Love, 179 Colo. 218, 499 P.2d 609 (1972), this court considered the validity of a legislative provision in

a general appropriations bill which set forth the following condition:

> Any federal or cash funds received by any agency in excess of the appropriation shall not be expended without additional legislative appropriation.

499 P.2d at 610 (emphasis supplied). This provision was held to be void as an unconstitutional attempt to limit the executive branch in the administration of federal funds received from federal agencies and unconnected with state appropriations. The court concluded: "... federal contributions are not the subject of the appropriative power of the legislature." 499 P.2d at 610. The power to administer federal funds was held to be exclusively an executive power under the Colorado Constitution.1/ See also Anderson v. Lamm, 195 Colo. 437, 579 P.2d 620 (1978).

It is not disputed that the Chevron funds would not have been available to the state but for the existence of consent order between Chevron and the U. S. Department of Energy. Colorado was not a party to this agreement. The purpose of the consent order was to resolve differences between Chevron and the U. S. Department of Energy over issues of compliance with that federal agency's petroleum price and allocation regulations. To remedy any violations Chevron agreed to a total of $82.5 million in remedies from which Colorado benefitted in an amount of $306,783.00.2/ See joint exhibits IX and X.

The only conceivable difference between the Chevron funds and the federal funds discussed in MacManus arises from the fact that the check in payment was written by Chevron rather than a federal agency. Paragraph 403(c) of the consent order expressly directs Chevron to make direct remittance of payments to the states under the order. Joint exhibit VI, pp. 10-11. As a condition of receiving payments under the consent order, the state was required to certify a plan complying with the approved purposes in the order. Joint exhibit VI, p. 10. The executive branch did submit the required certification. That plan was approved by the Department of Energy, and the moneys were expended accordingly.

Under these circumstances, the Chevron moneys fall squarely within the principle of the MacManus decision which recognizes the constitutional authority of the executive branch to administer federal contributions to the state. The critical fact is that this payment resulted from federal agency initiative, not that the form of remittance was by a check signed by a private corporation.

II.

ALTERNATIVELY, THE CHEVRON FUNDS WERE CUSTODIAL FUNDS NOT SUBJECT TO LEGISLATIVE. APPROPRIATION.

In Pensioners Protective Assoc. v. Davis, 112 Colo. 535, 150 P.2d 974 (1944) this court recognized that certain moneys held by the state as a custodian are not state moneys. The court there ordered expenditure of moneys which were on deposit in the constitutionally created Old Age Pension Fund without a legislative appropriation. The court concluded that these funds were held in trust for specified beneficiaries and therefore were not state moneys. See also Stong v. Industrial Commission, 71 Colo. 133, 204 P. 892 (1922). The state may receive funds, but if the funds are custodial in nature they are not properly the subject of the legislative appropriation power.3/

Examination of the federal consent order reveals that the purpose of the payments to the various states was to remedy overcharges paid by various consumers of specified petroleum products. The mechanism chosen to effect this remedy, as described in the Federal Register, was payment to certain states to be used for specified purposes determined by the parties to the consent order to benefit the affected class of consumers. Alternatively, recipient states could suggest other uses acceptable to the federal government which similarly benefitted the specified

class of consumers. Joint exhibit X, p. 41855.

The Chevron funds were paid to the state as a custodian to expend for the benefit of the affected class of consumers. The funds were not part of the general revenues of the State of Colorado, nor were they available to be spent for such general purpose as the state might wish. The general assembly's statement that the funds were spent at the "whim and caprice" of the executive branch is nonsense, and misrepresents the facts before the district court.

Those facts are undisputed: 1) that the executive branch submitted a certification it would expend the Chevron moneys for the approved purpose of an energy conservation office (joint exhibit VIII); 2) that the Department of Energy approved this certification (joint exhibit IX) and 3) that the Chevron moneys were expended in accordance with the certification. Executive expenditure of such custodial funds was properly made without legislative appropriation because those moneys were not state funds within the meaning of the Pensioners Protective Assoc. case.

CONCLUSION

The district court properly concluded that the Chevron funds could lawfully be expended without legislative appropriation. The order of the district court should therefore be af-

firmed.

1/ The MacManus decision has been cited as the leading case for the proposition that administration of federal funds is properly an executive branch function. See generally Note, 46 Albany L. Rev. 1020 (1982). Several jurisdictions have followed the MacManus reasoning. See Opinion of the Justices, 375 Mass. 851, 378 N.E.2d 933 (1978); Navajo Tribe v. Arizona Dept. of Administration, 111 Ariz. 279, 528 P.2d 623 (1974); State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974). Other state courts have reached a contrary conclusion in the interpretation of their own state constitutions. See Shapp v. Sloan, 480 Pa. 449, 391 A.2d 595 (1978), appeal dismissed sub. nom. Thornburg v. Casey, 440 U.S. 942 (1979); Andersen v. Regan, 53 N.Y.2d 356, 442 N.Y.2d 404, 425 N.E.2d 792 (1981); Opinion of the Justices, 118 N.H. 7, 381 A.2d 1204 (1978).

2/ Paragraph 403(a) of the consent order set forth the following as one of several remedial measures:

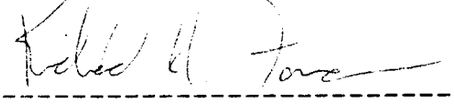
> Within ten (10) days after this Consent Order has been made effective, subject to the prior approval of OSC, Chevron shall institute a program of payments in the aggregate amount of twenty-five million dollars ($25,000,000) to those states (including those territories and possessions subject to DOE regulations) within which Chevron sold motor gasoline, No. 2 diesel fuel, No. 2 heating fuel and Kerosene based jet fuel ("Products") to customers other than brokers and refiners, during calendar year 1980, according to the terms set forth in this paragraph.

Joint exhibit VI, p. 9.

3/ In its brief, the general assembly suggests that the MacManus holding applies only to "custodial federal funds." This is a novel construction which ignores the express holding of MacManus that the legislature may not constitutionally attempt to appropriate federal contributions. As discussed above, the appropriations bill measure found to be void in that case purported to require appropriation of "any federal or cash funds." 179 Colo. at 222. (emphasis added). Accord, Bedford v. People ex

rel. Tiemann, 105 Colo. 312, 98 P.2d 474 (1939). The related issue whether current federal block grants are constitutionally different from the federal contributions discussed in MacManus is the subject of a separate lawsuit brought by the general assembly against Governor Lamm which presently is awaiting trial in the district court. Denver District Court, Civil Action No. 82-CV-9345. The general assembly would have this court interpret the MacManus decision so narrowly as to effectively overrule that precedent.

FOR THE ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF ON CROSS-APPEAL upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 27th day of February, 1984, addressed as follows:

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