2 Am. Jur. 2d Administrative Law Summary

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

Correlation Table

Summary

Scope:
This topic is a broad view of administrative law as it impacts all federal and state agencies. It covers the general aspects and principles of the law relating to the jurisdiction, powers, functions, and procedures of federal, state, and local governmental bodies other than the courts and legislatures. It considers these matters with regard to the investigatory, legislative, rulemaking, determinative, and adjudicatory functions of these bodies and agencies. It includes a basic treatment of the Federal Administrative Procedure Act and the 1981 version of the Model State Administrative Procedure Act and the 2010 version of the Revised Model State Administrative Procedure Act. This topic also discusses the creation, membership, and liabilities of administrative agencies and administrative and judicial review of administrative action, decisions, and orders.

Federal Aspects:
The Federal Administrative Procedure Act generally governs federal agencies. Other federal statutes control aspects of judicial review of agency action, such as judicial procedure and remedies. In addition, there are federal statutes governing the delegation of agency authority, disqualification of hearing officers, advice and assistance of the Attorney General to agencies, assessment of fees by federal agencies, and publication of agency documents. The Freedom of Information Act (5 U.S.C.A. § 552), which discusses what information an agency must disseminate to the public, and the Privacy Act of 1974 (5 U.S.C.A. § 552a), which governs maintenance of, disclosure of, and access to agency records on individual citizens or residents, are discussed in Am. Jur. 2d, Freedom of Information Acts §§ 1 et seq.

Treated Elsewhere:
Appealability as affected by transfer of federal civil case to administrative agency, see Am. Jur. 2d, Appellate Review § 139

Appeal to United States Supreme Court by administrative agency, see Am. Jur. 2d, Appellate Review § 29

Arbitration, generally, see Am. Jur. 2d, Alternative Dispute Resolution §§ 1 et seq.

Blasting damage, prior administrative action as affecting availability of judicial relief for, see Am. Jur. 2d, Explosions and Explosives § 134

Constitutional provisions, administrative construction of, see Am. Jur. 2d, Constitutional Law § 93

Corporations, immunity from suit when created as state agencies, see Am. Jur. 2d, States, Territories, and Dependencies § 108

Due process requirements: as affecting state and federal agencies, see Am. Jur. 2d, Constitutional Law §§ 976, 977; as met by

hearing before board or commission of administrative officer or tribunal, see Am. Jur. 2d, Constitutional Law § 1019; requirements of fair and impartial tribunal as applicable in administrative hearings, see Am. Jur. 2d, Constitutional Law § 1020

Equal-protection requirements, application to state and federal agencies, see Am. Jur. 2d, Constitutional Law §§ 839, 843

Federal corporations as agencies of federal government, see Am. Jur. 2d, Foreign Corporations §§ 89, 93

Federal diversity jurisdiction, citizenship of federal and state agencies and officers for purposes of, see Am. Jur. 2d, Federal Courts §§ 742, 744, 747 to 749

Finality, remand for proceedings before nonjudicial bodies as affecting, see Am. Jur. 2d, Appellate Review § 88

Immunity of school boards, commissions, and similar agencies or authorities, see Am. Jur. 2d, Municipal, County, School, and State Tort Liability §§ 25 to 28

Initiative or referendum, judicial review of administrative determination, see Am. Jur. 2d, Initiative and Referendum § 48

Injunction: against acts or orders of administrative bodies, see Am. Jur. 2d, Injunctions §§ 156 to 160, 166 to 169; exhaustion of administrative remedies as prerequisite to issuance of, see Am. Jur. 2d, Injunctions § 32

Judicial notice of rules, regulations, acts, reports, and records of administrative agencies, see Am. Jur. 2d, Evidence §§ 128, 131, 164 to 166

Judiciary, distinction between administrative agencies and, generally, see Am. Jur. 2d, Constitutional Law § 266

Libel or slander, privilege exempting responsibility for defamatory statements in judicial proceedings as extending to administrative proceedings, see Am. Jur. 2d, Libel and Slander § 283

Licenses and permits, aspects outside coverage of administrative procedure acts, see Am. Jur. 2d, Licenses and Permits §§ 1 et seq.

