

COUNTY OFFICERS

17-53-101. County officers enumerated.

- (1) The elected officers of a county are:
 - (a) (i) in a county operating under a county commission or expanded county commission form of government, county commission members; or
 - (ii) in a county operating under one of the other forms of county government under Subsection [17-52-402\(1\)\(a\)](#), county legislative body members and the county executive;
 - (b) a county treasurer, a sheriff, a county clerk, a county auditor, a county recorder, a county attorney, a district attorney in a county which is part of a prosecution district, a county surveyor, and a county assessor; and
 - (c) any others provided by law.
- (2) Notwithstanding Subsection (1), in counties having a taxable value of less than \$100,000,000 the county clerk shall be ex officio auditor of the county and shall perform the duties of the office without extra compensation.

Renumbered and Amended by Chapter 133, 2000 General Session

SALARIES

17-16-14. Salaries of county officers.

The annual salaries of the officers of all counties in the state shall be fixed by the respective county legislative bodies, provided no changes shall be made in existing salaries of county officers until the county legislative body in a county desiring to change existing salaries of county officers shall first hold a public hearing at which all interested persons shall be given an opportunity to be heard.

Amended by Chapter 227, 1993 General Session

Effective 5/13/2014

17-16-18. Salaries paid out of general fund.

The salaries of county officers shall be paid monthly, semi-monthly, or bi-weekly, as determined by the county legislative body, out of the county general fund or the county salary fund upon the order of the county legislative body.

Amended by Chapter 176, 2014 General Session

17-16-19. Salaries to be full compensation -- Compensation for deputies.

The salaries herein provided for shall be full compensation for all services of every kind and description rendered by the officers named herein; and where deputies or assistants have been allowed to any such officers the salary of any deputy or assistant shall be fixed by the county legislative body, and shall be a county charge.

Amended by Chapter 227, 1993 General Session

DEPUTIES

17-16-7. Deputies and employees -- Appointments -- County legislative body consent power -- Liability of principal -- Deputy may serve despite vacancy in office of appointing officer.

- (1) (a) A county or precinct officer, including an elected county executive, except a county commissioner or county council member, may, with the consent of the county legislative body, appoint deputies and employees as necessary for the discharge of the duties of the officer's office.
 - (b) The county legislative body's consent power under Subsection (1)(a) shall be defined in county ordinance and may include consent by:
 - (i) the budget approval process;
 - (ii) approval of an allocation of a certain number of positions; or
 - (iii) approval or disapproval of the hiring of individual applicants.
 - (c) A county legislative body may by ordinance delegate to the county executive the authority to consent to the appointment of deputies and employees under this Subsection (1).
- (2) If the county clerk performs district court clerk functions, the legislative body of that county shall provide the clerk with deputies and employees for the business of the district courts as considered necessary and advisable by the judge or judges of the district court, consistent with the level of funding for clerk services from the court administrator's office.
 - (3) (a) Each officer appointing a deputy shall, for each deputy appointed, file a signed writing with the county clerk that memorializes the appointment.
 - (b) The officer appointing the deputy is liable for all official acts of the deputy.
 - (c) If the office of the officer who appointed the deputy becomes vacant, the deputy may continue to serve despite the vacancy.

Amended by Chapter 241, 2001 General Session

17-16-8. Powers, duties and liabilities of deputies.

Whenever the official name of any principal officer is used in any law conferring powers or imposing duties or liabilities it includes deputies.

No Change Since 1953

LAWSUIT DIRECTION AND CONTROL

17-53-315. Actions -- Control and direction.

- (1) (a) A county executive may control and direct the prosecution, defense, and settlement of all lawsuits and other actions:
 - (i) to which the county is a party;
 - (ii) as to which the county may be required to pay the judgment or the costs of prosecution or defense; or
 - (iii) as further provided by county ordinance.
 - (b) If necessary, the county executive may, upon the recommendation of the county or district attorney or if required by court order, employ counsel to represent the county in the lawsuit or other action or assist the county attorney or, in a county that does not have a county attorney, the district attorney in conducting those lawsuits or any other actions where the county attorney or district attorney, as the case may be, is authorized by law to act.
- (2) If a lawsuit or other action is brought or prosecuted by another elected official or a board or other entity of the county under a statutory duty, that other elected official, board, or other entity may control and direct the lawsuit or other action, consistent with applicable law.

Amended by Chapter 241, 2001 General Session

SUPERVISION OF COUNTY ELECTED OFFICERS

17-53-106. Supervision of county elected officers -- Legislative body and executive may examine and audit accounts and conduct investigation.

- (1) As used in this section, "professional duties" means a county elected officer's functions, duties, and responsibilities specifically provided for by law and includes:
 - (a) the exercise of professional judgment and discretion reasonably related to the officer's required functions, duties, and responsibilities; and
 - (b) the management of deputies and other employees under the supervision of the elected officer under statute or county ordinance, policy, or regulation.
- (2) (a) A county legislative body and a county executive each:
 - (i) may generally direct and supervise all elected county officers and employees to ensure compliance with general county administrative ordinances, rules, or policies;
 - (ii) may not direct or supervise other elected county officers or their sworn deputies with respect to the performance of the professional duties of the officers or deputies;
 - (iii) may examine and audit the accounts of all county officers having the care, management, collection, or distribution of money belonging to the county, appropriated to the county, or otherwise available for the county's use and benefit; and
 - (iv) may investigate any matter pertaining to a county officer or to the county or its business or affairs, and may require the attendance of witnesses and take evidence in any such investigation.
- (b) In an investigation under Subsection (2)(a)(iv):
 - (i) the county executive or any member of the county legislative body may issue subpoenas and administer oaths to witnesses; and
 - (ii) if the county legislative body appoints members of the legislative body as a committee and confers on the committee power to hear or take evidence, the committee shall have the same power as the full county legislative body.
- (3) Nothing in this section may be construed to prohibit the county executive or county legislative body from initiating an action for removal or prosecution of an elected county officer as provided by statute.

Amended by Chapter 11, 2002 General Session
Amended by Chapter 185, 2002 General Session

CHAPTER 6



ELECTED OFFICIALS

ELECTION QUALIFICATIONS

The process for electing county officials and restrictions regarding their qualifications, eligibility and terms of office are established by state law. More specific information regarding the election process is set out below in Chapter 14.

To be eligible for a county office a person must be a U.S. citizen and must be both a registered voter and one-year resident of the county (or of a district, if running for a district office such as district attorney or council member).

Primary residence and voting registration in the county must be maintained during the elected officials' entire term of office; if the officer moves out of the county, the office is considered automatically vacant.¹ Other specific qualifications, such as training or certification for particular officers, is discussed in the sections below.

For most elected officials, the term of office is four years. The length of term may differ for county council members under optional forms of county government and the four year cycle will be different for some county commissioners due to staggered terms. In order to provide staggered terms for the other elected officials, the Legislature has provided that the treasurer, recorder, surveyor, and assessor shall be elected for one six-year term in 2014, with four-year terms thereafter.²

When elected, the officer takes office at noon on the first Monday in January following the election and holds

that office until a successor is elected or appointed and qualified.³ This last provision may be important in cases where an election is contested or other problems arise which may prevent the official-elect from taking office in a timely manner; if this happens, the prior elected official will remain in office for whatever time is necessary to resolve the problem.

The oath of office of a newly elected county official appears in the Utah Constitution at Art. IV, Section 10, which applies to all offices set out either in the



constitution or by statute. It states that: "I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this State and that I will discharge the duties of my office with fidelity."

The oath is administered both orally and in

writing, and the written oath is held by the county clerk. An oath of office may be administered by the county clerk or recorder, or their deputies or a judge, court clerk, or notary.⁴ The Supreme Court has held that taking an oath is essential to entering into the duties of office and if there is no oath, then any duties performed or responsibilities undertaken by the officer may be rendered legally null and void.⁵

County elected officials are required by law to be covered by fidelity bonds or theft or crime insurance securing the faithful and honest performance of official duties. The amount of the bond is established by the county legislative body, except for the county treasurer



whose bond amount is prescribed by the State Money Management Council. The insurance premium or cost of the bond is a county charge and counties are permitted to secure a group bond or insurance covering all their officials.⁶

Vacancies among county elected offices may occur through death, resignation, judicial removal, or failure to meet the mandatory qualifications of a specific office. The process for filling a vacancy will vary depending on how much of the prior official's unexpired term remains. The first step in the process provides that the county commission or council shall select an interim, acting elected official by soliciting the names of three persons from the county central committee of the political party of the prior officer; the commission or council then appoints one of those three persons to serve as the interim elected official. A permanent replacement is chosen depending on whether there are two or more years left in the prior official's term and when, in the general election year cycle, the vacancy arises.

If there are two or more years remaining and the vacancy occurs before April 10 of an even numbered year, then persons desiring to fill the vacancy file a declaration of candidacy and go through the political party nomination system. If two or more years remain and the vacancy occurs after April 10 in an even numbered year – but more than 50 days before the primary election – then the county clerk establishes a particular date upon which interested persons may file a declaration of candidacy and each county party central committee selects and certifies its candidate to appear on the ballot. If the vacant office has an unexpired term of over two years and there are less than 50 days before the primary election, but more than 50 days before the general election, the political party central committees summarily certify the name

of a candidate for the general election ballot. Lastly, if the vacant office has an expired term of less than two years or there are less than 50 days remaining before the general election, then the vacancy is filled in the same way that an acting, interim appointment is made (that is the county commission or council appoints a person from a list of three qualified individuals submitted by the political party central committee).⁷

However appointed, the person filling the vacancy serves for the remainder of the unexpired term of the prior official. Note that in any case in which an office is vacant and the official has appointed one or more deputies, those deputies may still continue to serve and perform the functions of the office, despite the vacancy.⁸

ELECTED OFFICIALS

What follows is a review of some of the duties and responsibilities of the various county elected officials, as established in the Utah Code. As these sections only summarize the powers and duties, reference should always be made to the specific provisions of state law to determine an elected official's authority, especially in complex matters. More specific and detailed information is available from UAC's elected officers' affiliate sections.

For the most part, county elected officials perform those functions and duties which are imposed by statute; most of these functions are examples of providing state services on a local basis. Discussions regarding the responsibilities of county officials occasionally make a distinction between discretionary offices and ministerial offices—this distinction may be helpful in understanding an official's authority. A discretionary office is one in which, by law, the professional responsibilities of the officer usually involve the exercise of judgment and professional discretion regarding the performance of duties. For example, by statute, a sheriff is directed to “make all lawful arrests” and the county attorney has a statutory responsibility to prosecute felonies; however, in these and other cases the law recognizes that a sheriff and an attorney retain the professional discretion to determine whether to arrest or prosecute in particular circumstances, based on specific events.⁹ In contrast, some elected offices perform what is referred to as a ministerial duty, typically requiring the management, custody or certification of official documents by the clerk or recorder; no professional discretion would permit that official from declining to accept a document that is

properly filed. Discretionary and ministerial functions also extend to an elected officer's deputies.

As mentioned previously, the county commission or council has the legal authority to control salaries and hiring among elected officials and to set their budgets. However, the courts have found that this authority does not extend to underfunding an elected official or his or her office to the extent that statutory functions can not be reasonably be performed.¹⁰

COUNTY ASSESSOR

The county assessor's statutory responsibility is to assist in the calculation of property taxes by making accurate and uniform assessments of the fair market value of real



and personal property, for purposes of collecting taxes against that property. It can be said that the counties serve a function of state government in this regard, in that they collect taxes not only for the county, but on behalf of all the local governments located therein, including municipalities, school districts, and special districts. In addition to the qualifications required of county elected officials in general, the county assessor is required to be a state certified appraiser—the assessor is required to become certified at some time during the first three years of his or her term of office.¹¹

The county assessor's duties are established in the County Code; however, assessor duties are more carefully defined in the Tax Code in Title 59.¹² The assessor's basic duty, as mentioned, is to assess real and personal properties which are subject to taxation in the county. These assessments are made on those persons or businesses which own the property on January 1, and a list thereof must be completed prior to May 22 of each year.¹³ The assessor needs to be aware of the requirements in the law which may exempt certain properties from taxation and is also required to list property according to each taxing entity (such as municipalities and special districts) in which the property is located.¹⁴ The assessor assists the county board of equalization (that is, the county legislative body) in equalizing property tax values and is required to attend board of equalization meetings.¹⁵ The assessor is likewise

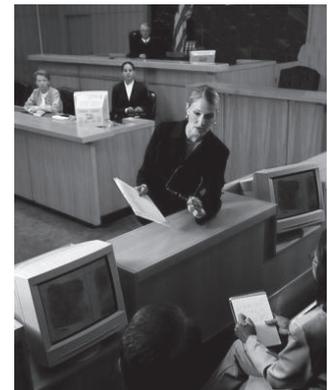
required, by statute, to work closely with the State Tax Commission and to attend required tax commission training for county assessors.¹⁶ Annual updates of property tax values are required, based on market data, and at least once in every five years the assessor must complete a detailed review of each property's characteristics.¹⁷

By May 22 of each year, the assessor is required to complete his or her work and deliver the assessment book to the county auditor for further processing in the tax collection process. When the assessor becomes aware that certain properties may have escaped the assessment process, that property may be assessed for up to five years prior to discovery.¹⁸ The assessor is subject to certain penalties for the willful failure to perform his or her duties in a timely fashion, which may include a \$1,000 penalty recovered against the assessor's bond and liability for the difference between the amount of taxes actually collected and the amount of taxes which would have been collected, had the assessor performed the duties of the office. Neglect or refusal to perform statutory duties may also result in prosecution by the attorney general; the state auditor and members of the State Tax Commission are empowered to examine the books of the county assessor and those other officials charged with the collection of taxes.¹⁹

