

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1991 Term

NO. 20325

COMMON CAUSE OF W. VA., ET AL.

v.

EARL RAY TOMBLIN, ET AL.

Petition for a Writ of Mandamus

WRIT GRANTED AS MOULDED

Submitted: September 11, 1991

Filed: December 9, 1991

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JUSTICE NEELY delivered the Opinion of the Court.

Miller, C. J., dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. W. Va. Code, 4-1-18 [1969], which directs the Conferees Committee on the Budget to prepare a digest summary of the budget bill containing detailed information similar to that included in the budget document submitted to the legislature by the governor, is not unconstitutional as a delegation of power by the whole legislature to a committee of the legislature because the digest summary in question does not have the force and effect of law.

2. Although the Legislative Budget Digest prepared by the Conferees Committee on the Budget does not have the force and effect of law, it is a legitimate part of the ongoing dialogue between the legislative branch and executive branch concerning the allocation of state funds; consequently, the integrity of the process by which the Digest is prepared is of sufficient importance to be legally protected.

3. The Budget Digest must be approved by the entire Conferees Committee on the Budget at a regular meeting scheduled in the normal course of business and open to the public.

4. In order that officers in the executive branch not be confused concerning the nature of the Budget Digest, the Budget Digest must be clearly marked with a notice that the document has been prepared

by the Conferees Committee on the Budget and that the Budget Digest does not have the force and effect of law.

5. In order for the Budget Digest to conform to the requirement of W. Va. Code, 4-1-18 [1969], which directs the Conferees Committee on the Budget to prepare a "digest or summary" of the budget, the finance committees, their chairmen, or the subcommittee chairmen must have memoranda of the negotiations, compromises and agreements or audio recordings of committee or sub-committee meetings where votes were taken or discussions had that substantiate the material which is organized and memorialized in the Budget Digest.

Neely, Justice:

W. Va. Code, 4-1-18 [1969], directs the legislature to "prepare a digest or summary of the budget bill containing detailed information similar to that included in the budget document submitted to the legislature by the Governor but including amendments of legislative committees, and as finally enacted by the Legislature."¹

On 17 March 1991 the West Virginia Legislature enacted into law Enrolled Committee Substitute for House Bill 2040, which was the budget bill of the State of West Virginia for fiscal year 1992. The budget bill was enacted pursuant to the procedures set forth in W. Va. Const., art. VI, § 51, known as the "Modern Budget Amendment."

After the budget bill was adopted, Chairman Tomblin of the Senate Finance Committee and Chairman Murensky of the House Finance

¹W. Va. Code, 4-1-18 [1969], in its entirety, provides:

The Legislature, acting by its appropriate committees, shall consider the budget bill, the budget document and matters relating thereto, and following such consideration and upon the passage of the budget bill by the Legislature, the Legislature shall prepare a digest or summary of the budget bill containing detailed information similar to that included in the budget document submitted to the Legislature by the governor but including amendments of legislative committees, and as finally enacted by the Legislature. Such digest or summary shall be prepared at the direction of and approved by members of the conferees committee on the budget and shall be included in the journals of the Legislature or printed as a separate document, and copies shall be furnished to the governor, commissioner of finance and administration, and the various state spending units for such use as may be deemed proper.

Committee, in their capacities as Senate and House Finance Committee Chairmen, respectively, and as Chairmen of the Conferees Committee on the Budget, met to prepare a digest of the enrolled budget bill as required by W. Va. Code, 4-1-18 [1969].

The petitioners assert that they did not know, and have not been able to discover, the date, time or place of the meeting at which the respondent finance committee chairmen prepared the Digest of the Enrolled Budget Bill [hereafter Budget Digest] and have not been able to discover who was present.

Although the petitioners have numerous specific allegations, their primary complaint is that the respondent committee chairmen² caused a document known as the "Budget Digest to be prepared and disseminated pursuant to the authority of Code, 4-1-18 [1969] which differs significantly from the actual budget bill as passed by the Legislature." Petitioners assert that no formal meeting was held by the members of the Conferees Committee on the Budget and that

² We hasten to point out that the proper respondents in this case are the Speaker of the West Virginia House of Delegates and the President of the West Virginia State Senate. However, because: (1) these officers had actual notice; (2) the respondents admitted in open court that had the President and Speaker been named as parties respondent, their answer to the petition and note of argument would be the same as for the respondents actually named; and (3) the issue in this case is ripe for decision, we have decided not to dismiss the entire case in order to make a procedural point. However, in the future, litigants should be careful to bring all cases involving the legislature against the presiding officers of the House and Senate.

if such a meeting was held, it did not meet the requirements of the Open Governmental Proceedings Act, W. Va. Code, 6-9A-1 et seq. [1975].

