Opinion No. 02-01

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OPINION OF: PATRICIA A. MADRID, Attorney General

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TO: The Honorable Rebecca Vigil-Giron, Secretary of State, 325 Don Gaspar Ste 300, Santa Fe, NM 87503

QUESTIONS

Is a provision of the Campaign Reporting Act [NMSA 1978, Section 1-19-34.4 (1993, as amended through 1997)] unconstitutional because it provides for binding arbitration of alleged violations of that Act for which a penalty has been imposed?

CONCLUSIONS

No. Section 1-19-34.4 is constitutional, provided that the provisions of the Uniform Arbitration Act are applied to allow judicial review of the arbitrator's decision.

FACTS

The Secretary of State administers and enforces the Campaign Reporting Act ("CRA"). If the Secretary of State determines that a person has violated a CRA provision for which a penalty may be imposed, she must notify that person of the specific violation and the fine imposed, and inform the person that he or she has ten working days to correct the violation and to explain in writing, under penalty of perjury, the reasons, if any, for violating the Act. Section 1-19-34.4(C). The Secretary of State then sends a notice of final action. **Id.**

The person may protest the notice of final action by submitting a written request for binding arbitration. Section 1-19-34.4(D). The person selects a single arbitrator from the Secretary of State's list of five arbitrators to conduct the hearing. Section 1-19-34.4(E). Following the hearing, the arbitrator may impose any penalty the Secretary of State is authorized to impose, and must submit a written decision. Section 1-19-34.4(F). The arbitrator's decision shall be "final and binding." **Id.** The CRA provides that the arbitration procedures are governed by the Uniform Arbitration Act, NMSA §§ 44-7-1 through 44-7-22 (1971). **Id.**

ANALYSIS

The CRA compels arbitration of disputes relating to violations of the Act. Courts around the country generally have stated that if the statute compelling arbitration allows the parties access to the courts for review of the arbitrator's decision, the statute generally

is considered constitutional.[1] However, such compulsory arbitration violates the constitutional guarantee of due process if the statute compelling arbitration closes the courts to the parties and makes the arbitrator's decision the final determination of the rights of the parties.[2]

The New Mexico Supreme Court has held that in an employer-employee context a statute compelling arbitration of disputes is constitutional, but the statutory limitation on the scope of judicial review of that arbitration is not. **Bd. of Educ. of Carlsbad Mun. Schools v. Harrell**, 118 N.M. 470 (1994). In **Harrell**, a school board discharged its superintendent, who then appealed his discharge. The superintendent's contract provided that the cancellation of his contract would be governed by state statutes and rules. By statute, the hearing was conducted by an arbitrator, and judicial review of the arbitrator's decision was limited to whether the decision was procured by corruption, fraud, deception or collusion. **Id.** at 475.

The Court found that the superintendent's contract effectively required him to submit to compulsory arbitration. **Id.** at 476. The Court held that the superintendent was not denied his right of access to the courts because the compulsory arbitration provided him with a full evidentiary hearing and adjudication before an alternative forum or a specialized tribunal, i.e. the arbitrator. **Id.** at 480.

However, the Court held that the scope of judicial review as limited by the statute was inadequate, and found that " **any** judicial review of administrative action, statutory or otherwise, requires a determination whether the administrative decision is arbitrary, unlawful, unreasonable, capricious, or not based on substantial evidence." **Id.** at 485 (citing **Regents of the Univ. of New Mexico v. Hughes**, 114 N.M. 304, 309 (1992)). The Court struck down the statute limiting judicial review of the superintendent's arbitration as violative of due process[3] and as an unconstitutional delegation of judicial power. **Harrell**, 118 N.M. at 485.

The CRA provision mandating arbitration raises the question of separation of powers. The Office of Secretary of State is an executive agency, and the Secretary of State administers the laws enacted by the legislature. **See** N.M. Const. art. V, § 1. The CRA delegates quasi-judicial or adjudicatory power regarding enforcement of the Act to the Secretary of State. The New Mexico Supreme Court has found such delegation of judicial or adjudicatory power to administrative agencies to be constitutional. **See Harrell**, 118 N.M. at 483 (N.M. Const. art. III, § 1 is not an absolute bar to delegation of some functions of one branch of government to another); **Wylie Corp. v. Mowrer**, 104 N.M. 751, 753 (1986) (legislature has empowered certain administrative agencies to adjudicate cases, and the Supreme Court has found such delegations to pass constitutional muster); **Montoya v. O'Toole**, 94 N.M. 303 (1980) (legislature can delegate authority to administrative agencies when that authority is restricted by specific legislative standards); **Fellows v. Shultz**, 81 N.M. 496 (1970) (agency may exercise quasi-judicial powers granted it by legislature).

The power to adjudicate enforcement of the CRA is ultimately a judicial function.[4] To preserve the fundamental constitutional principle of separation of powers, an arbitrator may perform a judicial function in enforcing the CRA only so long as a court, and not the administrative agency itself, has the ultimate power to determine whether the arbitrator's action is lawful.[5] The CRA specifically states that the procedures for the arbitration shall be governed by the Uniform Arbitration Act. **See** Section 1-19-34.4(F).