The assessor may also be tasked with assisting in the collection of taxes, though the board of county commissioners or council members has the statutory authority to assign those duties to the county treasurer. Likewise, the seizure of properties and subsequent tax sale may be conducted by the assessor, or those duties may be reassigned by the board of county commissioners or council members to the county treasurer.²⁰ The assessor, treasurer, and auditor all cooperate in and have certain duties regarding the tax sale, conducted in May of each year, of delinquent properties.²¹

COUNTY ATTORNEY AND DISTRICT ATTORNEY

The county's public prosecutor is another officer who is clearly assigned



to conduct state functions at the county level. It is significant that, in conducting prosecutions, the county attorney is referred to as “the state.” This office is unique in county government in that it is the only county office which is required, in the state Constitution, to be filled by an elected official.²²

Public prosecutor services are provided by the district attorney only in Salt Lake County; the office is filled and prosecutions conducted by the county attorney elsewhere in Utah. The Legislature has extended to counties the authority to create “prosecution districts” which are headed by an elected district attorney and which may consist of one or more counties. This may be accomplished by interlocal contract when two or more counties join together to create a single prosecution district. The counties need not be contiguous, but must be within the same judicial district. The funding and control of the prosecution district and the district attorney is undertaken by the counties pursuant to the terms of the interlocal agreement.²³

In addition to those qualifications required of all county elected officials, a county or district attorney must also be an active member in good standing with the Utah Bar. An elected district attorney is required to be a resident of the prosecution district. State law also provides for the appointment of a licensed attorney, who is not a resident of the county, in circumstances in which there are insufficient members of the bar residing in the county.²⁴

As a public prosecutor, the county attorney’s primary responsibilities include the prosecution, on behalf of the state, of persons who commit any public offense proscribed under state statute and any criminal offenses established under county ordinance, but excluding the prosecution of state infractions or misdemeanors which occur within municipal boundaries (these prosecutions are the responsibility of the city attorney).²⁵ In addition, the county attorney is charged with the duty to attend to all other state legal business, as required by the attorney general, “when it does not conflict with other official duties.”²⁶ In fact, there are many provisions in state statute which provide for legal representation by county attorneys in various state-related matters.²⁷

In addition to serving as a public prosecutor, the county attorney is also responsible, under state statute, for providing civil legal representation and advice on behalf

of the county and its officials.²⁸ The county attorney is required by law to provide written legal opinions to county officials regarding their duties, without charge.²⁹ In acting as the civil attorney for a county, a county attorney is not considered to be a legal representative of any particular county officer or employee, including the county commission or council, but acts as the legal representative of the county itself. In doing so, however, the attorney is required by state statute and by his or her ethical responsibilities to treat county officers, boards, and other representatives (as they are legally empowered to speak for, give direction regarding, and make decisions binding on the county), as the attorney’s client. In short this means that while the county commission, council or some other elected officer is not the county attorney’s civil client, those elected officers are permitted to speak for and act on behalf of the client, when acting within their statutory responsibilities. The attorney himself is permitted to act as the “client” for all criminal prosecutors.³⁰

In addition to these main responsibilities, the county attorney also has the duty to assist a grand jury in its deliberations (very rare in Utah), assist the state in finding escheated property, appear before the juvenile courts and, as mentioned, perform other specific statutory legal duties.³¹

The county attorney is prohibited by law and by his or her ethical responsibilities from participating in any private legal practice while in office which includes criminal defense or which may create a legal conflict of interest arising out of prior criminal defense which occurred before the county attorney’s election.³²

COUNTY AUDITOR

The county auditor is charged by state law with providing a number of fiscal-related services both to assist in the performance of state duties regarding the tax system and also to provide internal accounting services for county administration. No extra qualifications, other than those required of all county



ected officials, appears for the auditor. In smaller counties having a taxable value of less than one hundred million dollars, the county clerk is the ex officio county auditor; the consolidation of county clerk with auditor is not unusual in Utah counties.³³

The county auditor’s internal fiscal responsibilities chiefly revolve around the maintenance and examination of the county’s financial records and accounts. The auditor examines and makes recommendations regarding the settlement of claims and is responsible for examining the books and accounts of the county elected officials and justice court judges. In doing so, state statute accords the auditor free access to those books and accounts. The auditor’s responsibilities include the authorization of payments, including certifying the availability of funds and issuing checks and warrants. The county’s financial records regarding receipts and disbursements are maintained by the auditor and coordinated with the county treasurer. The auditor has the authority under statute to conduct investigations regarding financial records, including issuing subpoenas and requiring testimony under oath.³⁴

The auditor’s responsibilities regarding the preparation of the county’s annual budget appear in the Uniform Fiscal Procedures Act for Counties (though by county ordinance or the adoption of an optional plan of county government, these responsibilities can be undertaken by either the county clerk or the county executive).³⁵ As part of the budget process, the county auditor establishes certain required accounts and must keep those accounts according to uniform accounting and reporting standards. As part of the budget process, proposed annual budgets are forwarded by the county departments and elected offices to the auditor, who prepares a tentative, overall county budget for consideration and adoption by the county commission. The final adopted county budget must be certified by the auditor.³⁶ The budgeting process is examined in detail in Chapter 10 of this handbook.

In assisting in the property tax collection system, the auditor reviews and enters valuations in the assessment book prepared by the county assessor, enters into that

book the various tax rates of the taxing entities located within the county (that is, municipalities and districts), and then transmits that assessment book to the State Tax Commission, working with that body to ensure accuracy and make any corrections.³⁷ When finally prepared, the county’s assessment rolls are forwarded to the state and county treasurers.³⁸ The auditor also maintains the delinquent tax control account and conducts the May tax sale for delinquent taxes.³⁹ Final settlements in the tax system are prepared with the collaboration of the county assessor, the county treasurer, and the state treasurer.⁴⁰

In counties of the first class (Salt Lake County), and in all other counties effective January 1, 2015, the budget officer duties of the auditor shift to the elected county executive or to the county commission. In addition, the county legislative body is empowered to enact an ordinance vesting the county’s accounting responsibilities in an executive branch official other than the auditor and the auditor is authorized to conduct performance audits under the direction of the commission, council or executive.⁴¹

COUNTY CLERK

The county clerk performs duties both on behalf of the state and local government as set out below; state law sets no specific qualifications for the county clerk. In smaller counties (less than one hundred million dollars taxable value) the county clerk is the ex-officio county auditor.⁴² Three main county clerk duties appear in state statute.

First, the county clerk is required to serve as the clerk to the county legislative body – that is, the commission or council, but not the county executive. In this regard, the clerk’s responsibilities include keeping accurate records regarding the county legislative body’s activities, such as votes taken, ordinances enacted, and so forth.⁴³

Second, in some counties the county clerk also serves as the clerk of the State District Court. In years past, district court support services, and especially clerk duties, were performed by the counties; currently the counties provide these services, by contract, only in secondary locations of the State District Court administrative system.⁴⁴ When serving as the clerk of a

“In smaller counties (less than one hundred million dollars taxable value) the county clerk is the ex-officio county auditor.”

district court, the county clerk's responsibilities include keeping court records, issuing legal process, certifying acknowledgements, administering oaths, supervising any deputy clerks, and performing other duties required by the court system.⁴⁵

Third, county clerks most notably provide state services on a local level when they act as the election officer. In this capacity, clerks are responsible to conduct all federal, state, and county primary, general, and special elections. State statute defines the county clerk as the "elections officer," with responsibility to prepare and serve all notices and voting instructions regarding upcoming elections and to oversee voter registration.⁴⁶ The clerk prepares and supplies all voting equipment and facilities, including polling places, ballot boxes, ballot forms and ballot counting facilities.⁴⁷ When the election is completed, the clerk oversees the canvas and prepares the official report of election results.⁴⁸ Lastly, the clerk makes recommendations to the county commissioners regarding any change in voting precincts.⁴⁹

County clerks do not have a responsibility to conduct elections on the behalf of municipalities or special districts but may do so, pursuant to inter-governmental contracts with municipalities.

Finally, clerks perform several miscellaneous duties. They have a statutory responsibility to keep records regarding all notaries public in the county; they also issue marriage licenses.⁵⁰ The clerk, pursuant to contract, issues passports on behalf of the State Department of the United States.

COUNTY COMMISSIONER

The county commission is, by statute, the "default form" of county government—this is to say, unless a county has adopted some optional form of government, the governing body is the county commission. Commissioners serve terms of four years which are staggered to provide continuity and commissioners are elected at large, unless otherwise required by court order.⁵¹ A county commission consists of three members unless, pursuant to the adoption of an alternative form of county government, it has a county commission consisting of either five or seven members.⁵² In an expanded county commission optional form of government, commissioners may be elected either at large, from districts, or a combination of the two.⁵³

As the governing body of the county, the county commission exercises the combined powers of the county's "legislative branch" and "executive branch." Whenever the Utah Code makes reference to the county "legislative body" or to the county "executive," those terms refer to the county commission.⁵⁴ The duties of county commissioners are set out in detail in Chapter 3 of this handbook.

COUNTY COUNCIL MEMBER

The county council, composed of council members, is the product of an optional form of county government



and is created through the process described in Chapter 18 of this handbook. When an optional plan or charter is prepared, approved by the voters, and put into place, it becomes an organic document establishing the number and terms of county council members. A county council may consist of any odd number of members, from three to nine persons. Council members may be elected from districts, at large, or by a combination of both; council member terms (from two years to six years) are established by the optional county plan.⁵⁵ The county council is the "legislative body" of the county and, by statute, exercises the various legislative responsibilities of county government.⁵⁶ These responsibilities are, of course, separate from executive branch activities and are explained in more detail in Chapter 3 of the handbook.

COUNTY EXECUTIVE, MANAGER OR MAYOR

When a county adopts an optional form of county government which creates a county council, it is required

by the County Code to also establish a county executive or manager, which position may be either elected or appointed. The adopted optional plan must provide for the qualifications, election or appointment, term, and other functions and duties of the executive.⁵⁷

A county executive, whether elected or appointed, performs the administrative or executive branch duties of the county, other than those duties reserved by the County Code to other elected officers, as those duties are set out in statute and the optional plan.⁵⁸ These duties and functions are explained in more detail in Chapter 3 of this handbook. An elected county executive has veto power over the county legislative body's enactments, ordinances, and budget; this power is not held by an appointed executive⁵⁹ or by a county commissioner. Further, a county executive is empowered to issue "executive orders," which are used to establish executive branch policies or practices or to establish a means of executing legislative branch policies or ordinances. An executive order may not be inconsistent with county ordinances or expand or narrow legislative actions undertaken by the county's legislative body.⁶⁰ Lastly, a county executive may serve as the county's budget officer, instead of the county auditor, under the provisions of the Fiscal Procedures Act.⁶¹

COUNTY RECORDER

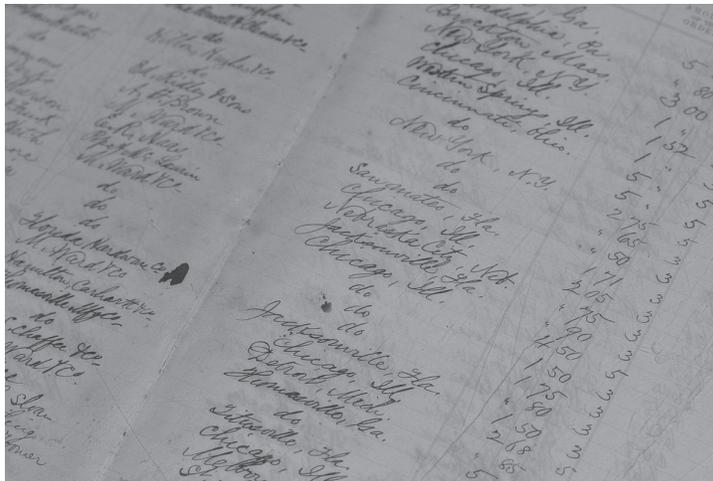
Every state in the union has adopted some means of providing for the regular recording of deeds and other documents which pertain to real property transactions and ownership; in almost all cases, these systems are similar to that adopted by Utah. The county recorder, therefore, performs an important state function in providing a process by which persons can go to a central local office to find documents relating to the ownership of properties located throughout the county. State statute sets no specific qualifications for the county recorder other than those required for all elected officers.

