HB
803

STATE OF ALASKA
THE LEGISLATURE

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LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

March 16, 1978

SUBJECT: HB 803: Constitutionality of amendments to "Administrative Rules"

TO: Representative Terry Gardiner
Chairman, House Judiciary Committee

FROM: Richard A. Bradley
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HB 803 establishes an alternate procedure for adjudication of challenges to administrative regulations. Among its provisions is section 302(e) which establishes a filing fee which is a variation of the filing fees established under the authority of the supreme court under Administrative Rule 11. The latter rule states that the filing fee for the initiation of litigation is established under Supreme Court Order No. 59.

Your question is whether it is constitutional for the legislature to amend administrative rules.

The genesis of your request is presumably Art. IV, Sec. 15 of the state constitution, which provides:

> The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

The question whether the legislature could amend "rules governing the administration of all courts" is one that has interested lawyers, observers of the legislative scene, and, perhaps, the judiciary. For all this interest, however, the question has received little, if any, direct attention from the supreme court in published opinions, primarily, I suppose, because none of the cases to reach the court involved matters

described either by counsel or the court itself as involving "administration."

Thus, the several leading cases all are said to involve matters of substance or of practice and procedure:

(1) Leege v. Martin, 379 P.2d 447 (1963), involved the legislature's effort to eliminate suspension of a court decision to revoke a fishing license; the court had a general rule allowing suspension of lower court judgments on appeal. The matter was treated as involving only a matter of practice or procedure. [The case is of primary interest because of its judicial embellishment on Art. IV, Sec. 15 that even if the legislature passes a bill which is later viewed as intruding on a court rule of practice or procedure by a two-thirds vote, thereby complying with Art. IV, Sec. 15, it will not be deemed by the court to have amended the court rule unless it does so explicitly and by specific reference to the court rule; and the court rule will prevail.]

(2) Channel Flying v. Bernhardt, 451 P.2d 570 (1969), involved the question whether a judicial disqualification statute constituted an amendment to a rule governing practice and procedure; if it did, it was invalid because its adoption was not affirmatively done as an amendment to the rules of practice and procedure as required under the Leege case. The court discussed Art. IV, Sec. 15 but concluded that the statute involved a matter of substance undoubtedly within the legislative prerogative.

(3) City of Valdez v. Valdez Development Company, 506 P.2d 1279 (1973), concerned a statute postponing automatically cases in which legislators are attorneys, primary witnesses, or otherwise significantly involved. While the court said: "...it is readily apparent the mandatory continuance provision can have grave consequences on the administration of the judicial system...," it is also true that the court considered the statute as a statute dealing with practice and procedure not adopted under the Leege procedures and therefore defective. No suggestion was offered that as a possible infringement on the administration of courts the subject was beyond legislative amendment.

(4) Silverton v. Marler, 389 P.2d 3 (1964), and Thomas v. State, 566 P.2d 630 (1977) both are concerned with the separation between substance and procedure, not between procedure and administration and offer no guidance.

A study done for the Legislative Council on July 1, 1960 is perhaps the best statement of the problem. It notes that the formulation of Article IV, Sec. 15 just prior to its revision into its present language was this way:

> The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts, which rules may be changed by the legislature by two-thirds vote of members elected to each house.

The report also notes that the revision to the present language was done by the committee on style and drafting; the report notes that

> "The committee had no authority to make substantive changes without the approval of the full convention."1/

The report concludes that "rules governing the administration of all courts cannot be changed by the legislature..."

Almost eighteen years later, I would agree only that the authority of the legislature over "rules of administration" is somewhat less clear than its authority over "rules of practice and procedure." Since the supreme court has never interpreted a rule it characterized as a rule of administration [nor has it interpreted a statute which it viewed as impinging on a rule of administration], the interpretations offered in the 1960 opinion are still untested.

1/ While the authority of the committee on style and drafting is as stated, the statement begs the question whether a change was in fact made.

Part of this problem is initially semantic, and only thereafter legal.

The supreme court has adopted codes of rules in eleven areas; one code is specifically characterized as "Administrative Rules" and three others are derived from the so-called "inherent" authority of the court over the practice of law. Sullivan v. Alaska Bar Association, 551 P.2d 531 (Alaska 1976). These rules would include the Alaska Bar Rules, the Code of Judicial Conduct, and the Code of Professional Responsibility.

Accordingly, it appears that the supreme court may have "made and promulgated" seven sets of rules under its authority to adopt rules of practice and procedure. [Criminal, Appellate, District Court Criminal, District Court Civil, Civil, Childrens, and Probate Rules]

The difficulty for lawyers, litigants, and the legislature is that what is clear is that the characterization of rules by their title or grouping does not necessarily resolve their status under the constitution.

The Valdez case, supra, contains no allusion to the challenged statute's status as a possible amendment to a rule of administration. In fact, of course, the court has located its rules on calendaring and continuances in the Civil Rules. Alaska Civil Rule 40(f).

Yet the scheduling of cases is among the areas viewed by the 1960 Legislative Council memorandum as within the term "rules governing the administration of courts." The phrase was said by the memorandum to comprehend not only the traditional areas of the court's inherent powers but also the areas necessary to manage a unified judicial system:

> What these grants [constitutional grants to a court system of power over "administration"] represent, apparently, is constitutional recognition of the modern unified court system. They comprehend a power over matters which are not "procedural" in the sense that the latter treat of the procedures involved in bringing a particular case to adjudication, but which are concerned rather with the internal organization of large and

> complex systems of courts. Levin and Amsterdam, Legislative Control over Judicial Rule Making: A Problem in Constitutional Revision, 107 U. Pa. L. Rev. 1, 33 - 34 (1958).