The Uniform Arbitration Act[6] provides for judicial review of the arbitrator's decision by authorizing a court to examine that decision. The Act also specifically sets forth the statutory grounds for vacating, modifying or correcting an arbitrator's award. **See** Sections 44-7A-24 and 44-7A-25; **see also Fernandez v. Farmers Ins. Co.**, 115 N.M. 622 (1993) (in the absence of these statutory grounds, the court must confirm the arbitration award). Further, an appeal may be taken from, among other things, a court order confirming or denying confirmation of an award, modifying or correcting an award, or vacating an award without directing a rehearing. Section 44-7A-29.

Judicial review of an arbitrator's award pursuant to the Uniform Arbitration Act ensures that the due process rights of the person subject to the CRA's penalty provisions are adequately protected, and allows the judiciary to evaluate whether that person received a fair hearing and whether the law was correctly applied. **See Harrell**, 118 N.M. at 485; **see also Regents of the Univ. of New Mexico**, 114 N.M. at 309. The New Mexico Supreme Court "agree[s] that due process, together with separation of powers considerations, requires that parties to statutorily mandated arbitration be offered meaningful review of the arbitrator's decision." **Harrell**, 118 N.M. at 485. Under the CRA, a court that reviews the arbitrator's award has the power to check the exercise of judicial functions by the quasi-judicial administrative tribunal and ensure that the adjudication does not violate the constitution. **See id.** at 484.

"It is essential that courts retain the power to review for legality so that we can have uniform principles of interpretation and to deter abuse of administrative discretion." Albert E. Utton, **Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies**, 7 Nat. Resources J. 599, 626 (1967). The reviewing court is the ultimate authority and retains and may exercise "essential judicial power." **See Harrell**, 118 N.M. at 484; **see also McHugh v. Santa Monica Rent Control Bd.**, 777 P.2d 91, 97, 106-108 (Cal. 1989) (to satisfy constitutional requirements, the essential judicial power to make binding and enforceable judgments must remain ultimately in the courts through review of agency determinations); **Peick v. Pension Benefit Guar. Corp.**, 724 F.2d 1247, 1277 (7th Cir. 1983) (compulsory arbitration is constitutional where it is the first step in dispute resolution with subsequent court review).

In short, we believe that a court would likely find the CRA's binding arbitration provision constitutional because the fact that the arbitrator's decision is subject to judicial review places no unconstitutional limits on a person's right of access to the courts. The CRA specifically requires that the arbitration procedures be governed by the Uniform Arbitration Act. Section 1-19-34.4(F). That Act expressly authorizes judicial review of an arbitrator's decision. Under the CRA, a person has a full evidentiary hearing and

adjudication before the arbitrator. Although the arbitrator's decision is described as "final and binding," that decision is subject to judicial review to determine whether the arbitrator's decision was lawful. **See** Sections 44-7A-24, 44-7A-25, 44-7A-29. Judicial review of a CRA arbitration decision thus operates as a "principle of check" and allows the court, rather than the arbitrator, to be the "final authority." **See Harrell**, 118 N.M. at 484; **see also** Utton at 622-23, 626. Any person subject to the CRA's penalty provisions thus has the right to meaningful judicial review of the arbitrator's decision, and the CRA is therefore constitutional. **See** Section 1-19-34.4(F); Sections 44-7A-24, 44-7A-25, 44-7A-29.

GENERAL FOOTNOTES

n1 **See City of Anadarko v. FOP, Lodge No. 118**, 934 P.2d 328 (Okla. 1997) (statute providing for binding arbitration is constitutional if it does not deny access to courts); **Firelock Inc. v. Dist. Ct. in and for the 20th Judicial Dist.**, 776 P.2d 1090 (Colo. 1989) (arbitration mandated by statute is constitutional because statute provides for de novo judicial review).

n2 **See** Annot., 55 A.L.R. 2d 432, 440, 441, **Constitutionality of Arbitration Statutes** (1957); **see also Mengel Co. v. Nashville Paper Products & Specialty Workers Union**, 221 F.2d 644 (6th Cir. 1955) ("compulsory arbitration, without right to have the issue determined by court action, is invalid").

n3 It might be argued that due process questions can be raised here because the list of available arbitrators is chosen only by the Secretary of State. We understand that the Secretary of State goes through a competitive bidding request for proposals (RFP) process and then contracts with the potential arbitrators but has no contact with or influence over them once the person selects the single arbitrator for his hearing. So long as the contracting process is conducted pursuant to the Procurement Code, we believe the threat of a conflict or due process violation is minimized or eliminated. Absent any showing of prejudice or fraud, we assume the arbitrators will exercise fair and impartial judgment. And as noted herein, the court as the ultimate reviewing authority serves as an appropriate guarantor to protect due process rights.

n4 **See generally** Note, **Separation of Powers Doctrine in New Mexico**, 4 Nat. Res. J. 350, 358 (1964) (adjudication with finality is a judicial power, and only the judiciary can adjudicate with finality).

n5 N.M. Const. art. III, § 1, art. VI, § 1 (powers of the judiciary); **see also** Albert E. Utton, **Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies**, 7 Nat. Resources J. 599, 603 (1967).

n6 Laws 2001, ch. 227 repealed NMSA 1978, §§ 44-7-1 through 44-7-22 and enacted §§ 44-7A-1 through 44-7A-32 as the Uniform Arbitration Act. The relevant provisions discussed herein are virtually identical.

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