In support of their contention that the Budget Digest is not a faithful summary of the budget bill, the petitioners point to three specific examples:

(a) Approximately \$11,500,000 is designated for particular events or projects that are not listed in the budget bill itself, and the funding for which was not specifically approved by the legislature or presented to the Governor for his approval or disapproval; See, e.g., Budget Digest at 26-28, Acct. No. 5150; Budget Digest at 42-44, Acct. No. 1210; Budget Digest at 59-61, Acct. No. 2860; and Budget Digest at 82-85, Acct. No. 3510.

(b) The executive branch is directed to use appropriations for the Area Agencies on Aging to fund only four out of the current six functioning area agencies despite the absence of such language in the budget bill and previous directions from the West Virginia Supreme Court of Appeals against the inclusion of general legislation in appropriation matters; See Budget Digest at 92, Acct. No. 4060.

(c) The executive branch is directed to undertake various projects at unspecified cost, such as "explore the possibility of purchasing the Danville-Madison Nursing Center," (Budget Digest at

156-57, Acct. No. 8855) "complete a detailed feasibility study of the road system needs in southern West Virginia," and expend "the necessary funds. . .for the operation of the new information/visitor center at the intersection of I-77/460 near Princeton." Budget Digest at 189, Acct. No. 6700.

I.

The theory of petitioners' case is grounded in two landmark constitutional decisions, Barker v. Manchin, 167 W. Va. 155, 279 S.E.2d 622 (1981) and Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983). Our own Barker case involved the constitutionality of one legislative committee's power to veto rules and regulations promulgated by administrative agencies pursuant to general statutory authority. We held in Barker that sections of the Administrative Procedure Act that empower a legislative rule-making review committee to veto rules and regulations otherwise validly promulgated by administrative agencies pursuant to legislative delegation of rule-making power violates the separation of powers doctrine.

In Chadha, the Supreme Court of the United States held that a provision in the Immigration and Nationality Act which authorized either House of Congress, by resolution, to invalidate a decision of the executive branch permitting deportable aliens to remain in

the United States, was unconstitutional because it delegated law-making power to one House of Congress in contravention of U. S. Const., Art. I, § 1 (which requires all legislative powers to be vested in a Congress consisting of a Senate and a House of Representatives) and U. S. Const., Art I, § 7 (which requires every bill passed by the House and Senate, before becoming law, to be presented to the President, and, if he disapproves, to be passed by two-thirds of the Senate and House.)

Consequently, if the Budget Digest--prepared as it is by the budget conferees--had the force and effect of law, this entire case would be easily decided in petitioners' favor by reference to Barker, supra and Chadha, supra. However, notwithstanding the deference that the Budget Digest receives from executive branch administrators, and further notwithstanding the natural reluctance that administrators have to thwart the will of powerful legislative committee chairmen, the Budget Digest does not have the force and effect of law or anything close to it. Indeed, although we have looked to the Budget Digest to help us ascertain the intent of the legislature in making specific appropriations, Jones v. Rockefeller, ___W. Va.____, 303 S.E.2d 668 (1983), we have also clearly recognized that the Budget Digest does not serve to alter or amend the enacted budget bill. Heckler v. McCuskey, ___W. Va.____, 365 S.E.2d 793 (1987).

In deciding this case, it must be reality, not theory, that is the interpretive principle. The budget-making process is, perhaps, the central undertaking of state government and important parts of that process go on when the legislature is not in session.

Under the provisions of W. Va. Const., art. VI, § 51, the Governor is required to present to the legislature his proposed budget for the ensuing fiscal year. In order to assist the Governor in this undertaking, every agency of state government is required to submit its proposed (or requested) budget to the Secretary of Finance and Administration. W. Va. Code, 5A-2-3 [1990]. The Secretary of Finance and Administration, the Governor's staff, and the Governor himself then attempt the nearly impossible task of allocating severely limited money among competing ends. Inevitably, few, if any, agencies of state government are lucky enough to have the Governor request from the legislature an appropriation as large as their own request to the Governor.

When the legislature convenes in January (or February every fourth year) the Governor presents his "budget document" to the legislature at the same time that he delivers his State of the State address. The Governor's "budget document" is an elaborate presentation, in the form of detailed line items, of what the Governor intends to do with money that is appropriated to the executive branch for the ensuing fiscal year. However, this "budget document" submitted to the legislature should not be confused with the Governor's

proposed "budget bill," which is a document that appropriates large amounts of money to agencies of state government according to broad, general categories.