The responsibility of the county recorder could be summarized as accepting and recording various deeds, liens and other instruments relating to the ownership of real property, together with any attachments, and organizing them by entry number, time (to the minute) of recording, fees paid, and tax serial numbers; the recorder also creates an index to the book and page number where the document may be found.⁶² The recorder keeps the custody of recorded documents and has the authority to develop the appropriate management, retention and preservation processes to safely keep those documents, including in electronic form.⁶³ The original documents are kept and certified copies thereof are issued.⁶⁴ The recorder is further directed to maintain certain records, books, indexes and files, including but not limited to, an entry record; grantee and grantor indexes; indexes relating to mortgages, tracts and powers of attorney; and court judgments.⁶⁵ The recorder has the authority to reject the filing of "wrongful liens"—that is, liens which are unauthorized by law, such as the so-called "common law liens."⁶⁶ The fees charged by the recorder are, to a large extent, established by state statute and any fees which are not so established are set by the county commission. The recorder is required to perform services only after collecting fees in advance.⁶⁷ Records held by the county recorder's office are considered open

under state law, particularly the Government Records Access and Management Act.⁶⁸

The county recorder also serves a duty within the property tax system. The recorder maintains ownership records and, as of January 30 of each year, transmits the lists of ownership records to the county assessor for property tax processing.⁶⁹

The recorder is subject to several prohibitions and liabilities set out by state law. The recorder is prohibited, for instance, from filing documents incorrectly and may not alter or obliterate documents presented for recording. The recorder and the county may be held civilly



liable for losses to property owners by misrecording. However, this liability can be avoided in some cases if constructive notice is given even though the actual recording procedure has departed from exact statutory requirements.⁷⁰

COUNTY SHERIFF

The office of county sheriff is, arguably, the most venerable and traditional of county offices. In addition to the general qualifications of all county officials, the sheriff must also be examined and certified by the state's Peace Officer Standards and Training division (POST). The sheriff must also satisfy the complete annual training required by POST and maintain POST certification throughout the term of office. If the sheriff does not maintain these qualifications throughout his or her term, the county commission or council is required by statute to declare the sheriff's office vacant.⁷¹

The first among the sheriff's general duties is his responsibilities to enforce criminal laws throughout the county. This is defined in statute as a duty to keep the peace and make all lawful arrests.⁷² The courts, however, have held that the sheriff's office implicitly retains a degree of professional discretion in the exercise of mandatory law enforcement duties to the extent that it is no violation of the sheriff's statutory responsibilities to decline to make a particular arrest or to conduct a specific investigation.⁷³ In regards to his law enforcement duties, as well as other responsibilities, the sheriff is empowered to form a traditional "posse" by enlisting the aide of county inhabitants in the execution of lawful duties.⁷⁴

A second significant area of sheriff's responsibility involves the serving of various kinds of civil process, including certifying returns on service.⁷⁵ In this regard, the sheriff also executes attachments on real property and performs other related civil functions.⁷⁶ A sheriff may be exposed to civil liability for any delay or failure to execute the service of process duties of office.⁷⁷

The sheriff is required by state law to attend the courts of the state at all levels, from the Supreme Court through juvenile and justice court.⁷⁸ In this context, the sheriff serves as bailiff, providing court security, transportation of prisoners, and acting as court crier.⁷⁹

Other miscellaneous functions served by the sheriff include the suppression of wildland fires, the organization



of search and rescue efforts, a requirement to adopt written policies prohibiting racial profiling, and other duties as may be established.⁸⁰ The fees charged by the sheriff are, in large part, established by state statute.⁸¹ Other fees may be established by the county commission or council.

SHERIFF: JAILS AND PRISONERS

A significant responsibility of the sheriff involves the keeping and management of the county jail. By statute, jail costs are considered a legitimate county charge.⁸² State law regarding jails includes provisions for keeping prisoners from other jurisdictions, setting maximum jail capacity, establishing alternatives to incarceration, and private contracting for jail services.

The county sheriff is in charge of keeping the county jail and receiving and keeping all prisoners committed thereto.⁸³ This includes the responsibility to transfer county prisoners to the state prison. The sheriff is responsible for employing jail guards and providing food, clothing and bedding, as a county charge.⁸⁴ The sheriff is also required to deliver process on jail inmates.⁸⁵

Statute requires that jail inmates be classified, according to a sheriff's office written policy, by gender and other factors which may be germane to the safety and well-being both of the inmates and the community.⁸⁶ Included in this responsibility is the sheriff's authority to establish a maximum jail capacity (with county commission approval), which may entail establishing alternatives to incarceration of certain classes of prisoners, within a state mandate that county jail practices not violate local planning and zoning requirements.⁸⁷ The county executive (the county commission) is permitted by law to contract for the construction and management

of jail facilities, with the consent of the sheriff. Once such a private contract is in place, the sheriff is required by law to cooperate with private contractors in jail management.⁸⁸

The sheriff is required to keep prisoners from other jurisdictions under certain statutory procedures and requirements. A county may be required to enter into a contract with the State Department of Corrections for housing state prisoners; state reimbursement for the cost of incarcerating state prisoners in the county's jail is set at 70% of the county's actual cost.⁸⁹ A county may also be required to incarcerate a state probation inmate, for which reimbursement is paid at 50% of the county's actual cost.⁹⁰ Records and reports regarding state prisoners are required. A county jail may also be required to accept federal prisoners pursuant to a contract and upon the same terms as state prisoners.⁹¹ Lastly, a county may determine, by agreement, to incarcerate



city prisoners and to otherwise permit city use of the county jail. If done so, incarceration is at no cost to the city. By statute and Supreme Court decision, however, the housing of city prisoners in the county jail is by agreement and is not mandatory.⁹²

COUNTY SURVEYOR

The county surveyor performs state and local functions by maintaining accurate surveys and preserving monuments in furtherance of the state's policy to provide certainty and confidence regarding the location of real property boundaries. A county surveyor is required by statute, in addition to the other qualifications of office, to be a licensed professional land surveyor.⁹³ In Utah the tendency is for counties to consolidate the surveyor's office with some other elected office—a strong preference is expressed in statute for consolidation with the county recorder. In such cases, all survey field work still must be done by a licensed public land surveyor—typically a private contractor. Other surveyor duties, which relate primarily to recording and maintaining survey records and other document management duties, may be performed by the county recorder.⁹⁴

The county surveyor's primary duties deal with either performing or arranging for the performance of all survey work involving the county, including acting upon directions from the courts, the county executive, or the county legislative body. This also contemplates the surveyor's duty to establish all corners and to verify the correct placement of all monuments. Further, the surveyor's responsibility includes recording, indexing and maintaining records of all survey work done and making those records available upon the payment of a fee. The commission may direct the surveyor to perform county engineering and architectural work, if the surveyor or his staff is qualified to do so.⁹⁵ Private surveyors are required by law to file boundary maps with the county surveyor; failure to do so may constitute a class C misdemeanor.⁹⁶ County surveyor fees are established by the county commission, and the commission is permitted to authorize a corner preservation fund for the surveyor's office.⁹⁷ Maps needed by the county or its officers are provided by the surveyor.⁹⁸

The responsibilities of the surveyor to oversee the preservation and placement of corners and monuments includes a requirement to set monuments at section, quarter section, or corner locations.⁹⁹ Any person who disturbs a corner or a monument is required to notify the surveyor. Willfully disturbing a monument is a class C misdemeanor, and includes civil liability to pay the costs to restore the monument to its correct condition and location.¹⁰⁰

COUNTY TREASURER

The county treasurer performs state duties as well as local internal administrative functions regarding

TAX LEDGER				
YEAR	LEVY (MILLS)	TAXES CHARGED	CREDITS	BALANCE
1960	88.45	173.35		173.35

keeping and investing county funds. No special statutory qualifications, other than those set out generally for elected officials, are required of the treasurer. The treasurer's duty regarding county finances is to receive, deposit, and invest all monies coming in to the county. Further, the treasurer disperses county funds based on warrants issued by the auditor. The treasurer is required to keep records of both funds received and disbursed.¹⁰¹

The treasurer's responsibilities include assisting in the property tax system, functioning along with the county assessor's and auditor's offices. The collection of personal property taxes may be the responsibility of either the assessor or the treasurer, depending on where the county commission has assigned those specific duties.¹⁰² The treasurer is to receive tax payments by sending out tax notices, making collections, and entering into settlement of all tax transactions for the prior year; receipts are provided to taxpayers. Tax notices and collections are the responsibility of the treasurer.¹⁰³

The treasurer's duties include resolving overpayments or erroneous payments of taxes and include determining and providing notice of tax delinquencies.¹⁰⁴ A list of delinquent properties is forwarded to the treasurer for further processing and, eventually, the May tax sale. The treasurer is responsible to assist the county auditor in conducting the May tax sale.¹⁰⁵ Lastly, the treasurer provides to the county commission or council quarterly settlements and records of taxes paid and advises the State Tax Commission regarding unpaid centrally assessed properties.¹⁰⁶



THE STATUS OF DEPUTIES

County elected officials who perform executive branch functions are permitted to employ deputies and other staff, with the consent of and at a salary set by the county commission or council. An elected officer's deputy is permitted under state law to perform all the statutory functions, exercise the powers, and be subject to the responsibilities of the elected official himself. Likewise, an elected official is responsible for a deputy's negligence and other liabilities. Deputies are not permitted for legislative officials, such as commissioners or council persons; it is not traditional in the American political system to permit a legislator to perform legal duties through a deputy (however, legislative officials may employ assistants and other employees).¹⁰⁷

The appointment of a deputy or other elected official's employee is with the approval of the county legislative body. By statute, the legislative body's process for consenting to new hires may be manifest in one of three ways: through the budget approval process in which the county commission or council establishes a personnel budget for an elected official and, thereafter, has no further involvement in the hiring of individual persons; through the approval of position allocations, in which the county legislative body approves the elected officials' hiring of a specific number of individuals, again without further involvement; or through the commission's or council's immediate approval or disapproval of hiring specific individual applicants. Obviously the degree of involvement in the hiring of individual employees by the elected officials may vary broadly depending on the

size of a county and the number of its employees and therefore each county is permitted to choose one of the above three options, adopting its choice by ordinance. Once appointed, a deputy's oath or other memorial of appointment shall be signed in writing and filed with the county clerk.¹⁰⁸

Under Utah law, a deputy occupies, for all intents and purposes, the same position as the elected official. This is to say that a deputy county attorney occupies the same position in terms of prosecuting criminal defendants, rendering civil legal advice to the county, and performing other statutory duties, as does the elected county attorney himself.¹⁰⁹

This fairly dramatic vesting of an elected official's authority in a deputy may lead, in some cases, to a special deputization. A special deputy is a person whose legal authority, as explained above, has been specifically limited by the elected official; these limitations may be by time, location, or duty. For instance, a person may be appointed to act as a deputy for only a limited time period, such as for the temporary incapacity of an elected official or to perform one specific act. Likewise a deputy's

powers and responsibilities might be limited by a special deputization, as if, for example, a county clerk limited a particular deputy's authority to performing only election functions. Special deputies, however, also exercise all the legal powers of the elected official, within the terms of the deputization.¹¹⁰

Some of the discussion above regarding discretionary and ministerial powers in elected officials also applies to those officials' deputies. For instance, a deputy recorder would not have any more legal authority to refuse to accept the recording of a document than the recorder. By the same token, a deputy sheriff would be afforded the same professional discretion to arrest or decline to arrest persons, based on a particular situation or circumstance. The law also occasionally makes a distinction between a government "officer" and "employee." This distinction, when made, usually revolves around the authority of the person to exercise discretion in the performance of duties. Under this distinction, the deputy of an elected official performing discretionary functions would be considered an "officer;" a clerical person who is not sworn and who does not perform statutory duties would be considered an "employee."

Utah courts have found a requirement that a deputy's appointment must follow proper procedures and that these technical requirements are essential to the deputy performing official functions. The approval and memorialization of the deputy's oath, in writing, is mandatory; a written oath must be subscribed and signed by the deputy, before entering into his or her duties, to be filed in the county clerk's office. Without meeting these requirements, a deputy may not perform statutory functions and any functions and duties which were performed by a purported deputy, with no appointment or oath on file, are rendered null and void.¹¹¹

While county commissioners and county councils have express statutory authority over the initial hiring and salaries of deputies and other employees, once an elected official has a deputy on staff, the county legislative

body has almost no legal ability to discipline or remove that deputy. An elected official is considered to hold an office equivalent in stature and authority to that of the commission or council itself regarding employees and, therefore, the official retains full responsibility for the supervision, discipline or termination of his or her deputies.¹¹² The county governing body certainly retains the ultimate authority to eliminate funding for a certain number of deputies in an elected official's office pursuant to its budget process; however, the commission has no authority under such circumstances to mandate that the elected official terminate a particular deputy.

With the exception of deputy sheriffs, the merit or other employment status of deputies is not addressed, for most counties. Counties which have a population in excess of 20,000 are, however, required to establish a merit commission governing the employment of sheriff's deputies and counties have the option to adopt a merit system for other employees.¹¹³ Information regarding merit systems and employment status is provided in this handbook in Chapter 9.

JUSTICE COURTS AND CONSTABLES

Judges of the justice courts and constables are officers which are not considered elected, in the traditional sense, but who serve for specific limited terms. They are appointed by the county legislative body and justice court judges thereafter stand for unopposed

retention elections.

