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OPINION NO. 85-32

The Honorable Knox Nelson  
State Senator  
State Capitol  
Little Rock, Arkansas 72201

HAND DELIVERED

Dear Senator Nelson:

You have requested our opinion concerning the constitutionality of proposed Senate Bill 330 currently pending before the Arkansas General Assembly. In our review of the bill, we note two constitutional issues:

- 1) Does SB 330 violate Art. 5, §20 of the Arkansas Constitution of 1874?
- 2) Does §10 of SB 330 providing for finality of awards violate any federal constitutional provisions, i.e. 14th Amendment due process?

Senate Bill 330, Section (a) provides:

SECTION 2. (A) All contracts for highway construction, and for the acquisition of materials used in construction. . . entered into by the Highway Department from and after the effective date of this Act, shall contain a provision that any controversy or dispute regarding the performance of such contract and compliance with Highway Department specifications or the interpretation of a provision of such contract or the specifications thereof, including all schedules of payments to be made under the contract, shall be submitted to arbitration as provided for in this Act. . .

The bill goes on to state that its purpose is to provide mandatory arbitration between contractors and the Highway Department of controversies which arise over performance and/or interpretation of contract provisions.

Sections 4, 5 and 6 set out a lengthy procedure to be followed for the conduct of hearings in the arbitration process.

Section 10 states:

The award by the Board of Arbitration shall be final and binding upon the parties.

Article 5, §20 of the Arkansas Constitution mandates that the State shall never be made a defendant in any of her courts.

On the other hand, Art. 16, §2 recognizes that the General Assembly shall provide for the just and legal debts of the State.

Pursuant to this latter authority, the Legislature established the Arkansas State Claims Commission which has jurisdiction over claims against the State of Arkansas and its agencies. See, Ark. Stat. Ann. §13-1401 et seq. (Supp. 1983).

A long line of Arkansas cases have held that private entities cannot sue public agencies for enforcement of contracts. Pitcock v. State, 91 Ark. 527, 121 S.W. 742 (1909); Arkansas State Highway Commission v. Nelson Bros., 191 Ark. 629, 87 S.W. 2d 894 (1935); and Arkansas State Highway Commission v. Cunningham, 239 Ark. 890, 395 S.W.2d 13 (1965). The primary issue in the cited cases was whether a certain public agency was an arm of the State, thus obtaining the benefits of sovereign immunity as granted by Art. 5, §20. The Arkansas Supreme Court held in the affirmative in all three.

However, currently the Arkansas Claims Commission hears and has jurisdiction over contract disputes between contractors and the Highway Commission. We find SB 330's provisions analagous to the Supreme Court's analysis of the jurisdiction of the Arkansas Workmen's Compensation Commission in Boshears v. Arkansas Racing Commission, 258 Ark. 741, 528 S.W.2d 646 (1975). Appellant Boshears in that case, an employee of the Arkansas Racing Commission, was injured on his way to his job. He filed a claim with the Workmen's Compensation Commission and the claim was denied on the grounds he was not within the course of his employment at the time of injury. Mr. Boshears then attempted to appeal the decision of the Commission to the Pulaski County Circuit Court and the appeal was denied because of the exclusive jurisdiction of the Commission at that time. Certiorari was granted by the Circuit Court when the appellant contended that the act establishing the Commission was violative of the Equal Protection Clause of the Arkansas and United States Constitutions. The Circuit Court found the Act to be constitutional and upheld the original decision of the Commission.

Reiterating, the doctrine of sovereign immunity, the Court stated:

Most of the cases coming before us involving Article 5, §20. . . have to do with whether the particular suit actually amounts to a suit against the State. . . and we [have] held that any suit, whether in law or in equity, which has for its purpose an effect, directly or indirectly, of coercing the State is one against the State.

Id. at 743.

However, it upholding the constitutionality of the establishment of the Workmen's Compensation Commission, the Court quoted the following language from Raschillo v. Industrial Commission, 47 Ill. 2d 359, 265 N.E.2d 663, 665, (1970):

The General Assembly drafted the statute which contained the distinction between State employees and private employees in accord with the doctrine of sovereign immunity. It cannot be said that the General Assembly in complying with the . . . constitutional doctrine of sovereign immunity created an invidious discrimination. The basis for the distinction between State employees and private employees being that of following such a constitutional mandate was wholly rational and did not contain arbitrary classifications so as to abridge the Equal Protection Guarantee. . .

Id. at 746.

The Supreme Court concluded that the General Assembly had actually made a "Claims Commission" out of the Workmen's Compensation Commission in connection with claims by State employees for injury or death growing out of their employment.

Second, a concern is raised by Section 10 of the bill which states that the award by the Board of Arbitration shall be final and binding upon the parties. In Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, 898 (1956), the United States Supreme Court held:

It is true that a state is not required by the federal constitution to provide appellate courts or a right to appellate review at all [citations omitted] but that is not to say that a state that does grant appellate review can do so in a way that discriminates. . .

In other words, as the Arkansas Supreme Court noted in Boshears, supra, at 746-747, while the State of Arkansas is not required to provide appellate review, if it does so, the classification established by the legislation will not carry a presumption of constitutionality if the class it establishes is "suspect", i.e., race, indigency, illegitimacy or sex. Section 10 of SB 330 does not appear to establish any such suspect classification and thus, it is my opinion that said section is not constitutionally suspect.

It has come to my attention that certain practical problems may exist in administration of this law in accordance with federal highway administration guidelines which the State of Arkansas has to follow in order to receive federal aid for highway construction. However, I currently see no federal constitutional problems raised by this practical issue.

While it is true that relief imposed against a state agency has been held an obligation of the state and violative of sovereign immunity, Page v. McKinley, 196 Ark. 331, 118 S.W.2d 235 (1938), and Section 8 of SB 330 requires payment by the Highway Department out of its funds should the Board find against it in a particular matter, procedure already exists in the Claims Commission which is similar to SB 330. If the Claims Commission finds against the Department in a contract action, funds for payment come from the Department budget.

Such actions in the Claims Commission are predicated upon the theory that officers of an agency may not do unlawful acts to the injury of others and shield themselves with sovereign immunity. An action against such officials is not an action against the State. See, Hickenbottom v. McCain, 207 Ark. 485, 490, 181 S.W.2d 226 (1944).

It is my opinion that SB 330 represents an attempt to do that which was upheld in Boshears, supra; namely, the establishment of a "claims comission" for contract disputes in a forum other than that of the Arkansas State Claims Commission. Therefore, it is my opinion that SB 330 is not constitutionally flawed with respect to the issues outlined above.

The foregoing opinion, which I hereby approve, was prepared by Deputy Chief of Staff R.B. Friedlander.

Sincerely,



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Attorney General

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