Negligence based on violation of administrative regulation: generally, see Am. Jur. 2d, Negligence §§ 753 to 758; contributory or comparative negligence as defense to, see Am. Jur. 2d, Negligence § 989; assumption of risk as barring recovery, under rule of Restatement of Torts 2d, see Am. Jur. 2d, Negligence § 787; excuse or justification as affecting determination of, see Am. Jur. 2d, Negligence § 710

Obscene matter, validity of legislation authorizing in first instance administrative agencies to protect public against, see Am. Jur. 2d, Lewdness, Indecency, and Obscenity § 15

Obstruction of justice, administrative proceedings as, see Am. Jur. 2d, Obstructing Justice §§ 23, 24

Parol evidence of records of administrative bodies, see Am. Jur. 2d, Evidence § 1116

Particular federal administrative bodies and regulation thereby, generally, see applicable articles, as, for example: Civil Service Commission, see Am. Jur. 2d, Civil Service §§ 10 to 12; Environmental Protection Agency, see Am. Jur. 2d, Pollution Control §§ 1 et seq.; Equal Employment Opportunity Commission, see Am. Jur. 2d, Job Discrimination §§ 1 et seq.; Federal Aviation Administration and the Civil Aeronautics Board, see Am. Jur. 2d, Aviation §§ 1 et seq.; Department of Housing and Urban Development, see Am. Jur. 2d, Housing Laws and Urban Redevelopment § 14; Federal Energy Regulatory Commission, see Am. Jur. 2d, Public Utilities §§ 194, 195; Federal Trade Commission, see Am. Jur. 2d, Consumer and Borrower Protection §§ 110, 161; National Labor Relations Board, see Am. Jur. 2d, Labor and Labor Relations §§ 1 et seq.; Nuclear Regulatory Commission, see Am. Jur. 2d, Energy and Power Sources §§ 57, 58; Patent and Trademark Office, see Am. Jur. 2d, Patents §§ 1 et seq.; Securities and Exchange Commission, see Am. Jur. 2d, Securities Regulation—Federal §§ 1 et seq.; Veterans' Administration, see Am. Jur. 2d, Veterans and Veterans' Laws §§ 1 et seq.

Presumptions relating to acts of administrative and regulatory agencies, see Am. Jur. 2d, Evidence § 222

Public officers and employees, generally, see Am. Jur. 2d, Public Officers and Employees §§ 1 et seq.

Public records, inspection and disclosure of, see Am. Jur. 2d, Records and Recording Laws §§ 1 et seq.

State or local administrative authorities and regulation thereby, generally, with regard to: drainage and sewage, see Am. Jur. 2d, Drains and Drainage Districts § 2; food, see Am. Jur. 2d, Food § 6; highways, see Am. Jur. 2d, Highways, Streets, and Bridges §§ 12 to 14; hotels, restaurants, or similar places, see Am. Jur. 2d, Hotels, Motels, and Restaurants § 27; housing, see Am. Jur. 2d, Housing Laws and Urban Redevelopment §§ 11 to 13; insurance, see Am. Jur. 2d, Insurance §§ 27, 28; pollution control, see Am. Jur. 2d, Pollution Control §§ 3 to 5; public utilities, see Am. Jur. 2d, Public Utilities §§ 143, 144; schools, see Am. Jur. 2d, Schools §§ 66 to 73; securities, see Am. Jur. 2d, Securities Regulation—State §§ 130 to 140; workers' compensation, see Am. Jur. 2d, Workers' Compensation §§ 47 to 50; zoning, see Am. Jur. 2d, Zoning and Planning §§ 605 to 705

Will, prosecution of or intervention in administrative proceedings as election to accept or renounce provisions of, see Am. Jur. 2d, Wills § 1377

Wrongful discharge claims as affected by prior administrative decisions, see Am. Jur. 2d, Wrongful Discharge § 182

Research References:

Westlaw Databases

All Federal Cases (ALLFEDS)

All State Cases (ALLSTATES)

American Law Reports (ALR)

West's A.L.R. Digest (ALRDIGEST)

American Jurisprudence 2d (AMJUR)

American Jurisprudence Legal Forms 2d (AMJUR-LF)

American Jurisprudence Proof of Facts (AMJUR-POF)

American Jurisprudence Pleading and Practice Forms Annotated (AMJUR-PP)

American Jurisprudence Trials (AMJUR-TRIALS)

Code of Federal Regulations (CFR)

Federal Procedure (FEDPROC)

Federal Procedural Forms (FEDPROF)

Uniform Laws Annotated (ULA)

United States Code Annotated (USCA)

End of Document

2 Am. Jur. 2d Administrative Law I A Refs.

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 1 to 3

A.L.R. Library

A.L.R. Index, Administrative Law
West's A.L.R. Digest, Administrative Law and Procedure 1 to 3

End of Document

2 Am. Jur. 2d Administrative Law § 1

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

A. In General

§ 1. Generally; definition of “administrative law”

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Administrative Law and Procedure 1, 2.1

