

Opinion No. 77-12

March 15, 1977

OPINION OF: Toney Anaya, Attorney General

BY: Jill Z. Cooper, Assistant Attorney General

TO: Senator John Rogers, New Mexico State Senator, Room 321-D, State Capitol, Santa Fe, New Mexico 87503

SEPARATION OF POWERS-LEGISLATIVE REVIEW-ADMINISTRATIVE RULES AND REGULATIONS-ARTICLE III, SECTION 1. - A statute providing for legislative review of administrative rules and regulations does not necessarily violate the doctrine of separation of powers.

QUESTIONS

Is legislative review of administrative rules and regulations consistent with the constitutional doctrine of separation of powers in New Mexico?

CONCLUSIONS

Yes, but see analysis.

ANALYSIS

Article III, Section 1 of the New Mexico Constitution, defining the doctrine of separation of powers, provides that:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this Constitution otherwise expressly directed or permitted.

OPINION

This provision would prohibit any one branch of government from infringing upon the authority of another. "No branch of the state may add to or detract from its clear mandate." **State ex rel. Hovey Concrete Products Company v. Mechem**, 63 N.M. 250, 252, 316 P.2d 1069 (1957).

While it has been observed that the New Mexico Supreme Court has strictly construed Article III, Section 1, see Separation of Power Doctrine in New Mexico, 4 Natural Resources J. 350 (1964-65), we do not find that proposed legislation granting the

legislature the authority to review administrative agency rules and regulations for the purpose of amending or repealing those which violate legislative intent would be contrary to the doctrine of separation of powers in New Mexico. We would note that the United States Supreme Court has found that separation of powers is not a "doctrinaire concept to be made use of with pedantic rigor." **Panama Refining Co. v. Ryan**, 293 U.S. 388, 400 (1935).

{*111} The lawmaking power of the state is clearly vested in the legislature. Article IV, Section 1, New Mexico Constitution. To the extent that the legislature, in turn, delegates some portion of that lawmaking power to administrative agencies, it may "not vest unbridled or arbitrary power in an administrative agency but must furnish a reasonably adequate standard to guide it." **City of Santa Fe v. Gamble-Skogmo, Inc.**, 73 N.M. 410, 417, 389 P.2d 13 (1964). An administrative body has only that power conferred upon it by law but the rules and regulations lawfully adopted by such a body will have the force and effect of law. See **Brinstool v. New Mexico State Board of Education**, 81 N.M. 319, 466 P.2d 885 (Ct. App. 1970).

What is at issue here is whether or not the legislature, having vested certain rule-making power in administrative agencies, may repeal or amend such rules and regulations found violative of legislative intent without infringing upon the powers of the judicial or executive branches of government.¹ Our conclusion that it does not is based essentially on the view that although the legislature, in the exercise of its lawmaking power, delegates some part of that power to administrative agencies, it retains its control over the lawmaking process.² Administrative rule-making is not pursued independently of legislative direction but rather may be defined as "subordinate legislation." See **Relationships Between Administrators and the California Legislature**, 30 Cal. L. Rev. 293 (1956).

Thus, a statute providing for legislative review of administrative rules and regulation³ may be enacted as a condition upon the delegation of the law-making authority to an administrative agency. It is not disputed that the legislature, in vesting rule-making power, should be able to attach such safeguards and conditions as it deems necessary. See **Schwartz, Legislative Control of Administrative Rules and Regulations**, 30 N.Y.U.L.R. 1031 (1955). The legislature may, therefore, repeal or amend those rules and regulations the content of which does not conform to what the legislature had intended the administrative agency to adopt when it delegated to the administrative agency the authority to adopt rules and regulations.

As the source of the delegation of rule-making power, the legislature may exercise its control over the employment of that power. To the extent, therefore, that legislative review of administrative rules and regulations is within {*112} the rule-making process, the exercise of that function would not violate the doctrine of separation of powers. We can find no substantial authority holding that legislative review of administrative rules and regulations would, in any way, intrude upon the power of the executive branch. And, while Article VI, Section 29, New Mexico Constitution provides for judicial review of

decisions of administrative agencies "as authorized by law," legislative review of administrative rules and regulations does not intrude upon judicial prerogative.

It is well settled that although the adoption of regulations is legislative in nature, the court has the power and authority to review regulations on appeal and set aside those that are found to be arbitrary, capricious, an abuse of discretion, not reasonably related to the purpose of the statute or otherwise not in accordance with the law.⁴ **Wylie Bros. C.C. v. Albuquerque-Bernalillo C.A.C.B.**, 80 N.M. 633, 459 P.2d 159 (Ct. App. 1969). The court may, for example, review regulations to determine if they exceed statutory authority or are impermissibly vague. See **New Mexico Municipal League, Inc. v. New Mexico Environmental Improvement Board**, 88 N.M. 201, 539 P.2d 221 (1975). Judicial review of administrative rules and regulations does not, however, involve content as such and is directed instead toward a determination of whether or not a rule or regulation has been lawfully adopted or is constitutionally valid.

A court may no more substitute its judgment as to the content of a lawfully adopted administrative rule or regulation than it may substitute its judgment as to the content of a statute. See Davis, *Administrative Law*, Third Edition, West Publishing Co., St. Paul, Minnesota (1972). It is up to the legislature to decide upon the wisdom and propriety of legislation, not the courts. **In re McCain**, 84 N.M. 657, 506 P.2d 1204 (1973). Similarly, it would follow that it is not for the courts to decide upon the wisdom and propriety of rules and regulations. Thus, as judicial review and legislative review are of such a fundamentally different nature, there would appear to be no conflict under the doctrine of separation of powers.

In conclusion, therefore, we would advise that, as a matter of legal principle, a statute providing for legislative review of administrative rules and regulations would not necessarily be in violation of the doctrine of separation of powers. The merits of such proposed legislation, as well as the means by which it is to be accomplished, would, of course, be left to the wisdom of the legislature in compliance with the requirements of the Constitution.

ATTORNEY GENERAL

Toney Anaya, Attorney General

ⁿ¹ A thorough discussion of the rule-making powers of administrative agencies and statement of the constitutional issues raised with regard to legislative review of such powers has been prepared by Richard Folmar of the New Mexico Legislative Council Service. See Information Memorandum No. 202.31113A.

ⁿ² Rules and regulations adopted by administrative agencies deriving their rule-making power from the constitution and not the legislature may not be subject to review by the

legislature. For example, "[t]he corporation commission has the power to adopt rules and regulations addressed to the efficient exercise of the powers conferred upon it by the Constitution." **State Corporation Com'n. v. Mountain States Tel. & Tel. Co.**, 58 N.M. 260, 270 P.2d 685 (1954). The power granted to the Corporation Commission may not be exercised by the Legislature. **In re Atchison, T. & S.F. Ry. Co.**, 37 N.M. 194, 20 P.2d 918 (1933).

[n3](#) Such a statute would, however, have to comply with constitutional provisions governing due process and with all legislative enactment provisions set forth in Article IV, Section 15, New Mexico Constitution.

[n4](#) The scope of judicial review of rules and regulations adopted pursuant to the Administrative Procedures Act, Section 4-32-1, **et seq.**, NMSA, 1953 Comp. is specifically defined at Section 4-32-22, **supra**, and may be broader than that applied to rules and regulations not adopted pursuant to that Act.