A county legislative body may, but is not required to, appoint county constables. Constables have the primary duty of serving civil process throughout the county; they have no law enforcement responsibilities. A constable or deputy constable is initially appointed through the recommendation of a county nominating commission who makes recommendations to the county legislative body for the appointment of either a constable or deputy constable. A constable is required to be certified by POST as a special function officer, must have no conflicts of interest regarding process served, and must maintain an office where he or she can be contacted by the public or the courts. A constable is appointed for a term of



six years, subject to reappointment, and may appoint deputies, with the approval of the county legislative body. The rates charged by constables are the same as those set out in statute for the service of civil process by county sheriffs. A constable's legal authority may be revoked by the county legislative body, for cause.¹¹⁴

Justice courts are considered "not of record" under the Utah Constitution.¹¹⁵ They may be established by a county, a municipality, or a county in cooperation with a municipality, by filing a written request with the state judicial council before July 1, at least two years prior to the effective date of the court's creation.¹¹⁶ County justice courts hold jurisdiction within the county and may, with the concurrence of a municipality, also function as a municipal justice court. The county commission or council has flexibility to either establish a single justice court precinct, countywide, or divide the county into multiple precincts including, as mentioned above, with agreeable municipalities. A county justice court's territorial jurisdiction extends throughout the county, except for those municipalities which have separate municipal justice courts. Justice court jurisdiction is over class B and class C misdemeanors, ordinance violations, and infractions; they also have jurisdiction over small claims cases.¹¹⁷

A county creating a justice court is required to provide certain physical facilities, equipment and clerical personnel. An appropriate office or courtroom, copies of current laws and ordinances, court clerical personnel, and sufficient public prosecutors are all required by statute.¹¹⁸ One-half of all fines collected by a justice court are remitted to the local government responsible for the court and the other half to the local government which prosecutes the violation. There are variations on the disposition of fines for offenses involving wildlife, over-weight vehicles, and other matters.¹¹⁹

A justice court judge is initially nominated by the chair of the county commission or by the executive in a county executive-council form of government and final appointment is by vote of the county commission or county council. Judges are appointed for a six-year term, and when that term expires the judge is subject to an unopposed retention election.¹²⁰ Justice court judges must be U.S. citizens, age 25 or older, a Utah resident for at least three years, a resident of the county or adjoining county for at least six months, and a registered voter of

the justice court precinct. Judges are not required to be licensed attorneys but are required to have a high school education and be a person of demonstrated judgment, integrity and ability to understand and apply appropriate law.¹²¹

Justice court judges are paid a fixed compensation determined by the county commission or council and based on recommendations of the State Court Administrator's office. Justice court compensation is limited to no greater than 90% of the salary of a district court judge.¹²² Justice court judges are required to comply with applicable county rules and regulations regarding personnel, purchasing, budgets and administrative functions. If a judge fails to comply with these requirements, the county commission or council may refer the matter to the State Justice Court Administrator; such failures are considered in the justice court judge's performance evaluations and may result in referral to the Judicial Conduct Commission.¹²³

MISCONDUCT AND REMOVAL OF ELECTED OFFICIALS

As mentioned in Chapter 3, the county commission or council enjoys only limited supervision over the professional and statutory activities of elected officials.¹²⁴ The commission or council does, however, exercise significant investigative authority regarding the conduct of the county's business, again as mentioned above in Chapter 3. The county commission, council or executive may investigate any aspect of the county's business, including the conduct of county officers, may examine and audit books and accounts, and may subpoena and administer oaths to witnesses.¹²⁵

The failure of an elected county official to substantially perform that officer's duties constitutes "malfeasance" in office. If a county officer's conduct rises to the level of a felony, that person may immediately be placed on paid administrative leave by the county legislative body until a court of competent jurisdiction resolves the charges. During an officer's absence under such circumstances, the county commission or council may reassign the elected



official's duties to some other officer or to a person employed for that purpose. The commission or council does not, however, have any authority to permanently remove an official who is accused of dereliction of duty. This power is held only by the courts. If the elected officer is convicted of a felony, the sentencing judge in the criminal case shall order that the officer be removed from office.¹²⁶

In addition to removal based on a felony conviction, officers are subject to removal by judicial proceedings under the Code of Criminal Procedure. A proceeding alleging the official is guilty of high crimes, misdemeanors, or malfeasance in office is commenced when a taxpayer, grand jury, county attorney or the attorney general presents a sworn, written accusation to the district court. If the district court judge does not dismiss the accusation for insufficiency, a trial is conducted and, upon conviction, the elected official is immediately removed from office. During any appeal of that verdict, the elected official is considered suspended from office.¹²⁷

In examining this statutory proceeding, the courts have held that a public official cannot be removed based on a felony or misdemeanor unless the offense occurred while the official was serving in office.¹²⁸ The statutory removal process is strictly construed against the person invoking it and liberally in favor of the officer against whom it is asserted. In considering the nature of “high crimes, misdemeanors or malfeasance in office,” a forfeiture will not be ordered unless the offense is serious, harms other persons, violates the basic mores of society, involves moral turpitude, or is offensive to accepted standards of honesty and integrity.¹²⁹ Lastly, in considering the term “malfeasance” the courts have held it is necessary that the alleged act be positively unlawful or involve some wrongdoing on the official's part and this must be known to him at the time the act is committed, but it is not necessary that the act arise to the level of a “high crime or misdemeanor.”¹³⁰

County commissions, councils or executives or other county officers have no legal authority to remove from office or suspend an elected official—other than by the two court proceedings mentioned—felony conviction or judicial removal. There is no provision in Utah law for the popular removal of elected officials by a petition or electoral process. Two Utah counties have created procedures for popular removal by election, based on charters prepared as part of a change in form of government, but those procedures have not been reviewed by the appellate courts of the State. State statute now prohibits counties from adopting such removal procedures and the Utah Constitution permits removal of elected officials only by procedures established by state law.¹³¹

(Endnotes)

- 1 § 17-16-1 (U.C.A.)
- 2 § 17-16-6 (U.C.A. 2011)
- 3 § 17-16-6 (U.C.A. 2011)
- 4 §§ 46-1-6 and 57-2a-3(1) (U.C.A.)
- 5 *State v. Matthews*, 375 P.2d 392 (1962)
- 6 § 17-16-11 (U.C.A.)
- 7 §§ 17-53-104; 20A-1-508 (U.C.A.)
- 8 § 17-16-7(3)(c) (U.C.A.)
- 9 § 17-53-106(1)(a); *Obray v. Malmberg*, 484 P.2d 160 (1971)
- 10 *See County Government in Utah Chapter 3; Murphy v. Grand County*, 268 P.2d 677 (1954)
- 11 § 17-17-2(1) (U.C.A.)
- 12 § 17-17-1 (U.C.A.)
- 13 §§ 59-2-301; 59-2-303 (U.C.A.)
- 14 §§ 59-2-305; 59-2-1101 (U.C.A.)
- 15 § 59-2-1001(5) (U.C.A.)
- 16 § 59-2-313 (U.C.A.)
- 17 § 59-2-303.1 (U.C.A.)
- 18 § 59-2-309 (U.C.A.)
- 19 §§ 59-2-314; 59-2-315; 59-2-1312; and 59-2-1313 (U.C.A.)
- 20 § 17-17-1 (U.C.A.)
- 21 § 59-2-1303 (U.C.A.)
- 22 *Utah Constitution*, Art. VIII, § 16
- 23 § 17-18-1.9 (U.C.A.)
- 24 §§ 17-18-1.6; 17-18-4; 17-18-5 (U.C.A.)
- 25 §§ 17-18-1(1)(i); 10-3-928 (U.C.A.)
- 26 § 17-18-1(1)(a)(iii) (U.C.A.)
- 27 *For example, the county attorney has the statutory responsibility to provide legal and prosecution services to Adult Protective Services, 62A-3-309; Health Department, 26-23-1; Financial Institutions Commission, 7-1-319; Office of Recovery Services, 62A-11-107; Labor Commission, 34A-1-401; parental obligations and paternity litigation, 78B-15-110; Division of Real Estate, 57-11-16; Division of Securities, 61-1-21.5; State Engineer, 73-2-13; and Department of Workforce Services, 35A-1-501.*



28	§§ 17-18-1(7); 17-18-2 (U.C.A.)	80	§ 17-22-2 (U.C.A.)
29	§ 17-18-1(7)(c) (U.C.A.)	81	§ 17-22-2.5 (U.C.A.)
30	<u>Salt Lake County Commission v. Salt Lake County Attorney</u> , 985 P.2d 899 (1999); <u>Utah Rules of Professional Conduct</u> 1.13	82	§§ 17-22-2, 17-22-4, 17-50-319(c) (U.C.A.)
31	§ 17-18-1 (U.C.A.)	83	§ 17-22-2(1)(g) and (1)(h) (U.C.A.)
32	§ 17-18-1(8) (U.C.A.)	84	§ 17-22-8 (U.C.A.)
33	§ 17-53-101 (U.C.A.)	85	§ 17-22-6 (U.C.A.)
34	§ 17-19-1 (U.C.A.)	86	§ 17-22-5 (U.C.A.)
35	§§ 17-36-1, et seq.; 17-36-3(5) (U.C.A.)	87	§ 17-22-5.5 (U.C.A.)
36	§§ 17-36-6; 17-19-19; 17-36-10; 17-36-15 (U.C.A.)	88	§§ 17-22-8(3), 17-22-4(2), 17-53-311(1) (U.C.A.)
37	§§ 59-2-320; 59-2-321; 59-2-322; 59-2-323 (U.C.A.)	89	§§ 64-13e-103, 17-22-5(4) (U.C.A.)
38	§§ 59-2-324; 59-2-325; 59-2-326 (U.C.A.)	90	§ 64-13e-104 (U.C.A.)
39	§§ 59-2-1372; 59-2-1345 (U.C.A.)	91	§ 17-22-9 (U.C.A.)
40	§§ 17-19a-101 through 206 (U.C.A. 2012)	92	§ 10-8-58 (U.C.A.); <u>Orem City v. Utah County</u> , 699 P.2d 707 (Utah 1985) (titled <u>Utah County v. Orem City</u>)
41	§§ 59-2-1316; 59-2-1372 (U.C.A.)	93	§ 17-23-1(1)(a) (U.C.A.)
42	§ 17-53-101 (U.C.A.)	94	§§ 17-23-1(1)(b) and (1)(c) (U.C.A.)
43	§§ 17-20-1; 17-20-1.5; 17-20-1.7(1), (2), (3) (U.C.A.)	95	§ 17-23-1(2), (3), (4), and (5) (U.C.A.)
44	§ 17-20-1 (U.C.A.)	96	§ 17-23-17 (U.C.A.)
45	§ 78A-5-108 (U.C.A. 2008)	97	§§ 17-23-2, 17-23-19 (U.C.A.)
46	§§ 20A-1-102(25); 20A-5-101; 20A-5-102; 20A-5- 204; 20A-5-401 (U.C.A.)	98	§ 17-23-5 (U.C.A.)
47	§§ 20A-5-402.5 through 407; 20A-4-101 (U.C.A.)	99	§ 17-23-13 (U.C.A.)
48	§ 20A-4-304 (U.C.A.)	100	§ 17-23-15 (U.C.A.)
49	§ 20A-5-303 (U.C.A.)	101	§ 17-24-1 (U.C.A.)
50	§§ 17-20-3; 17-20-4 (U.C.A.)	102	§§ 17-16-5.5, 59-2-1302, 59-2-1310 (U.C.A.)
51	§ 17-52-501 (U.C.A.)	103	§§ 59-2-1305, 59-2-1316 through 59-2-1319 (U.C.A.)
52	§ 17-52-502 (U.C.A.)	104	§ 59-2-1321 and 1322 (U.C.A.)
53	§ 17-52-401(5)(d) provides that commissioners may be elected at large, by district, or by combination, while § 17-52-501(3)(c) and 502(3)(c) provides that commissioners may only be elected at large.	105	§§ 59-2-1331, 1332, 1332.5, 1338, 1339, and 1343 to 1351
54	§ 17-52-501(2) (U.C.A.)	106	§§ 59-2-1320, 59-2-1311 (U.C.A.)
55	§§ 17-52-401(4) (U.C.A.)	107	§§ 17-16-7, 17-16-8, 17-16-19 (U.C.A.)
56	§§ 17-52-504(3); 17-52-505(4) (U.C.A.)	108	§ 17-16-7 (U.C.A.)
57	§§ 17-52-504; 17-52-505 (U.C.A.)	109	§§ 17-16-8, 68-3-12(2)(v) (U.C.A.)
58	§§ 17-52-504(3)(b); 17-52-505(4); 17-53-301(2) (U.C.A.)	110	§ 68-3-12(2)(v) (U.C.A.)
59	§§ 17-52-505(2)(b); 17-53-302(12) (U.C.A.)	111	<u>Page v. McAfee</u> , 487 P.2d 861 (1971)
60	§ 17-53-316 (U.C.A.)	112	<u>Sheriff of Salt Lake County v. Board of Comm'rs of Salt Lake County</u> , 268 P. 783 (1928)
61	§§ 17-19-19(1)(b); 17-36-3(5) (U.C.A.) See also 17-19a-203 (U.C.A. 2012)	113	§§ 17-30-2(1) and 17-33-1 (U.C.A.)
62	§§ 17-21-12 (U.C.A.)	114	§§ 17-25a-1 through 4 (U.C.A.)
63	§§ 17-21-1 (U.C.A.)	115	§ 78A-7-101 (U.C.A.)
64	§ 17-21-3 (U.C.A.)	116	§§ 78-5-101.5(1)(b), (3), and (7) (U.C.A.)
65	§§ 17-21-6; 17-21-10 (U.C.A.)	117	§§ 78-5-102, 103, and 104 (U.C.A.)
66	§ 38-9-3 (U.C.A.)	118	§§ 78A-5-109, 110, and 111 (U.C.A.)
67	§§ 17-21-18; 17-21-18.5 (U.C.A.)	119	§§ 78A-5-110
68	§§ 17-21-19; 63G-2-301(2)(g) (U.C.A.)	120	§§ 78A-7-202; 78A-7-203
69	§ 17-21-22 (U.C.A.)	121	§ 78A-7-201
70	§ 17-21-17 (U.C.A.); <u>Arnold Industries v. Love</u> , 63 P.3d 721 (2002); <u>Boyer v. Pabvant Merchantile</u> , 287 P. 188 (1930)	122	§ 78A-7-206
71	§ 17-22-1.5 (U.C.A.)	123	§ 78A-7-210
72	§ 17-22-2(1)(a) and (1)(b) (U.C.A.)	124	§ 17-53-106 (U.C.A.)
73	<u>Obrey v. Malmborg</u> , 484 P.2d 160 (1971)	125	§§ 17-53-106, 212, 226, 303 (U.C.A.)
74	§ 17-22-2(1)(f) (U.C.A.)	126	§ 17-16-10.5 (U.C.A.)
75	§ 17-22-2 (U.C.A.)	127	§ 77-6-1, et seq. (U.C.A.)
76	§§ 17-22-11, 17-22-12 (U.C.A.)	128	<u>State v. Bowen</u> , 620 P.2d 72 (1980)
77	§§ 17-22-13, 17-22-14 (U.C.A.)	129	<u>State v. Jones</u> , 407 P.2d 571 (1965)
78	§ 17-22-2 (U.C.A.)	130	<u>Law v. Smith</u> , 98 P. 300 (1908)
79	§§ 17-22-22, 17-22-23, 17-22-27 (U.C.A.)	131	<u>Utah Constitution</u> , Art. VI, § 21; §§ 17-52-401(3) and 402(1)(b) (U.C.A.)