Administrative law is concerned with the legal problems arising out of the existence of agencies which combine in a single entity legislative, executive, and judicial powers.[1] Acts necessary to carry out legislative policies and purposes already declared by the legislature are administrative.[2]

Observation:

The identifying badge of a modern administrative agency is the combination of judicial power (adjudication) with legislative power (rulemaking); however, agencies report to and draw their funds from the legislative body, the executive branch appoints the personnel of the agency, and the residual power of checks resides with the judiciary.[3]

Footnotes

1 Mitchell v. Wright, 154 F.2d 924 (C.C.A. 5th Cir. 1946); Handlon v. Town of Belleville, 4 N.J. 99, 71 A.2d 624, 16 A.L.R.2d 1118 (1950); Floyd v. Department of Labor and Industries, 44 Wash. 2d 560, 269 P.2d 563 (1954).

2 State ex rel. Woods v. Block, 189 Ariz. 269, 942 P.2d 428 (1997).

3 McNeil-Terry v. Roling, 142 S.W.3d 828 (Mo. Ct. App. E.D. 2004).

End of Document

2 Am. Jur. 2d Administrative Law § 2

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

A. In General

§ 2. Concern with private and public rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 2.1, 3

Because administrative agencies serve in part to effectuate the constitutional obligation of the executive branch to see that the laws are faithfully executed, the public interest is an added dimension in every administrative proceeding.[1] While sometimes the language of "private rights" is used in the administrative context, this language may simply signify a policy relevant to administrative law encompassing both public and private rights.[2]

In essence, the public-rights doctrine reflects a pragmatic understanding that when Congress selects a quasi-judicial or administrative method of resolving matters that could be conclusively determined by the executive and legislative branches, the danger of encroaching on the judicial powers is less than when private rights which are normally within the purview of the judiciary are relegated as an initial matter to administrative adjudication.[3] Where private, common-law rights are at stake, the courts' examination of the congressional attempt to control the manner in which those rights are adjudicated will be searching.[4] However, Congress may create a private right that is so closely integrated with a public regulatory scheme as to be a matter for agency resolution with limited involvement by the federal judiciary.[5] These separation-of-powers concerns are diminished where parties are not required to but merely have the option of proceeding in an administrative forum.[6] In addition, when an agency refuses to act, it generally does not exercise its coercive power over an individual's liberty or property rights and thus does not infringe upon areas that courts often are called upon to protect.[7]

Footnotes

1 City of Hackensack v. Winner, 82 N.J. 1, 410 A.2d 1146 (1980).

2 In re St. Joseph Lead Co., 352 S.W.2d 656 (Mo. 1961).

3 Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986); Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985).

[4] Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986).

[5] Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985).

[6] Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986).
As to the separation of powers of government in this context, see §§ 59 to 61.

[7] Heckler v. Chaney, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985).

End of Document

2 Am. Jur. 2d Administrative Law § 3

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

A. In General

§ 3. Relation of administrative process to legal process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 2.1

Administrative agencies belong to a different branch of government than judicial courts. They are separately created and exercise executive power in administering legislative authority delegated to them by statute.[1]An important goal of any administrative scheme is to guarantee the rationality of the process through which results are determined.[2]The administrative system substitutes administrative agencies for courts in making many determinations in the establishment and definition of individual rights.[3]

Administrative procedure is generally simpler, less formal, and less technical than judicial procedure.[4]For instance, strict rules of evidence generally do not apply to administrative proceedings.[5]In addition, the right to a jury trial in suits at common law preserved by the Seventh Amendment to the United States Constitution is generally inapplicable in administrative proceedings.[6]

Footnotes

1 City of Hackensack v. Winner, 82 N.J. 1, 410 A.2d 1146 (1980).
As to administrative agencies, generally, see §§ 20 to 30.

2 State ex rel. K.M. v. West Virginia Dept. of Health and Human Resources, 212 W. Va. 783, 575 S.E.2d 393 (2002).

3 Federal Trade Com'n v. National Lead Co., 352 U.S. 419, 77 S. Ct. 502, 1 L. Ed. 2d 438 (1957); Benedict v. Board of Police Pension Fund Com'rs of Seattle, 35 Wash. 2d 465, 214 P.2d 171, 27 A.L.R.2d 992 (1950).

4 Foley v. Metropolitan Sanitary Dist. of Greater Chicago, 213 Ill. App. 3d 344, 157 Ill. Dec. 514, 572 N.E.2d 978 (1st Dist. 1991); Ruffin v. City of Clinton, 849 S.W.2d 108 (Mo. Ct. App. W.D. 1993).

5 § 332.