In New Jersey, under a very similar provision, rules have been adopted providing for the sittings of court, the assignment of judges, general matters regarding the dispatch of judicial business, calendars, publication of opinions and similar issues. 2/ The 1960 memorandum noted that by that time, the Alaska Supreme Court had promulgated "rules governing administration" including the duties of the administrative director, the designation of holidays, the sittings of the court, the provision for court facilities, the duties of clerks and so forth.

Roscoe Pound, in his commentary on the Winberry case at 66 Harvard Law Review 28, (38 - 39), comments that courts have not been reluctant, even historically in the absence of a constitutional provision similar to Art. IV, Sec. 15, to declare legislative intrusions on the independence of the judiciary to be invalid:

> Houston v. Williams, 13 Cal. 24, 25 (1859) (Justices of California Supreme Court must deliver their opinions in writing.)
>
> Vaughn v. Harp, 49 Ark. 160, 162, 4 S.W. 751, 752 (1887) (Justice of Arkansas Supreme Court must deliver opinions in writing and address all issues raised by counsel.)
>
> Ex parte Griffiths, 118 Ind. 83, 20 N.E. 513 (1889) (Court must write and file headnotes to its opinions.)
>
> Speight v. People, 87 Ill. 595 (1877) (The opinion of each judge is to be stated on each issue submitted.)
>
> In re Janitor of the Supreme Court, 35 Wis. 410 (1874) (As the court had the inherent power to appoint and remove its janitor, it could appoint and remove his assistants.)

2/ See Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406 (1950); see also, discussing Winberry, 65 Harvard L. Rev. 234, 66 Harv. L. Rev. 28.

The 1960 memorandum notes that not all that is contained in Rules for Administration might be adopted under that power:

> "This [the mandate to adopt rules governing administration] would include much of the material found in the rules promulgated by the Alaska Supreme Court entitled 'Rules Governing the Administration of all Courts,'..." [Emphasis added]

The final question then is whether legislation setting filing fees is a rule of administration or not. 3/

As you know, the supreme court has exercised the responsibility to set filing fees since statehood. However, the long unchallenged exercise of a power does not necessarily validate it, if the underlying premise is absent. Bradner v. Hammond, 553 P.2d 1 (1976).

The fees that are set as a condition for filing cases are in economic terms not analagous to a charge for the privilege of filing a case measured by the cost to the state of processing the case; the filing fees would need to be measurably higher than their present levels. The legislature, as the basic determiner of tax policy under the constitution, Article IX, may, however, reserve to itself the right to vary the charges made in order to resolve public policy questions of interest to it, even if it has never found fault with the court's own filing fees.

While my research has turned up no case that characterizes filing fees either as a part of rules of administration, rules of practice and procedure, or as substantive law undoubtedly committed to the legislature, the setting of fees for entry into the judicial process is not analagous to any of the cases described as involving the inherent powers of courts. While I believe this conclusion to be supportable in law, the committee must note that the final arbiter on this point will be the supreme court.

3/ As noted earlier, the locus of the rule does not determine its status under the constitutional rule-making authority given to the supreme court.

The Alaska Administrative Rules typically deal with topics concerned with the internal management of court affairs, for example Rule 2 prohibits the practice of law by judicial personnel; Rule 4 deals with judicial conferences; Rule 18 deals with terms of the supreme court; Rule 24 with the sittings of courts, and so forth.

These rules may fairly be characterized as rules of administration and it is unnecessary to suggest, at this time, what the legislature's role as to their revision might be. 4/

In my opinion, it is clear that the court's allocation of the rules to the various collections of rules represents a judgment by it not only of the implications of Art. IV, Sec. 15 but also an allocation of a rule which could be a matter of substance, where the legislature has acquiesced in the court's implementation of that power. In other words, the rules were developed entirely subsequent to the adoption by the legislature of Ch. 50, SLA 1959. The court itself was not appointed until several months after Ch. 50 took effect. In that context, the court, recognizing the necessity for filing fees, may be viewed as either (1) filling a gap under Ch. 50 or (2) exercising a constitutional power under some part of Art. IV, Sec. 15.

At this time, I conclude that the location of a rule in the "administrative rules" adopted by the supreme court is not a necessary determination as to the status of the rule under Article IV, Section 15.

4/ The 1960 memorandum to the Legislative Council represents a carefully considered analysis of this question. For its time, considering that the supreme court had only recently opened its doors for business, the 1960 memorandum represents the then state of the law. Any subsequent analysis, however, must consider not only the language of Art. IV, Sec. 15 and its history, but, also the judicial evolution of the section in the context of the practice and procedure/administration dichotomy.

Having said that, I then conclude that the establishment of fees for the filing of cases is not a matter involving the administration of courts but rather a matter of substance, or at the least, a matter of practice and procedure amendable by the legislature. Accordingly, the substance of §302(e) in HB 803 does not violate the provisions of Article IV, Section 15 of the Alaska Constitution.

RAB:jpd