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(Cite as: 4 P.3d 789)



Supreme Court of Utah.

Pauline M. **GREEN**, Clerk/Auditor for **Morgan**
County, Plaintiff, Appellee, and Cross-Appellant,

v.

Jan **TURNER** and Michael McMillan, individually
and as **Morgan** County Commissioners, Defendants,
Appellants and Cross-Appellees.

No. 981485.
June 27, 2000.

County clerk petitioned for writ of mandamus, alleging county commissioners exceeded their authority when they reduced her salary to cover expenses incurred in hiring outside auditor to perform some of clerk's duties. The District Court, Morgan County, **Michael Glasmann**, J., held that county commission acted unlawfully in withholding portions of clerk's salary, and held that commissioners were liable for payment of prejudgment interest, a statutory penalty of \$500, and clerk's attorney fees of \$10,000. On cross-appeals, the Supreme Court, **Durrant**, J., held that: (1) neither statute authorizing county commission to fix annual salaries of county officers nor commission's inherent and discretionary powers over county officers permitted commission to reduce clerk's salary, and (2) commissioners' mistake in legal judgment regarding their authority was insufficient to impose statutory penalty and award clerk her attorney fees.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Appeal and Error 30  **842(1)**

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in
General

30k838 Questions Considered

30k842 Review Dependent on Whether
Questions Are of Law or of Fact

30k842(1) k. In general. **Most Cited**
Cases

Matters of statutory interpretation are reviewed
for correctness.

[2] Counties 104  **74(2)**

104 Counties

104III Officers and Agents

104k68 Compensation

104k74 Particular Officers, Agents and
Services

104k74(2) k. Clerk. **Most Cited Cases**

Statute authorizing county commission to fix annual salaries of county officers did not permit commission to sanction county clerk for alleged abuses of her office and to seek to recoup the costs of hiring an outside auditor by deducting costs from clerk's regular paychecks. **U.C.A.1953, 17-16-14.**

[3] Counties 104  **74(2)**

104 Counties

104III Officers and Agents

104k68 Compensation

104k74 Particular Officers, Agents and
Services

104k74(2) k. Clerk. **Most Cited Cases**

County commission's inherent and discretionary

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powers over county officers did not allow it to make discretionary deductions from county clerk's paycheck for purpose of paying costs of hiring an outside auditor to perform clerk's official duties. [U.C.A.1953, 17-5-213](#).

[4] Counties 104 75(3)

104 Counties

104III Officers and Agents

104k68 Compensation

104k75 Allowance, Recovery, and Payment

104k75(3) k. Actions. [Most Cited Cases](#)

County commissioners' mistake in legal judgment regarding their authority to make deductions from county clerk's paychecks was insufficient to impose statutory penalty and award clerk her attorney fees under statute allowing for imposition of penalties for county commissioner's willful breach of duty. [U.C.A.1953, 17-5-207 \(1999\)](#).

[5] Administrative Law and Procedure 15A 412.1

15A Administrative Law and Procedure

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(C) Rules, Regulations, and Other Policymaking

15Ak412 Construction

15Ak412.1 k. In general. [Most Cited Cases](#)

Statutes 361 1132

361 Statutes

361III Construction

361III(D) Particular Elements of Language

361k1131 Particular Words and Phrases

361k1132 k. In general. [Most Cited Cases](#)

(Formerly 361k199)

Inclusion or exclusion of a scienter requirement in construing the term “willfully” depends largely on the context and purposes of the statute or rule at issue.

[6] Counties 104 59

104 Counties

104II Government

104II(C) County Board

104k59 k. Liabilities of members. [Most Cited Cases](#)

“Willfully,” as used in statute allowing for imposition of penalty for county commissioner's willful breach of duty, implicitly requires a finding that the commissioner who willfully attempts to perform an act unauthorized by law either knew or should have known that the act was unauthorized by law; a mere mistake in legal judgment does not suffice for a finding of willfulness. [U.C.A.1953, 17-5-207 \(1999\)](#).

*790 Joseph E. Hatch, Eric P. Hartman, Salt Lake City, for Plaintiff.

Benson L. Hathaway, Jr., Richard J. Armstrong, Salt Lake City, for Defendants.

DURRANT, Justice.

¶ 1 The **Morgan** County Commission accused its clerk/auditor, Pauline M. **Green**, of failing to perform her statutorily mandated duties. The Commission hired an outside auditor to perform some of those duties. After conducting a public hearing, two of the three **Morgan** County Commissioners, Jan Turner and Michael McMillan, voted to “reduce” **Green's** salary by deducting the costs of hiring the outside auditor from **Green's** paychecks. **Green** petitioned for a writ of mandamus. The district court granted summary judgment in **Green's** favor, ordering the Commission to repay the amounts withheld from **Green's** salary.

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The court also ruled that Turner and McMillan owed a statutory penalty and were liable for **Green's** attorney fees. We affirm the district court's ruling regarding the deductions from **Green's** salary, but reverse its award of the penalty and attorney fees.

BACKGROUND

¶ 2 Pauline M. **Green** was appointed **Morgan** County Clerk/Auditor in February 1996 after her predecessor resigned. She was subsequently elected to that position in November 1996 for a term of two years. Thereafter a dispute arose between **Green** and the **Morgan** County Commission concerning the performance of **Green's** official duties. The Commission asserted **Green** had failed, after numerous requests, to perform a number of her statutory duties. Specifically, the Commission accused **Green** of failing to prepare a budget for the 1997 tax year, which resulted in the State Auditor's Office withholding property tax distributions. The Commission also claimed that **Green** had failed to reconcile the County's books with those of the County Treasurer, that she had failed to work on a full-time basis, and that she had been frequently absent from the office.

¶ 3 The Commission retained the services of an independent accountant to prepare a budget for 1997, and allegedly incurred other costs related to **Green's** purported failure to perform her statutorily mandated duties. In June of 1997, after conducting a publicly noticed meeting, the Commission entered an order, set forth in the minutes as follows:

Commissioner McMillan moved that the direct costs that [are] being incurred supporting the **Morgan** County Clerk's Office be deducted from the Clerk's wages as the billing for services is received. When the board of county commissioners finds that the Clerk's Office can no longer meet statutory requirements that they employ an accountant to stay in compliance and that those direct costs be deducted from the clerk's wages the deduction will be distributed across the remaining pay

periods for the year in which the charges are levied.

¶ 4 Turner and McMillan voted in favor of this motion. In response, **Green** filed a petition for an extraordinary writ in the form of mandamus. She accused Turner and McMillan of exceeding their authority as county commissioners. Turner and McMillan moved to dismiss. At a status conference, the motion to dismiss was converted to **Green's** motion for summary judgment for purposes of narrowing the legal issues prior to conducting*791 discovery. The court heard oral argument on the converted motion and ruled in favor of **Green**. It held that the **Morgan** County Commission had acted unlawfully in withholding portions of **Green's** salary. The court also held that Turner and McMillan were liable for payment of prejudgment interest, a statutory penalty of \$500, and attorney fees in the amount of \$10,000. The court imposed the penalty and awarded attorney fees based on [Utah Code Ann. § 17-5-207](#), which permits assessment of penalties and damages against county commissioners who “willfully, fraudulently, or corruptly attempt[] to perform an act unauthorized by law.” Turner and McMillan appeal both orders. **Green** cross-appeals from the court's refusal to grant a higher amount for attorney fees.

DISCUSSION

[1] ¶ 5 On appeal, Turner and McMillan argue that the district court erred in holding the Commission had no statutory authority to reduce **Green's** salary in the manner it did.^{FN1} They also argue that the court improperly construed the meaning of the term “willfully” in [Utah Code Ann. § 17-5-207](#) to justify its assessment of a \$500 penalty and an award of attorney fees. Both of these questions are matters of statutory interpretation, which we review for correctness. *See Stephens v. Bonneville Travel, Inc.*, 935 P.2d 518, 519 (Utah 1997).

FN1. As a preliminary matter, Turner and McMillan assert that **Green's** petition for an extraordinary writ was an improper proce-

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dural mechanism for bringing her complaint before the district court. However, Turner and McMillan have failed to present any substantial argument indicating that the district court did not have jurisdiction to entertain the complaint. Therefore, we do not address it. See *Brinton v. IHC Hosps., Inc.*, 973 P.2d 956, 964 (Utah 1998).

I. DEDUCTIONS FROM GREEN'S SALARY

[2] ¶ 6 Turner and McMillan argue that the Commission's act of making deductions from Green's salary falls within the scope of [Utah Code Ann. § 17-16-14](#), which provides as follows:

The annual salaries of the officers of all counties in the state shall be fixed by the respective county legislative bodies, provided no changes shall be made in existing salaries of county officers until the county legislative body in a county desiring to change existing salaries of county officers shall first hold a public hearing at which all interested persons shall be given an opportunity to be heard.

Turner and McMillan argue that this provision grants the Commission express power to deduct amounts paid to an outside auditor from Green's regular paychecks. They also maintain that the inherent implied powers the Commission possesses, *see, e.g., Gardner v. Davis County*, 523 P.2d 865, 867 (Utah 1974), and its discretionary supervisory power over county officers, *see Utah Code Ann. § 17-5-213*,^{FN2} allow it to make salary deductions for the alleged failure of an officer to perform statutory duties. We disagree.

FN2. The cited provision states that the county legislative body

may supervise the official conduct of all county officers and officers of all precincts, districts, and other subdivisions of

the county (except municipal corporations); see that they faithfully perform their duties, direct prosecutions for delinquencies, and when necessary require them to renew their official bonds, make reports, and present their books and accounts for inspection.

[Utah Code Ann. § 17-5-213](#).

¶ 7 [Section 17-16-14](#) plainly pertains to the fixing of “annual salaries” of county officers. As a matter of common sense, a *fixed* annual salary describes prospective, yearly pay. If the salary is subject to alterations in the midst of its prescribed term, then it is no longer a fixed salary at all, but a variable wage, adjusted according to the county legislative body's judgment about the performance of the officer's duties.

¶ 8 Moreover, the apparent purpose of [section 17-16-14](#) relates to budgetary concerns. Prior to 1969, [section 17-16-14](#) contained detailed information setting maximum annual salary levels for the various statutorily defined offices, indexed to the class level of the county. *See, e.g.*, 1967 Utah Laws, ch. 32, *792 § 1. It functioned in conjunction with the former [section 17-16-15](#), which directed the county commissions to meet biennially for the purpose of fixing the specific salary levels.^{FN3} In 1969, [section 17-16-15](#) was repealed. The general requirements relating to the timing of meetings to fix annual salaries were streamlined, simplified, and moved to [section 17-16-14](#). This evidently allowed county legislative bodies more flexibility in the process by which they fixed annual salaries.

FN3. The relevant text of this section provided as follows:

The board of county commissioners shall biennially, at a meeting held at least six

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months prior to the election of county officers, fix and determine the salaries of county officers, for whom maximum salaries are fixed, for the term next succeeding; provided that the salaries of such officers shall not be diminished or increased for the term for which they were elected and shall have qualified

Utah Code Ann. § 17-16-15 (repealed 1969 Utah Laws, ch. 41, § 2).

¶ 9 Despite the amendments, the essential nature of the provision has not been altered. It governs the method by which annual salaries are fixed. In this case, the Commission attempted to employ the statute as a punitive and remedial measure, sanctioning Green for alleged abuses of her office and seeking to recoup the costs of hiring an outside auditor. There is no indication the provision was intended to serve such purposes. Thus, the Commission's actions were not consonant with the evident scope of section 17-16-14.

[3] ¶ 10 We likewise find Turner's and McMillan's reliance upon the Commission's inherent and discretionary powers unavailing. If the Commission's authority under its generalized powers of supervision allowed discretionary deductions from an official's paycheck, the effect would be to eviscerate the requirement of section 17-16-14 that annual salaries be fixed. Moreover, the entire constitutional and statutory scheme defining the relevant spheres of authority of county officials would be jeopardized if we adopted Turner's and McMillan's interpretation. Taken to its logical conclusion, such a construction would allow county legislative bodies to directly hire persons to replace any elected official with whom they are displeased. We directly rejected this type of manipulation in *Salt Lake County Commission v. Salt Lake County Attorney*, 1999 UT 73, ¶ 21, 985 P.2d 899, 907 (holding county may not delegate statutory duties of county attorney to private counsel except in narrowly defined circumstances).^{FN4}

FN4. Although the facts of this case have not been sufficiently developed to allow a judgment as to the applicability of other statutory provisions, we note there are specifically defined methods for sanctioning county officials who fail to perform their duties and for obtaining remedies for damages caused by their unlawful actions. See, e.g., Utah Code Ann. § 17-18-1(4)(c) (authorizing county attorney to “proceed against any officer and sureties under this subsection for any neglect of duty”); *id.* §§ 77-6-1 to -9 (judicial proceedings to remove officers not subject to impeachment); *id.* § 17-16-11 (requirements for official bonds).