[6] Pernell v. Southall Realty, 416 U.S. 363, 94 S. Ct. 1723, 40 L. Ed. 2d 198 (1974).

End of Document

2 Am. Jur. 2d Administrative Law § 4

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

A. In General

§ 4. Advantages of administrative process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 1 to 3

One of the purposes of administrative remedies is to enable parties to resolve their disputes in a less cumbersome and less expensive manner than is normally encountered at a trial in court.[1] Administrative proceedings operate to the advantage not only of the litigants but also of the courts which are thereby relieved of some matters on their dockets.[2]

In addition, by the administrative device, advantages are gained which are not procurable by the judicial process, including preventive action and decisions which persons can procure in advance of action.[3] The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.[4]

Footnotes

1 Buras v. Board of Trustees of Police Pension Fund of City of New Orleans, 367 So. 2d 849 (La. 1979).

2 Buras v. Board of Trustees of Police Pension Fund of City of New Orleans, 360 So. 2d 572 (La. Ct. App. 4th Cir. 1978), writ granted, 363 So. 2d 534 (La. 1978) and judgment rev'd on other grounds, 367 So. 2d 849 (La. 1979).

3 Guiseppi v. Walling, 144 F.2d 608, 155 A.L.R. 761 (C.C.A. 2d Cir. 1944), judgment aff'd, 324 U.S. 244, 65 S. Ct. 605, 89 L. Ed. 921 (1945).

4 N.L.R.B. v. Seven-Up Bottling Co. of Miami, 344 U.S. 344, 73 S. Ct. 287, 97 L. Ed. 377 (1953).

End of Document

2 Am. Jur. 2d Administrative Law § 5

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

A. In General

§ 5. Collaboration of administrative agencies and courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 1, 2.1

Despite the differences between the administrative and judicial processes, they are to be deemed collaborative instrumentalities of justice.[1]Collaboration of judicial power and function with the administrative process is a necessary part of today's legal system.[2]Courts, in actions brought before them, may call to their aid the appropriate administrative agency on questions within its administrative competence.[3]

Many statutes in regulating economic enterprise have divided the duty of enforcement between courts and administrative agencies. However, there is the greatest variety in the manner in which this responsibility is distributed; under some statutes, the administrative process is teamed with the judicial process and the authority of the court and agency is intertwined,[4]and in some instances, an administrative finding is a statutory prerequisite to the bringing of a lawsuit.[5]

Footnotes

1 U.S. v. Ruzicka, 329 U.S. 287, 67 S. Ct. 207, 91 L. Ed. 290 (1946); S.S.W., Inc. v. Air Transport Ass'n of America, 191 F.2d 658 (D.C. Cir. 1951).

2 Walling v. Benson, 137 F.2d 501, 149 A.L.R. 186 (C.C.A. 8th Cir. 1943).

3 Federal Trade Commission v. Cement Institute, 333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1948).

4 U.S. v. Ruzicka, 329 U.S. 287, 67 S. Ct. 207, 91 L. Ed. 290 (1946).

5 Ewing v. Mytinger & Casselberry, 339 U.S. 594, 70 S. Ct. 870, 94 L. Ed. 1088 (1950).

Works.

2 Am. Jur. 2d Administrative Law § 6

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

A. In General

§ 6. Role of Attorney General in advising administrative agencies

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 1, 2.1

Treatises and Practice Aids

As to duties of the attorney general, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

Pursuant to federal statute, the head of an executive department may require the opinion of the Attorney General of the United States on questions of law arising in the administration of that executive department.[1] While the opinion of the Attorney General of the United States does not control a court in the construction of an act,[2] it may have a controlling influence in some instances.[3]

With regard to state law, while it may be persuasive, an attorney general opinion is neither conclusive nor binding, and the recipient of it is free to follow it or not as he or she chooses.[4] Otherwise, any executive office could be controlled by the opinion of the attorney general specifying what the law requires to be done in that office.[5]

Footnotes

1 28 U.S.C.A. § 512.
As to the powers, duties, and liabilities of the U.S. Attorney General, see Am. Jur. 2d, Attorney General §§ 45 to 53.

2 Lewis Pub. Co. v. Morgan, 229 U.S. 288, 33 S. Ct. 867, 57 L. Ed. 1190 (1913); Pueblo of Taos v. Andrus, 475 F. Supp. 359 (D.D.C. 1979).

[3] U.S. Bedding Co. v. U.S., 55 Ct. Cl. 459, 1920 WL 656 (1920).

