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FILE NO. 92-005

LABOR:
Enforceability of Personnel
Records Review Act

Ms. Shinae Chun, Director
Illinois Department of Labor
310 South Michigan Avenue, 10th Floor
Chicago, Illinois 60604

Dear Ms. Chun:

I have your letter wherein you inquire whether the amendment of section 10 of the Personnel Records Review Act (Ill. Rev. Stat. 1989, ch. 48, par. 2010), without reenactment of the entire Act (Ill. Rev. Stat. 1989, ch. 48, par. 2001 et seq.), was effective to make the Act enforceable in light of the Supreme Court's declaration that "the Act" was unconstitutional. (See Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc. (1987), 118 Ill. 2d 389.) For the reasons hereinafter stated, it is my opinion that reenactment of the Act in its entirety was not required in order to cure the constitutional defects and render the Act enforceable.

In Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc. (1987), 118 Ill. 2d 389, 394-403, the court held that "An Act to permit employees to review personnel records * * *" (Ill. Rev. Stat. 1984 Supp., ch. 48, pars. 2001 through 2012 (now referred to as the Personnel Record Review Act (see Ill. Rev. Stat. 1990 Supp., ch. 48, par. 2000)) was vague and uncertain, and unconstitutionally violated the due process rights of employers. The court found that there were conflicts and inconsistencies between section 2 of the Act (see Ill. Rev. Stat. 1984 Supp., ch. 48, par. 2002), which required employers to permit employees to inspect personnel documents used in determining their qualifications for various personnel transactions (e.g., employment, promotion, transfer), and subsection 10(c) of the Act (see Ill. Rev. Stat. 1984 Supp., ch. 48, par. 2010(c)), which denied to employees the right to inspect materials used by the employer for management planning, including recommendations concerning compensation, promotions and job assignments. The court stated:

" * * *

Given these conflicting and inconsistent provisions, we do not believe that an employer of ordinary intelligence can determine with reasonable certainty which personnel documents are, or are not, subject to disclosure. We therefore agree with the appellate court that the Act is vague and uncertain and, therefore, is unconstitutional in that it violates the due process rights of employers.

* * *

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(Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc. (1987), 118 Ill. 2d 389, 403.)

These were the only constitutional deficiencies in the Act identified or discussed by the court.

Less than one year after the Spinelli decision, the General Assembly amended section 10 of the Act by replacing subsection (c). (See Public Act 85-1393, section 4, effective September 2, 1988; 1988 Ill. Laws 3248, 3258.) This amendment was designed specifically to remedy the constitutional deficiencies identified in Spinelli. (Remarks of Rep. Saltsman, June 28, 1988, House Debate on House Bill No. 3379, at 57-58; Remarks of Sen. Brookins, June 24, 1988, Senate Debate on House Bill No. 3379, at 105.)

You have suggested that the Personnel Record Review Act may not be enforceable despite the amendment to section 10 thereof because the General Assembly did not reenact the entire Act. Although there appear to be no reported Illinois cases directly on point, there is authority from other jurisdictions in support of the proposition that a legislature may not validly amend an unconstitutional act. (See, e.g., State v. Long (La. 1913), 61 So. 154-155 (a decision declaring the unconstitutionality of an act left no vestige of the act that could be amended); In the Interest of R.A.S. (Ga. 1982), 290 S.E. 2d 34, 35 (a statute declared unconstitutional and void cannot be saved by amendment as there is nothing to amend).) The weight of authority, however, supports the conclusion that

the amendment of a statute that has been declared invalid may nevertheless constitute a valid enactment. (Valente v. Mills (Idaho 1969), 458 P. 2d 84, 86-87 (defects in an unconstitutional statute may be remedied by the proper enactment of amending an statute); State v. Silver Bow Refining Co. (Mont. 1926), 252 P. 301, 304 (an amendatory act correcting defects in an unconstitutional act, which defects could have been eliminated originally and a valid law created, is a valid enactment); Ex Parte Cooper (Okla. Crim. App. 1931), 300 P. 321, 324; Los Angeles County v. Jones (Cal. 1936), 59 P. 489, 494.) In his treatise on statutory construction, Singer states:

" * * *

A majority of courts seem to have rejected the theory that an unconstitutional act has no existence, at least for the purpose of amendment. The unconstitutional act physically exists in the official statutes of the state and is available for reference, and as it is only unenforceable, the purported amendment is given effect. If the law as amended is constitutional, it will be enforced. Although desirable, it is not necessary that the act be separately intelligible and complete on its subject.

This escape from the legal fiction that an unconstitutional act does not exist is sound. That fiction serves only as a convenient method of stating that an unconstitutional act gives no rights or imposes no duties. This conclusion should not be used to determine an issue which was not considered in formulating the fiction.

The intent of the legislature is just as easily ascertained whether amending a valid act or an unconstitutional one. Amendment offers a convenient method of curing a defect in an unconstitutional act.

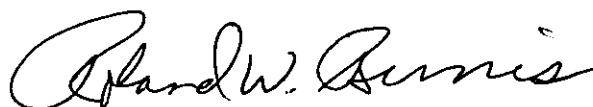
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(1A N. Singer, Sutherland Statutory Construction §22.04 at 179 (4th ed. 1985) (footnotes omitted).)

I concur with the majority of states that have decided this issue and with the reasoning expressed in Sutherland. It is my opinion, therefore, that the General Assembly had the power to cure the constitutional deficiencies in the Personnel Record Review Act by amending section 10 of the Act without reenacting the entire Act. The amendment to section 10 of the Act constitutes a valid enactment and you may treat the Act as enforceable unless and until such time as a court of law may otherwise declare.

Respectfully yours,



ROLAND W. BURRIS
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