¶ 11 Therefore, we affirm the district court's grant of summary judgment with respect to its interpretation of section 17-16-14. The Commission exceeded its statutory authority when it deducted amounts from Green's paychecks for the purpose of paying the costs of hiring an outside person to perform her official duties.

II. STATUTORY PENALTY AND ATTORNEY FEES

[4] ¶ 12 The district court relied on Utah Code Ann. § 17-5-207 to assess a \$500 penalty against Turner and McMillan and to award Green \$10,000 in attorney fees. That section reads as follows:

Any county commissioner who refuses or neglects to perform any duty imposed upon him without just cause therefor or willfully violates any law provided for his government as such officer, or who, as commissioner, *willfully, fraudulently, or corruptly attempts to perform an act unauthorized by law* shall, in addition to the penalty provided in the penal code, *forfeit to the county \$500 for every such act, to be recovered on his official bond, and shall be further liable on his official bond to any person injured*

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thereby for all damages sustained.

Utah Code Ann. § 17–5–207 (emphasis added). The district court held that, based on *793 the stipulated facts, Turner and McMillan had “willfully ... attempt[ed] to perform an act unauthorized by law.” Additionally, the court concluded that Turner’s and McMillan’s liability in damages under this section extended to payment of Green’s attorney fees.

¶ 13 In holding Turner and McMillan had acted willfully, the district court reasoned that the statute “does not require bad faith or malice, but only deliberate and purposeful conduct.” The court cited *State v. Larsen*, 865 P.2d 1355, 1358 (Utah 1993) *Larsen* examined section 61–1–1(2) of Utah’s Uniform Securities Act, which dealt with making untrue statements or omitting necessary facts in the context of offers, sales, or purchases of securities. Penalties for violation of that section were in turn prescribed by section 61–1–21, which at that time imposed criminal liability for “[a]ny person who willfully violates any provision of this chapter.” See *id.*, 865 P.2d at 1358. With reference to the operation of section 61–1–21 in conjunction with subsection 61–1–1(2), we concluded that there was no “scienter” requirement inherently associated with the term “willfully,” and that the trial court did not err in failing to instruct the jury that it must find an intent to “deceive, manipulate, or defraud.” See *id.* at 1358–60; see also *Utah Dep’t of Transp. v. Osguthorpe*, 892 P.2d 4, 8 (Utah 1995).

¶ 14 The district court in the instant case adopted the same reasoning in the context of section 17–5–207. Because Turner and McMillan clearly intended to deduct money from Green’s salary, and because the district court determined that the Commission did not have the legal authority to make deductions from Green’s salary, the court concluded that Turner and McMillan had “willfully” attempted “an act unauthorized by law.”

¶ 15 Turner and McMillan argue that *Larsen* does not provide a correct analogy for usage of the term “willfully” in the context of section 17–5–207. Instead, they urge this court to look to the definition employed in the context of judicial conduct complaints. In *In re Worthen*, 926 P.2d 853, 869 (Utah 1996), we construed the grounds described in article VIII, section 13 of the Utah Constitution and in section 78–7–28(1) of the Utah Code as permitting disciplinary action against a judge for “willful misconduct in office,” or “willful and persistent failure to perform judicial duties.” We held that the term “willful” consisted not merely of deliberate or volitional action, but that it necessarily included a specific element of wrongful purpose or scienter. “Otherwise, a judge could have been acting out of the best of motives, could have been negligent only in exceeding his or her powers, and still could be found guilty of ‘willful misconduct.’ ” *Id.*, 926 P.2d at 868. The standard we adopted required a showing “that a judge intentionally committed a lawful act for an improper purpose or intentionally committed an unlawful act that the judge knew or should have known to be beyond his or her lawful power and committed the act for an improper purpose.” *Id.* at 869.

[5] ¶ 16 In the instant case, section 17–5–207 does not expressly indicate whether the term “willfully” includes an implied scienter component. As both *Larsen* and *Worthen* illustrate, the inclusion or exclusion of a scienter requirement depends largely on the context and purposes of the statute or rule at issue. In *Osguthorpe*, for instance, we held no scienter requirement was implicated in a “willful” failure to respond to discovery. See 892 P.2d at 8; see also *Morton v. Continental Baking*, 938 P.2d 271, 276 (Utah 1997). On the other hand, in *Fibro Trust, Inc. v. Brahman Financial, Inc.*, 1999 UT 13, ¶¶ 14–15, 974 P.2d 288, 293–94 we revisited the Uniform Securities Act previously construed by *Larsen* and held that scienter was required with respect to a different subsection of the Act. Specifically, we concluded that section 61–1–1(1) of the Act, which proscribes any

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“device, scheme, or artifice to defraud,” implicitly required scienter. We relied heavily on interpretations of the Uniform Act in other jurisdictions, which in turn had found a scienter requirement implicitly necessary to the concepts of “device,” “scheme,” or “artifice” to defraud. See 974 P.2d at 294. Thus, in two different cases treating precisely the same word in section 61–1–21 of the Uniform Securities Act, we attributed different interpretations. When interpreted in conjunction with subsection *794 61–1–1(2) of the Act, the term “willfully” did *not* include a scienter requirement, but when interpreted in conjunction with the preceding subsection 61–1–1(1), “willfully” *did* include such a requirement.^{FN5}

FN5. *Fibro Trust* consequently defeats Green's contention that the term “willful” or “willfully” presumptively does not include a scienter requirement unless the legislature plainly indicates. Taken together, *Larsen* and *Fibro Trust* demonstrate that context is the critical factor when interpreting the term “willful” or “willfully” in a statute or rule.

¶ 17 Looking to the context and purposes of section 17–5–207, we are persuaded that *Worthen* and *Fibro Trust* provide better analogues than *Larsen*. The overall tenor and context of section 17–5–207 indicates it was directed at punishing bad faith misconduct. The other terms within the same phrase, “fraudulently,” and “corruptly,” invoke concerns about bad faith abuses of public office. Cf. *Fibro Trust*, 974 P.2d at 294 (holding contextual implication of “device,” “artifice,” and “scheme” necessarily required element of scienter). Even the first portion of the provision, which contains no specific requirement of willfulness, states that refusal or neglect to perform duties may be sanctioned only if the dereliction was without good cause.

[6] ¶ 18 Moreover, the concerns relating to judicial conduct provide a much closer analogue to the situation at hand than any criminal statutes. Both

judges and county commissioners are public officials who have affirmative duties to act in the public interest. Although there are significant differences between the specific powers and responsibilities of judges and the specific powers and responsibilities of county commissioners, the fundamental concepts relating to acts beyond, or in derogation of, a judge's or commissioner's legal authority are fundamentally similar. If county legislative officials are unable to act upon affirmative duties in good faith and without fear of personal sanction or liability, they lose the capacity to act vigorously because they must constantly second-guess their actions. A mere mistake in judgment regarding the scope of authority could trigger serious personal consequences.^{FN6} County legislative officials must necessarily exercise judgment and discretion in many of the decisions they undertake. We do not believe the legislature designed section 17–5–207 to function as an instrument for rendering commissioners personally liable for those good faith misjudgments. There is a substantial policy justification for assuming the legislature intended this provision to apply only to actions implicating an element of bad faith.^{FN7} We therefore hold that the term “willfully,” as used in section 17–5–207, implicitly requires a finding that the commissioner who “willfully ... attempts to perform an act unauthorized by law” either knew or should have known that the act was unauthorized by law. A mere mistake in legal judgment, which is all that has been shown thus far, based on the stipulated facts in this case, does not suffice for a finding of willfulness. The district court erred in its interpretation of section 17–5–207.^{FN8}

FN6. This does not mean that the legislature or other drafter of rules governing the conduct of public officials cannot choose to hold public officials to a higher standard. Rather, it means there is a clear public policy basis for justifiable hesitation in imposing severe personal sanctions for good faith misjudgments as to scope of authority. For instance, *Worthen* acknowledged that judges are ex-

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pected to educate themselves sufficiently to avoid departures, willful or otherwise, from the proper exercise of their authority. *See* 926 P.2d at 870. Accordingly, some of the standards permitting sanctions for judicial misconduct do not include a requirement that the misconduct be willful. *See id.* (noting that “conduct prejudicial to the administration of justice which brings a judicial office into disrepute,” does not require a showing of willful “bad faith”). However, merely negligent judicial misconduct is presumptively less egregious and therefore entails a lesser sanction. *See id.* In the instant case, by contrast, the statute draws no distinction in the severity of the sanction for willfully, fraudulently, or corruptly attempting an unauthorized act.

FN7. We have often cited this same policy concern as the justification for granting governmental immunity to officials who are exercising discretionary functions. *See, e.g., Nelson v. Salt Lake City*, 919 P.2d 568, 574–76 (Utah 1996).

FN8. Because our interpretation of the term “willfully” resolves the issue of the assessment of penalties and damages under section 17–5–207, we need not address the question of whether “damages” under that same section may include attorney fees.

*795 ¶ 19 In conclusion, we affirm the court's summary judgment with respect to the issue of the Commission's authority to make deductions from Green's paycheck, but reverse on the issue of the statutory penalty and attorney fees.^{FN9} We remand the case for further proceedings, if any.

FN9. In her cross-appeal, Green asserts that the district court lacked a substantial eviden-

tiary basis for reducing the award of attorney fees from approximately \$15,700 to \$10,000. In light of our decision that the district court improperly awarded attorney fees pursuant to section 17–5–207, Green's cross-appeal is rendered moot. Nor do we address Green's contention that there are alternate grounds for affirming the district court's award of attorney fees. While we may consider any alternate ground that was argued below for supporting the district court's decision, that alternate ground must be supported by an adequate record. The bare record in this case, consisting of stipulated facts, provides an inadequate basis for awarding attorney fees on any of the asserted alternate grounds.

¶ 20 Chief Justice HOWE, Associate Chief Justice RUSSON, Justice DURHAM, and Justice WILKINS concur in Justice DURRANT's opinion.

Utah, 2000.

Green v. Turner

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Supreme Court of Utah.
MURPHY
 v.
GRAND COUNTY et al.

No. 7998.
 March 25, 1954.

Proceeding to recover salary of the predecessor of plaintiff as County Attorney of Grand County in lieu of the salary fixed by the Board of County Commissioners. From a judgment for plaintiff in the Seventh Judicial District Court for Grand County, F. W. Keller, J., the defendants appealed. The Supreme Court, McDonough, J., held that where salary of County Attorney which formerly had been \$1,000 per year was reduced by the Board to \$10 per year, plaintiff elected to the office was not entitled to compensation at the rate paid his predecessor on the ground that \$10 a year was tantamount to a prohibited destruction of the office.

Reversed.

Wade, J., dissented.

West Headnotes

[1] Administrative Law and Procedure 15A
 **324**

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak324 k. Discretion. **Most Cited Cases**

Officers and Public Employees 283  **103**

283 Officers and Public Employees
283III Rights, Powers, Duties, and Liabilities
283k102 Authority and Powers
283k103 k. In general. **Most Cited Cases**

A “discretion” when vested in an officer does not mean absolute or arbitrary power but it must be exercised in a reasonable manner and not maliciously, wantonly, and arbitrarily to the injury of another.

[2] Officers and Public Employees 283  **99**

283 Officers and Public Employees
283III Rights, Powers, Duties, and Liabilities
283k93 Compensation and Fees
283k99 k. Form and amount of compensation. **Most Cited Cases**

Presumption is that a stated compensation attached to an office is adequate for the services.

[3] Constitutional Law 92  **2563**

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)3 Encroachment on Executive
92k2561 Powers, Duties, and Acts Under Legislative Authority
92k2563 k. Judicial encroachment on executive acts taken under statutory authority. **Most Cited Cases**
 (Formerly 92k74)

In the absence of clear evidence of a failure by the

(Cite as: 1 Utah 2d 412, 268 P.2d 677)

board of county commissioners to exercise a legal discretion, the court cannot substitute its views of proper salaries for those of a board vested with discretion by the legislature.

[4] Officers and Public Employees 283 99

283 Officers and Public Employees

283III Rights, Powers, Duties, and Liabilities

283k93 Compensation and Fees

283k99 k. Form and amount of compensation. [Most Cited Cases](#)

Determination of what is a reasonable compensation for a particular service rendered by a public officer rests in the discretion of a public board and court will not revise its action in absence of clear evidence of manifest abuse of discretion.

[5] District and Prosecuting Attorneys 131 1

131 District and Prosecuting Attorneys

131k1 k. Nature and functions of office. [Most Cited Cases](#)

District and Prosecuting Attorneys 131 2(5)

131 District and Prosecuting Attorneys

131k2 Appointment or Election, and Qualification and Tenure

131k2(5) k. Tenure and removal. [Most Cited Cases](#)

Board of county commissioners could not constitutionally abolish the office of county attorney by refusing to appropriate a salary as compensation for the position, nor did it have power to terminate the salary of the official during his elected term and thus vacate the office. Const. art. 21, § 1; U.C.A.1953, 17-16-15.

[6] District and Prosecuting Attorneys 131 5(4)

131 District and Prosecuting Attorneys

131k4 Compensation and Fees

131k5 In General

131k5(4) k. Salary, extra allowances, and deductions. [Most Cited Cases](#)

The board of county commissioners has the power to determine the value of the office of county attorney to the county and the courts will not usurp that power. U.C.A.1953, 17-16-15.