Because the Department of Health and Human Services is one of the largest agencies of state government, we choose it as an example of what the respective documents discussed in this opinion look like.

Appendix A is the detailed proposed spending plan for the Department of Health and Human Services for the fiscal year 1991-92 as submitted to the legislature in the Governor's budget document. Appendix B is the actual budget bill as enacted by the legislature relating to appropriations to the Department of Health and Human Services. Appendix C is the part of the Budget Digest, as prepared by the Finance Committee Chairmen, summarizing the purposes to which legislative budget-makers (whoever they may be) believe the money appropriated to Health and Human Services should be put.

After the Governor has submitted his "budget document" and budget bill to the legislature, and the budget bill has been introduced in the House of Delegates, the respective Finance Committees of the Senate and House hold hearings on the budget.³ The hearings that the

³ Since reality and not theory is the appropriate interpretive principle, I would relate to the reader that I served on the House Finance Committee from January 1971 through December 1972. During that time, notwithstanding an undergraduate degree in economics and a law degree, I had not a clue about what was going on in the budget process. Had I served another two terms the whole scheme would undoubtedly have become revealed to me; however, from what I could see as a freshman, most of the hard budget-making decisions were made

Senate and House Finance Committees hold are one way of allowing legislators to oversee administrative agencies and to make those agencies aware of legislative concerns. Those sessions, however, tend to be rather formal and not to be the best forum for negotiation, accommodation, and compromise. The nitty-gritty of the budget-making process usually transpires in sub-committee meetings, and in private meetings between constituents and the finance committee chairman or sub-committee chairmen. Furthermore, in this whole process it would be unrealistic not to acknowledge the central role played by knowledgeable, dedicated and extremely high quality committee staff.⁴

by the chairman, the vice-chairman, the ranking minority member, and the professional staff who were paid big money to worry about the nits and lice of the State budget on a more or less regular basis.

Indeed, members of both houses, agency heads and constituents would petition the chairman to include specific appropriations into the budget and frequently these petitions were granted in whole or in part. Thus a great deal of dialogue went on among the chairman, members of the committee, representatives of affected constituencies, and department heads. Nonetheless, most of these negotiations tended to have a bilateral rather than multilateral structure, partially because ordinary members of the committee like me had other fish to fry than worrying about specific appropriations for pork barrel projects in counties other than our own.

The greatest monument to the ongoing practical need to commend decision-making on budget matters to the leadership is the convention among members of the legislature that there will be no floor amendments to the budget bill. Indeed, members frequently offer amendments, either from ignorance, perversity, or a desire to satisfy militant constituents, but the amendments are always voted down.

⁴ I do not use this language either unadvisedly or simply to flatter. In my experience some of the highest quality people in state government are staff members of the two finance committees and the office of the legislative auditor. Because finance committee chairmen, vice-chairmen, and sub-committee chairmen can be easily defeated in elections, given their high profiles, it is important to have knowledgeable staff who can provide continuity from year to year in an enormously complicated and confusing process.

The long and the short of all this is that various compromises and agreements emerge from myriad negotiations, and it is those negotiations and compromises that are, at least theoretically, summarized in the Budget Digest. Nonetheless, the agency heads are not bound in law to follow the dictates of the Budget Digest. Yet, it should be obvious that if a legislator importuned a Finance Chairman to insert extra money into the Department of Highways' budget to build an information/visitor's center at the junction of I-77/460, it would be shortsighted not to build such a center, everything else being equal. But that is not as unreasonable a proposition as it might at first appear because, after all, other things often are not equal. Should, for example, a rock slide suddenly cause a quarter of a mile of important highway to be impassable, requiring millions of unexpected dollars to repair the damage, the money that the legislature would have liked to have seen spent on an information/visitors' center could be reallocated for interstate highway repair.

This brings us, then, to petitioners' argument that all of the specific allocations of money summarized in the Budget Digest should be set forth in detail in the budget bill and voted on by the legislature. Unfortunately, although that proposition appears to vindicate pristine democratic theory, it is of limited practical use because carving everything into the stone of the budget bill would

perpetrate an evil even greater than the evil petitioners seek to redress. Indeed, establishing detailed line item budgets would create a complete lack of flexibility. Under the system urged by petitioners, the powerful legislator who managed to get a Finance Chairman to include funding for his information/visitors' center in the budget bill would have that money locked in and available for no other purpose, thus making it extraordinarily difficult for the Department of Highways to repair my hypothetical quarter-mile of highway destroyed by the rock slide.

II.

