State of Arkansas
Bureau of
Legislative Research

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MEMORANDUM

TO: Arkansas Legislative Council

FROM: Matthew Miller, Administrator, Administrative Rules Review

DATE: October 21, 2011

SUBJECT: Legislative Review

Question Presented

The PEER subcommittee requested that the legal staff of the Bureau of Legislative Research provide an official document on the issue of "review" and "approval", including a description of the process before and after relevant litigation.

Discussion

The "legislative review" issue is rooted in the doctrine of separation of powers, preserved in sections 1 and 2 of Article 4 of the Arkansas Constitution:

> The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.
>
> No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

The Arkansas Supreme Court well summarized the roles of the three branches of government in Federal Express Corp. v. Skelton, 265 Ark. 187, 578 S.W.2d 1 (1979):

> Our government is composed of three separate independent branches: legislative, executive and judicial. Each branch has certain specified powers delegated to it. The legislative branch of the State government has the power and responsibility to proclaim the law through statutory enactments. The judicial branch has the power and responsibility to interpret the legislative enactments. The executive branch has the power and responsibility to enforce the law as enacted and interpreted by the other two branches. The "Separation of Powers Doctrine" is a basic principle upon which our government is founded, and should not be violated or abridged.

Id. at 197, 198

The key Arkansas case on the issue of separation of powers in the Legislative Council context is Chaffin v. Arkansas Game and Fish Commission, 296 Ark. 431, 757 S.W.2d 950 (1988). Chaffin dealt with an allegation by the Game and Fish Commission that certain provisions of acts emerging from the regular and extraordinary sessions of 1987 contained unconstitutional restrictions. Id. at 434. The commission raised three separate issues. The analysis of the first two (dealing with appropriated funding for a commission publication and the maximum amount of money that may be charged for hunting and fishing licenses) was rooted in Amendment 35 to the Arkansas Constitution (which created the Game and Fish Commission) and is not broadly applicable. However, the third question has applicability beyond the constitutionally created commission.

A provision of the Game and Fish Commission's appropriation bill prohibited the agency from entering into a professional or consultant services contract that extended beyond twenty actual working days or exceeded a value of $5,000 without seeking the "advice" of the Legislative Council. Id. at 442. At that time the Legislative Council had a "Review and Advice Committee" with a goal "to advise state agencies on the intent of legislative appropriations and to let the legislature know whether its intent was being carried out." Id. The committee would review a contract and label it "favorable" or "unfavorable". Id. While the committee asserted that the action was advisory and what happened after the motion was up to the agency, a DFA representative testified that the agency's practice was to automatically disapprove a contract that received an "unfavorable" review by Legislative Council. Id. at 442, 443.

Despite the Council's assertion that its review was merely "advice", the court looked at how the "advice" was treated to determine its true nature. Id. at 443. The court viewed DFA's practice of disapproving contracts based on legislative review as evidence that the "advice" was actually a veto by the legislature. Id. The court noted that it was "unreasonable to expect any state agency to defy such a body which has the power to determine its well-being." Id. The court noted that the "legislative veto" could take forms other than an outright "unfavorable" designation, noting that:

> A subtle coercion exercised by a powerful branch of government can effectively tie the hands of a coordinate branch. The executive authority should be free, not only from blatant usurpation of its powers, but from paralyzing interference as well. The legislature cannot hold the executive branch hostage to its will.

Id. at 444.

At first blush Chaffin appears to be a complete repudiation of the legislative review process. However, that is not the case -- as part of its holding the court notes that the General Assembly "can and should hold hearings and investigate at length the performance of state government." Id. So, while upholding the legislature's power to monitor agency operations, Chaffin makes it clear there is a line that such monitoring cannot cross.

Chaffin provides three main takeaways as applied to the legislative review process:

(1) When assessing constitutionality, the court looks at effect -- not intent. In Chaffin, the practice of the Legislative Council was to conclude review with a motion of "favorable" or "unfavorable". Chaffin does not directly come out and say such a motion was inappropriate, noting the testimony of the Council chair that the intent of the motion was purely advisory. The court instead looked beyond the plain language and stated intent of the motion to its effect. The court felt that the message sent from the motion was one of exercising a "legislative veto", an opinion borne out by actual results at the agency level. Chaffin illustrates that the wording used when reviewing agency actions is not as important as the agency's interpretation of the review. That is not to say that any motion would be appropriate -- a motion to "approve" an agency action clearly expresses an intent contrary to Chaffin. But the wording of a motion is not dispositive of its effect -- the court will look at the motion's effect at the agency level. Thus, a key part of a constitutional review system is an understanding at the agency level that the process is indeed a review.

(2) "Paralyzing interference" is viewed as equal with an outright expression of disapproval. Chaffin also makes it clear that an outright motion of approval or denial is not required for a violation of separation of powers -- "paralyzing interference" that "ties the hands" of the executive branch is as impermissible as a clear veto of legislative actions. Thus, one could theorize that refusing to schedule an agency action for review (with an intent to delay or impede an agency's action) is equal to expressly vetoing the action at a public meeting. If an agency viewed such an action as restricting its ability to act, it would be impermissible under Chaffin. As Chaffin upholds the right of the General Assembly to review agency operations, a reasonable delay centered on preparing materials for review would seemingly be permissible. However, a delay with ulterior motives would be impermissible. "Paralyzing interference" could take many forms and bears consideration in the legislative review process. But, as noted above, the key factor in evaluating whether an action constitutes "paralyzing interference" is the agency's interpretation of the action.

(3) There is a constitutional manner in which to conduct legislative review of agencies. As noted above, the Chaffin court recognizes that detailed reviews of agency performance are part of the legislative function. However, it states that such reviews "cannot intrude on the prerogatives of the executive branch of government." Id. at 444. While Chaffin makes it clear what the Legislative Council cannot do, it lacks specific guidance on what a constitutional review would specifically look like. However, it provides broad guidance -- a constitutional form of review will not impede agency operations or leave an agency with the impression that it needs legislative approval to take action. While the legislature cannot exert that type of influence on agencies, there is nothing in Chaffin that forecloses other actions purely within the purview of the legislative branch, such as amendments to the law or amendments to appropriations.

MBM/vjf