[7] District and Prosecuting Attorneys 131 5(4)

131 District and Prosecuting Attorneys

131k4 Compensation and Fees

131k5 In General

131k5(4) k. Salary, extra allowances, and deductions. [Most Cited Cases](#)

Where salary of county attorney for Grand County which formerly had been \$1,000 per year was reduced by the board of county commissioners to \$10 per year, one elected to the office was not entitled to compensation at the rate paid his predecessor on the ground that \$10 a year was tantamount to a prohibited destruction of the office in absence of proof that the action of the board was arbitrary. U.C.A.1953, 17-16-14, 15, 17-18-1.

FN1. [Taylor v. Robertson](#), 16 Utah 330, 52 P. 13.

FN2. [Argyle v. Wright](#), 63 Utah 184, 224 P. 649.

*413 **677 Mitchell Melich, Moab, for appellants.

Hammond & Hammond, Price, for respondent.

McDONOUGH, Justice.

Appeal from a judgment of the lower court granting respondent the salary of his predecessor in the position of County Attorney of Grand County in lieu of the salary fixed for the position by the Board of County Commissioners of Grand County.

On April 3, 1950, the Board of County Commissioners of Grand County at a regularly held meeting and in pursuance of the power vested in the board by U.C.A.1943, 19-13-15 (now U.C.A.1953, 17-16-15) set ****678** the salaries for the various county officials. A noticeable change was made in the salary for County Attorney, which had formerly been \$1,000 per year, when the salary for the coming term, beginning January 1, 1951, was set at \$10 per year. Plaintiff was elected and qualified for office by taking his oath and furnishing his bond at the beginning of that term, and subsequently presented a claim based on the rate of \$1,000 per year and when this claim was denied, brought suit. The trial court, finding that \$10 per year was tantamount to destruction of the office by the board, held the action of the board in setting such salary void.

[1] It has been held that the statute fixing the maximum salaries for officers of counties of the five classes, U.C.A., 1943, 19-13-14 (U.C.A.1953, 17-16-14) determines merely the maximum beyond which which the county boards may not fix a salary but leaves the exact amount to be paid below ***414** that maximum to the discretion of the board. [Johnson v. Bankhead, Utah, 232 P.2d 372](#). The question here presented, then, is whether the courts may interfere with a determination of the board which sets the salary at only one per cent of the salary paid for the term immediately preceding or slightly more than one-half of one per cent of the statutory maximum for a county of that class.

In 14 Am.Jur., Counties, Sec. 33, the rule is laid down as follows:

‘The relationship of the courts to the other departments of government is such that they cannot perform executive duties or interfere with the performance of legislative duties. They are not endowed with visitatorial powers to approve or disapprove the manner in which county commissioners exercise the powers conferred upon them. They cannot reach or control the commissioners in this regard unless in some manner the latter have brought themselves within judicial cognizance. So long as the commissioners act honestly and in good faith and keep within the limits of the powers given them by the law, the courts have no authority to interfere with or control their legitimate discretion.’

This broad rule for the limits upon discretion vested by the legislature in public officers has been further qualified in this jurisdiction: ‘Discretion, when vested in an officer, however, does not mean absolute or arbitrary power. The discretion must be exercised in a reasonable manner, and not maliciously, wantonly, and arbitrarily to the wrong and injury of another.’ [Taylor v. Robertson, 16 Utah 330, 52 P. 13](#).

The difficulty here involved is created by the fact that the trial court, although recognizing this rule, determined that the amount of compensation alone was evidence of an abuse of discretion on the part of the county board, for no evidence was presented to prove that the board lacked jurisdiction or acted other than in good faith. We have no evidence in the record transmitted to us showing unreasonableness in the board's action, and thus must inquire whether the fact of the drastic reduction alone is conclusive evidence of either an arbitrary and unreasonable action on the part of the board or bad faith in seeking to discourage candidates for office. The meager evidence which we may consider is gleaned from admissions, stipulations, and judicial notice. Grand County is a county of approximately 2,000 inhabitants. In many of our 29

counties, the county attorney is not required to be a lawyer and plaintiff is not a member of the Utah Bar. We have nothing to tell us of his qualifications as a legal advisor to the county. No one ran for the position of county attorney at the time of his election, which was achieved through a write-in vote of 44 votes.

Whether or not the action was arbitrary in the light of services rendered to the *415 county cannot be determined from the statute outlining the powers and duties of a county attorney, U.C.A.1943, 19–15 (now U.C.A.1953, 17–18), for we have no evidence of the extent of need of the county for such services or how often such services are rendered. The mere fact that the statute empowers an elected person to perform certain legal functions, regardless of his lack of training, is not evidence that plaintiff is capable of performing or in fact does perform those functions. In the case of **679 *De Merritt v. Weldon*, 154 Cal. 545, 98 P. 537, 16 Ann.Cas. 955, the court recognized the statutory duties of the town marshal of Ukiah City (1800 inhabitants) as consisting of execution of all process, collecting town taxes and licenses, and being in charge of the police department, the city prison, and any chain gang; but upon evidence that there was no prison nor chain gang, held that \$10 per month salary was not an abuse of discretion by the town board of trustees, nor evidence of bad faith or fraud, such as would nullify the action of the board.

[2][3] It is conceivable that, in the smaller counties, the office of county attorney is one for which qualified persons will compete merely for the prestige of the office. We cannot determine the amount of time necessary for the county attorney to devote to his official position and have no guides by which to say that the board acted arbitrarily. Additionally, we are met by the presumption that a stated compensation attached to an office is adequate for the services. 43 Am.Jur., Public Officers, Sec. 393. In the absence of clear evidence of a failure by the board to exercise a legal discretion, the court cannot substitute its views of proper salaries for those of a board vested with

discretion by the legislature.

The few cases in point on this matter adopt the principle that there is a limitation to the discretion of the administrative bodies in fixing salaries in that they cannot fix the salary so low as to amount to destruction of the office or to create a situation where no competent person would perform the duties of the office for that compensation. However, the only cases which we have discovered to which the limitation was applied to defeat the action of the board, were cases where there was a positive showing of bad faith on the part of the members of the board. *State ex rel. Yeargin v. Maschke*, 90 Wash. 249, 155 P. 1064; *Board of Sup'rs of De Soto County v. Westbrook*, 64 Miss. 312, 1 So. 352. In the case of *State ex rel. Thurmond v. City of Shreveport*, 124 La. 178, 50 So. 3, 134 Am.St.Rep. 496, the court merely raised the salary to the statutory minimum. In the cases of *City and County of Denver v. Bigelow*, 113 Colo. 170, 155 P.2d 998, *De Merritt v. Weldon*, 154 Cal. 545, 98 P. 537, 16 Ann.Cas. 955, supra, *Locke v. City of Central*, 4 Colo. 65, 34 Am.Rep. 66, where there was no allegations of fraud or bad faith, the courts refused to interfere with a board's determination of salaries to be paid to county officials, even though expressing *416 the view that the court's determination of a reasonable salary would be much greater in amount.

The fact that no one ran for the office of county attorney in Grand County for the term beginning 1951 is not evidence of a design on the part of the board to abolish the office. We do not know if the previous attorney was elected on a write-in vote when the compensation was fixed at \$1,000. The argument that no competent person would perform the duties for a salary fixed at so low a rate was squarely met by the court in *Butler v. Williams*, 207 Cal. 732, 279 P. 992, 994, where, as here, plaintiff took office after the salary had been reduced:

'Nor do we think the petitioner has any just cause to complain. The salary of the office of county sur-

veyor of said county was fixed at the sum of \$10 per month more than a year before he was elected to that position. He knew at the time he became a candidate for said office and at the time he qualified and took the oath to perform the duties of the office what the salary was and would be during the term for which he was elected. The fact that he accepted the office with the salary as fixed at that time and that he has continued to discharge its duties is a conclusive answer to his contention that the Legislature by fixing the salary at this low figure has thereby destroyed the office and that no competent person would perform the duties thereof for the amount fixed as salary. No doubt the prestige enjoyed by petitioner as county surveyor of his county and the right given him under the statute to engage in private practice are of substantial value to him.'

****680 [4]** The determination of what is a reasonable compensation for a particular service rendered by a public officer rests in the discretion of a public board and the court will not revise its action in the absence of clear evidence of such manifest abuse of power as to show that the board failed to exercise a legal discretion.

We do not hold that an express showing of bad motive is necessary to make out a case where the effect of the board's action is to abolish an office provided for by the constitution. If this were necessary, very often the taxpayer or office-holder would have no redress, for only those in conspiracy would have evidence necessary to make the proof. However, because of the court's reluctance to interfere in matters properly within the province of an administrative body, some proof must be offered to show arbitrariness and abuse of discretion in that board. It is as difficult for this court to determine that the board has acted unreasonably in setting the salary at ten dollars per year as it would be for this court to set the reasonable value of plaintiff's services in the first instance without some evidence of the actual functions*417 of the County Attorney in Grand County.

[5][6] The board could not constitutionally abolish the office by refusing to appropriate a salary as compensation for the position, Constitution of Utah, Art. XXI, Sec. 1, nor does it have the power to terminate the salary of an official during his elected term and thus vacate the office, *Argyle v. Wright*, 63 Utah 184, 224 P. 649. However, the Board does have the power to determine the value of the office to the county under our statute U.C.A.1943, 19-13-15 (now U.C.A.1953, 17-16-15) and the courts will not usurp that power.

[7] Plaintiff has not presented a claim upon which relief may be granted. The judgment of the trial court is reversed. Each party to bear its own costs.

CROCKETT and HENRIOD, JJ., concur.

WADE, Justice (dissenting).

I agree that the Board of County Commissioners 'cannot fix the salary so low as to amount to destruction of the office or create a situation where no competent person would perform the duties of the office for that compensation,' and that 'an express showing of bad motive is' not necessary. Fixing the salary of the county attorney for Grand County at \$10.00 per year is no compensation at all and could have no other effect than to destroy the office or make it so that no competent person would perform the duties of that office for that sum. It seems clear that such salary would be no inducement to a competent person to accept the office and perform the duties thereof. This case is distinguishable from *Butler v. Williams*, 207 Cal. 732, 279 P. 992, in that there the salary was fixed at \$10.00 per month, twelve times as much as here, and the term of office covered a period from 1927 to 1931 when the value of a dollar was much greater than now.

The office of county attorney is created by express constitutional provision, ^{FNI} and the statutory duties thereof cover the whole range of governmental

activities in the county. He must cause the arrest of and prosecute in the justices' court all public offenders in the county and assist the district attorney in his prosecution in the district court. He must represent the interests of juveniles charged with delinquency in the juvenile court, represent the state in juvenile custody cases and prosecute persons charged in the juvenile court with contributing to the delinquency of minors; he must approve or reject all claims for juror fees and fees for witnesses in criminal cases; he must defend all actions against the county and prosecute for the county all actions for debt, fines, penalties and forfeitures; he must give his opinion to all county, district and precinct officers *418 and must give receipts and account monthly for all moneys and property received by him in his official capacity.^{FN2} He is the official adviser of the Board of County Commissioners and must pass on all claims **681 against the county.^{FN3} He must forward to the district attorney the transcript of all examination before a justice of the peace of persons charged with felony and held for the district court with a list of the witnesses for the state and a statement of the facts.^{FN4} He must institute suits to recover all forfeitures by the county treasurer.^{FN5} He must appear and represent the child in cases for the annulment of an adoption.^{FN6} No warrant for the arrest of any person shall be issued by a justice of the peace except on his approval.^{FN7} He must institute proceedings to enforce the banking laws,^{FN8} institute bastardy proceedings and examine the woman in the presence of the defendant,^{FN9} prosecute violations of the blue sky laws,^{FN10} and in all cases where foul play is suspected he must receive the death certificate and investigate the bodies and circumstances of death and make recommendations on whether an inquest should be held;^{FN11} he must be served with summons in all divorce cases charging permanent insanity and must investigate the merits of the case and defend the rights of the person so charged,^{FN12} and witness the drawing of the names of all trial and grand jurors.^{FN13} He must prosecute the violation of election laws,^{FN14} laws requiring campaign statements,^{FN15} and the corrupt practice act.^{FN16} He must examine and certify the fees

of all jurors and all witnesses in criminal cases,^{FN17} institute suits to recover all moneys unlawfully paid by the county;^{FN18} upon request, aid in the prosecution or defense of workmen's compensation suits,^{FN19} collect property of deceased from justice of the peace and the costs of inquests from the estate of the deceased,^{FN20} prosecute military offenses,^{FN21} institute proceedings for a bond to keep the peace and prosecute the violation thereof,^{FN22} and is the legal adviser of the state engineer on matters in his county.^{FN23} He must prosecute on the assessor's bond for failure to complete assessments,^{FN24} bring an action to set aside any unlawful *419 levy,^{FN25} institute and prosecute actions in behalf of the trade commission,^{FN26} and prosecute for the operation of all unlawful pools and trusts.^{FN27}

FN1. Constitution of Utah Article VIII, § 10.

FN2. Sec. 17-18-1, U.C.A.1953 and 55-10-12, U.C.A.1953.

FN3. Sec. 17-18-2, U.C.A.1953.

FN4. Sec. 17-18-3, U.C.A.1953.

FN5. Sec. 17-24-13, U.C.A.1953.

FN6. Sec. 78-30-13, U.C.A.1953.

FN7. Sec. 77-12-1, U.C.A.1953.

FN8. Sec. 7-1-23 and 24, U.C.A.1953.

FN9. Sec. 77-60-2, U.C.A.1953.

FN10. Sec. 61-1-27, U.C.A.1953.

FN11. Sec. 26-4-8 and 9, U.C.A.1953 and Sec. 77-58-22, U.C.A.1953.