The petitioners allege and the respondents do not deny that the Budget Digest is prepared by the Finance Committee Chairmen with the help of full-time staff and published without being considered by all the budget conferees. At a bare minimum, the Court finds that this procedure offends the clear wording of W. Va. Code, 4-1-18 [1969].

Obviously if the two Finance Chairmen got together over dinner, prepared a summary of how they expected state agencies to spend money, and then memorialized their discussion on the back of a menu, state agencies would give such a document great deference because "next year" is always on the horizon. Nonetheless, the Budget Digest is a sufficiently formal document that executive branch employees feel peculiarly bound to follow its dictates. This being the case, the Court holds today that any document purportedly issued pursuant to

W. Va. Code, 4-1-18 [1969], must be approved by majority vote of a quorum of all the budget conferees pursuant to a meeting regularly called after the passage of the budget bill.

It is only fair to state agencies and affected constituencies to provide some protection against inclusion in the Budget Digest of language not faithfully reflecting the various agreements and compromises that occurred during the legislative session. Thus, all of the specific provisions of the Budget Digest, except those that simply restate provisions of the Budget Bill, should be supported by memoranda of the negotiations, compromises and agreements or audio recordings of committee or sub-committee meetings where votes were taken or discussions had that substantiate the material which is organized and memorialized in the Budget Digest.

Because of the potential for abuse inherent in a statutorily mandated document like the Budget Digest, the Court finds W. Va. Code, 4-1-1-8 [1969] is right on the cusp of those delegations of authority permitted by Barker, supra, and Chadha, supra. Nonetheless, we believe that with appropriate procedural protections, the use of the Budget Digest is preferable to available alternatives. In this regard, Mr. Justice White's observations in his dissenting opinion in Chadha reflect reasoning that we have found compelling.

The prominence of the legislative veto mechanism in our contemporary political system and its importance to

Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies.

Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with the hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role.

462 U.S. at 967-68.

If the whole budget-making process is visualized as an ongoing negotiation, then the Budget Digest (properly supported by files or audio recordings reflecting the decisions and compromises made) is a valuable contribution to Mr. Justice White's "accountability of executive and independent agencies." It is only when the Budget Digest is perceived as an adjunct to the budget bill enjoying legal force and effect that this process confounds Barker and Chadha.

The way to reconcile all of the competing considerations we have discussed, then, is to make sure that the Budget Digest does not confound principles of Barker and Chadha in practice, and the way to do that is to require an appropriate disclaimer. Consequently, although we do not find W. Va. Code, 4-1-18 [1969], either unconstitutional on its face or unconstitutionally applied in the

type of document currently promulgated pursuant to its authority, we do find that the Budget Digest must have an adequate disclaimer.

All legislative budget digests should clearly state that the Budget Digest is a summary of what the members of the Conferees Committee on the Budget believe the legislature's intent to be, but that the Budget Digest does not have the force and effect of law and in no way circumscribes the discretion of spending units. Thus spending units may allocate money appropriated to them under the broad line items of the budget bill without regard to the suggestions of the Budget Digest when, in their discretion, such action is appropriate.

Accordingly, the relief for which the petitioners pray is granted in part and denied in part. We hold today that: (1) the Budget Digest does not have the force and effect of law and the Budget Digest must clearly so state; (2) W. Va. Code, 4-1-18 [1969] contemplates preparation of the Budget Digest by the entire Conferees Committee on the Budget (or a quorum thereof) which must meet and approve the Budget Digest before it may be published pursuant to the authority of W. Va. Code, 4-1-18 [1969]; and (3) nothing may be published in the Budget Digest that does not reflect committee or sub-committee votes, actual negotiations, compromises, and decisions of the legislative committees, sub-committees, or chairmen, and the files of the committees or their chairmen must be maintained, open

to public inspection, supporting the specific provisions of the Budget Digest.

The respondents argue that once the legislature adjourns, the Conferees Committee on the Budget ceases to exist as such and, therefore, it is not possible once the budget bill has been passed to reconvene the Conferees Committee on the Budget for the purpose of considering and voting on the Budget Digest. We find, however, that W. Va. Code, 4-1-18 [1969] specifically extends the life of the Conferees Committee on the Budget past the adjournment date of the legislature until that committee has fulfilled its statutory duties by considering and voting on the Budget Digest.

The Court finds that the petitioners brought this case for the purpose of establishing appropriate guidelines for the adoption, promulgation and use of the Budget Digest in the future and, because the Budget Digest has already been printed for the 1991-92 fiscal year, no specific action need be taken with regard to the Budget Digest for the 1991-92 fiscal year.

For the reasons stated above, the writ of mandamus for which petitioner prays, as moulded, is awarded.

Writ as moulded,
awarded.