FN12. Sec. 30-3-1, U.C.A.1953.

[FN13](#). Sec. 78–46–21, U.C.A.1953.

[FN14](#). Sec. 20–13–11, U.C.A.1953.

[FN15](#). Sec. 20–14–14, U.C.A.1953.

[FN16](#). Sec. 20–14–23, U.C.A.1953.

[FN17](#). Sec. 24–5–7, U.C.A.1953.

[FN18](#). Sec. 17–5–12, U.C.A.1953.

[FN19](#). Sec. 35–1–32 and 101, U.C.A.1953.

[FN20](#). Sec. 77–58–20 and 21, U.C.A.1953.

[FN21](#). Sec. 39–1–50, U.C.A.1953.

[FN22](#). Sec. 77–4–15, U.C.A.1953.

[FN23](#). Sec. 73–2–13, U.C.A.1953.

[FN24](#). Sec. 59–5–35, U.C.A.1953.

[FN25](#). Sec. 59–9–9 and 10, U.C.A.1953.

[FN26](#). Sec. 13–2–17, U.C.A.1953.

[FN27](#). Sec. 50–1–9, U.C.A.1953.

Though the county attorney is not required to be admitted to the bar, still it was the duty of the board of county commissioners to make his compensation sufficient to induce a competent person to accept the office and perform the duties thereof efficiently. If the salary was fixed so low because they do not expect competent services, then their purpose in fixing it so low is to destroy the office and not be bothered with such an officer. It is not material here whether this

plaintiff efficiently performed any services or not. It was the board's duty to fix reasonable compensation for the services required of that office so that the office would perform its proper functions, and not to reduce the compensation so low that no services could be expected therefrom. The latter would have the effect of destroying the office, which the law forbids the board to do.

Grand County has an assessed valuation of \$4,976,689 and a population of ****682** about 2000 people. Even assuming that its population is exceedingly law abiding and its county business is unusually small, a reading of the duties of the county attorney makes it very clear that compensation for the discharge of the duties of that office would amount to many times the nominal sum allowed. There are bound to be some arrests made, a lot of claims presented to the county and much advice and some litigation over claims against the county which he should attend to. I think it entirely outside of the bounds of reason to hold that \$10.00 per year is any compensation for the services required, and that such a salary could have any other effect than to destroy the office and render it incapable of being of any value to the county.

WOLFE, C. J., does not participate herein.

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Supreme Court of Utah.
SHERIFF OF SALT LAKE COUNTY et al.

v.

BOARD OF COM'RS OF SALT LAKE COUNTY.

Nos. 4727, 4728.

June 4, 1928.

Application by the Sheriff of Salt Lake County and others for a writ of prohibition to the Board of County Commissioners of such county. Writ made permanent.

Gideon, J., dissenting.

West Headnotes

Counties 104 38

104 Counties

104II Government

104II(C) County Board

104k38 k. Nature and Constitution in General. [Most Cited Cases](#)

Sheriffs and county commissioners' offices are co-ordinate offices or branches of county government, and act independently.

Officers and Public Employees 283 71

283 Officers and Public Employees

283I Appointment, Qualification, and Tenure

283I(G) Resignation, Suspension, or Removal

283k71 k. Removal or Suspension by Act of Superior Officer or Authority. [Most Cited Cases](#)

Authority appointing public officer, whose term or tenure is not fixed by law, generally may suspend or remove him without notice, charges, or hearings.

Prohibition 314 1

314 Prohibition

314I Nature and Grounds

314k1 k. Nature and Scope of Remedy. [Most Cited Cases](#)

Prohibition is preventive, not corrective, remedy.

Sheriffs and Constables 353 1

353 Sheriffs and Constables

353I Appointment, Qualification, and Tenure

353I(A) Sheriffs

353k1 k. Nature and Existence of Office. [Most Cited Cases](#)

Generally, sheriff acts independently of county commissioners in performing his statutory duties.

Sheriffs and Constables 353 18

353 Sheriffs and Constables

353I Appointment, Qualification, and Tenure

353I(C) Deputies and Assistants, Substitutes, and Special Officers

353k16 Deputies and Delegation of Powers

353k18 k. Appointment. [Most Cited Cases](#)

Sheriff appoints deputies, but appointments are ineffective until county commissioners consent and appointees take oaths (Comp. Laws 1917, § 1461).

Sheriffs and Constables 353  **21****353** Sheriffs and Constables**353I** Appointment, Qualification, and Tenure

353I(C) Deputies and Assistants, Substitutes, and Special Officers

353k16 Deputies and Delegation of Powers**353k21** k. Term and Tenure of Office.**Most Cited Cases**

Sheriff only can summarily suspend or remove deputies, except as affected by county commissioners' determination that their services are no longer necessary (Comp. Laws 1917, § 1461).

***784** Fabian & Clendenin and Badger, Rich & Rich, all of Salt Lake City, for plaintiffs.

Walter B. Kelly, Co. Atty., of Salt Lake City, for defendant.

STRAUP, J.

The question presented by this proceeding involves the power of the county commissioners of Salt Lake county to suspend or remove from office deputy sheriffs of the county against their will and that of the sheriff.

The commissioners suspended six deputy **sheriffs** without notice or a hearing and without preferring any charges against them or stating any reason or ground therefor, except that the commissioners "deemed it advisable and for the best interest and welfare" of the county. The **sheriff** and the deputies applied to this court for a writ of prohibition to restrain and prevent the commissioners from enforcing or carrying into effect the order, alleging that the commissioners had no power or authority to so suspend the deputies or to further proceed in the premises. An alternative writ was issued by us directed to the **commission** to desist or show cause. The commissioners demurred and

answered admitting that the deputies were suspended by them without notice or a hearing and without preferring any charges against them; that the commissioners did so because they "deemed it advisable and for the best interest and welfare" of the county; and in substance alleged that the deputies in legal effect were appointed by the commissioners for an indefinite and unstated period and that hence they had the right, with or without cause and without notice or a hearing, or without preferring any charges, to suspend or remove the deputies whenever the board was disposed so to do, without the advice of or consultation with the **sheriff** and even against his will. The commissioners further alleged that they as a matter of fact suspended the deputies because the deputies by indictment of the grand jury of the United States District Court in and for the state of Utah were charged with violations of the act of Congress known as the National or Federal Prohibition Act, and that hence the commissioners deemed it advisable and for the best interest of the county that such deputies be not permitted longer to perform any duties or functions of their office until a trial on or other disposition of the indictments; and while no such, or any, ground was charged or preferred by or before the board of county commissioners, and no such or any ground made a matter of record by the board, yet, such, without notice or a hearing or inquiry further than the fact that such indictments were found and returned, was the real cause which induced the suspension of the deputies by the commissioners.

When the term or tenure of a public officer is not fixed by law, the general rule is that the power of removal or suspension, unless controlled by statute, is an incident to the power of appointment. In such case the office is held during the pleasure of the authority making the appointment, and in the absence of a statute on the subject no notice or charges or hearings are required for the suspension or removal by the authority appointing the officer. 22 R. C. L. 562-576. The appointment of the deputies here was not for any fixed or stated term or period. What divides the parties is this: The commissioners contend that the appointing

power was with them and that they, in legal effect, appointed the deputies, and hence that they had the authority to summarily suspend or remove them at pleasure with or without cause; that the sheriff and the deputies dispute and urge that the power of appointment and summarily to suspend or remove the deputies rested with the sheriff, so long as the office itself was not abolished or that the purpose or necessity for which the deputies were appointed no longer existed, a matter not here claimed or involved. That is to say, the deputies were not suspended or removed for any reason that the purpose or necessity for which they were appointed no longer existed, or had ceased.

*785 The statute, section 1461, Comp. Laws Utah 1917, provides that “every county * * * officer * * * may, by and with the consent of the board of county commissioners, appoint as many deputies and assistants as may be necessary for the prompt and faithful discharge of the duties of his office,” and “that any officer appointing any deputy shall be liable for all official acts of such deputy.” The commissioners contend that when this section is construed in connection with other provisions of the statute relating to the powers, duties, and offices of the board of county commissioners, the section means that the county officer, here the sheriff of the county, may only nominate and present to the board the name or names of a deputy or deputies deemed necessary for the prompt and faithful discharge of the duties of his office, and that it is then the province and within the power of the board to determine the question of necessity of making the appointments as well as the fitness and suitability of the person or persons whose names are presented, and accordingly to consent or withhold consent which, as it is claimed, in legal effect, is tantamount to the making or not making of the appointment. The additional provisions of the statute referred to are: Section 1361, Comp. Laws Utah 1917, providing that the powers of the county can be exercised only by the board of county commissioners or by agents and officers acting under authority of the board or authority of law; Sections 1400 and 1400x3, that

the board of county commissioners in each county has jurisdiction and power, among other things, to supervise the official conduct of all county officers; section 1400x19, authorizing the board of county commissioners to make and enforce, within the limits of the county, outside the limits of incorporated cities and towns, all such legal, police, sanitary, and other regulations as are not in conflict with general laws; and section 1400x22, which authorizes the board to do and perform all other acts and things required by law which may be necessary to the full discharge of the duties of the board.

The **sheriff's** office is an elective office of the county, as is also the office of a county commissioner, and is a co-ordinate office or branch of our county government. His powers and duties are prescribed by statute and are similar to those generally prescribed by other western states. In performing them, he, generally speaking, acts independently of the board of county commissioners except as otherwise restricted and specified by statute. Except by and with the consent of the board of county commissioners he may not make a binding or completed appointment of a deputy or deputies, and until such consent is had and such deputy has taken the oath of office, he, in law, is not a deputy and may not act or perform official functions or offices as such. While the matter may not be entirely free from doubt, yet we are of the opinion that the proper construction and interpretation of section 1461 is that it is the county officer, here the **sheriff**, who appoints his deputy or deputies, but that such appointment does not become effective or binding until consented to by the board of county commissioners and the person so appointed has taken the oath of office; and therefore, whatever summary power of suspension or removal of a deputy may be exercised is to be exercised by the **sheriff** and not by the board of county commissioners, except as may directly or indirectly result from a determination by the board that the services of the deputy or deputies theretofore appointed are no longer necessary, and even then we think it would be within the province of the **sheriff** to

indicate which of his deputies were to be retained and which dismissed or let out, unless the **commission** had determined that the service of no deputy longer was necessary. In principle, directly or indirectly supporting these views, as we think, are the following cases: [Hanchett v. Burbidge](#), 59 Utah, 121, 202 P. 377; [Skeen v. Browning](#), 32 Utah, 164, 89 P. 642; [Sedgwick County Commissioners v. Toland](#), 121 Kan. 109, 245 P. 1019; [Jackson v. Thurston County](#), 127 Wash. 41, 219 P. 840; [Harrington v. Pardee](#), 1 Cal. App. 278, 82 P. 83; [People v. Prendergast](#), 219 N. Y. 252, 114 N. E. 433; [People v. Raymond](#), 129 App. Div. 477, 114 N. Y. S. 365; [Myers v. United States](#), 272 U. S. 52, 47 S. Ct. 21, 71 L. Ed. 160. Such view is also in harmony with the provision of the section that “any officer appointing any deputy shall be liable for all official acts of such deputy,” which is in recognition of the principle “that those in charge of and responsible for administering functions of government, who select their executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint” ([Myers v. United States](#), *supra*). Certain it is that the board of commissioners is not nor are any of its members in any sense civilly or otherwise liable for the official acts of a deputy **sheriff** but the **sheriff** is so civilly liable. The commissioners do not deny that, but urge that while the **sheriff** may summarily remove or suspend a deputy either with or without the consent of the board, yet so may also the board suspend a deputy with or without the consent of the **sheriff**; to support which, and also to support the contention that the suspension was within the power of the board, the commissioners chiefly rely on the cases of [State v. Megaarden](#), 85 Minn. 41, 88 N. W. 412, 89 Am. St. Rep. 534, and [State v. Peterson](#), 50 Minn. 239, 52 N. W. 655. It, however, is perceived that these cases deal with a statute and with a question different from that here involved, and for such reason as we think do not support the claim of the commissioners.

The petitioners further urge that the methods*786 provided by statute (sections 3360 and 8625, Comp. Laws Utah 1917) relating to removal of officers are

exclusive and that no attempt was made to comply therewith or to pursue such a course. We find it unnecessary to decide whether the methods so provided by such sections for a removal or suspension of an officer are or are not exclusive. It is enough to now decide, as we do, that the board of county commissioners have no power to summarily suspend or remove the deputies as here was done.

On the face of the record the remedy sought by prohibition may be open to question because the commissioners, when the writ was applied for and the alternative writ granted, had already suspended the deputies and because the writ of prohibition is a preventive and not a corrective remedy. On the other hand, there is the further question of whether the action of suspension was only partial and not fully completed and whether in connection therewith there was any further action to be arrested and injury to be prevented in carrying out the order. [Oldroyd v. McCrea](#), 65 Utah, 142, 235 P. 580, 40 A. L. R. 230; High, Extraordinary Remedies. However, no question of remedy is raised or presented by the commissioners. Evidently both parties desire the views of this court as to the power and jurisdiction of the commissioners in the premises, regardless of any question of remedy. We are of the opinion that the action of the commissioners suspending the deputies as here was done was without authority; and as no question of remedy is urged, let the writ heretofore issued be made permanent. Such is the order. No costs.

THURMAN, C. J., and CHERRY and HANSEN, JJ., concur.

GIDEON, J.

I dissent. Time permitting, I shall later file with the clerk the reasons upon which I base my dissent.

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