[4] League of United Latin American Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 26 Fed. R. Serv. 3d 1379 (5th Cir. 1993) (rejected on other grounds by, U.S. v. Charleston County, S.C., 365 F.3d 341 (4th Cir. 2004)) (applying Texas law); Frazier v. State By and Through Pittman, 504 So. 2d 675, 39 Ed. Law Rep. 417 (Miss. 1987); Follmer v. State, 94 Neb. 217, 142 N.W. 908 (1913).

[5] Follmer v. State, 94 Neb. 217, 142 N.W. 908 (1913).

End of Document

2 Am. Jur. 2d Administrative Law § 7

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

A. In General

§ 7. Role of Attorney General in advising administrative agencies—Provision of legal services

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 1, 2.1

Under federal law, when, in the opinion of the head of an executive department or agency, the interests of the United States require the service of counsel on the examination of any witness concerning any claim, or on the legal investigation of any claim, pending in the department or agency, he or she will notify the Attorney General. The notification must give the Attorney General all the facts necessary to enable him or her to furnish proper professional service in attending the examination or making the investigation, and the Attorney General will provide for that service.[1]

Footnotes

1 28 U.S.C.A. § 514.

2 Am. Jur. 2d Administrative Law § 8

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

A. In General

§ 8. Administrative Conference of United States

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 1, 2.1

The Administrative Conference Act establishes the Administrative Conference of the United States.[1] The purposes of the Act are:[2]

(1) to provide suitable arrangements through which federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other federal responsibilities may be carried out expeditiously in the public interest;

(2) to promote more effective public participation and efficiency in the rulemaking process;

(3) to reduce unnecessary litigation in the regulatory process;

(4) to improve the use of science in the regulatory process; and

(5) to improve the effectiveness of laws applicable to the regulatory process.

To carry out its stated purposes, the Administrative Conference is empowered to:[3]

(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out their programs, and make appropriate recommendations to the agencies, the President, Congress, or the Judicial Conference of the United States;

(2) arrange for interchange among agencies of information potentially useful in improving administrative procedure;

(3) collect information and statistics from agencies and publish such reports as it considers useful for evaluating and improving administrative procedure;

(4) enter into arrangements with any administrative agency or major organizational unit within an agency pursuant to which the Conference performs any of the prescribed functions; and

(5) provide assistance in response to requests relating to the improvement of administrative procedure in foreign countries, subject to the concurrence of the Secretary of State, the Administrator of the Agency for International Development, or the Director of the United States Information Agency, as appropriate, except that such assistance will be limited to the analysis of issues relating to administrative procedure, the provision of training of foreign officials in administrative procedure, and the design or improvement of administrative procedure, where the expertise of members of the Conference is indicated; and such assistance may only be undertaken on a fully reimbursable basis, including all direct and indirect administrative costs.

Footnotes

[1] 5 U.S.C.A. §§ 591 to 596.

[2] 5 U.S.C.A. § 591.

[3] 5 U.S.C.A. § 594.

2 Am. Jur. 2d Administrative Law § 9

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

A. In General

§ 9. Administrative Conference of United States—Membership

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 1, 2.1

The Administrative Conference is composed of not more than 101 nor less than 75 appointed members.[1] The Conference is composed of:[2]

(1) a full-time chairman, appointed for a five-year term by the President with the advice and consent of the Senate;

(2) the chairman of each independent regulatory board or commission, or an individual designated by the board or commission;

(3) the head of each executive department or other administrative agency which is designated by the President, or an individual designated by the head;

(4) one or more appointees from a board, commission, department, or agency as designated by the head thereof with the approval of the board or commission;

(5) individuals appointed by the President to membership on the Council who are not otherwise members of the Conference; and

(6) not more than 40 other members appointed for two-year terms by the chairman, with the approval of the Council, such as members of the practicing bar, scholars in the field of administrative law or government, or others specially knowledgeable or experienced in federal administrative procedure.

Members of the Conference, except the chairman, are not entitled to pay for service. However, members appointed from outside the federal government are entitled to travel expenses, including per diem instead of subsistence.[3]

Footnotes

[1] 5 U.S.C.A. § 593(a).

[2] 5 U.S.C.A. § 593(b).

[3] 5 U.S.C.A. § 593(c).

End of Document

2 Am. Jur. 2d Administrative Law § 10

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

A. In General

§ 10. Administrative Conference of United States—Organization

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 1, 2.1

The Administrative Conference is organized into three parts:
(1) the chairman, who is the Conference's chief executive and reports to the President and the Congress;[1]

(2) an 11-member Council which calls the Conference into session, proposes bylaws and regulations, and makes recommendations;[2] and
(3) the Conference itself, constituting the Assembly of the Conference, which adopts recommendations, bylaws, and regulations.[3]

Footnotes

1 5 U.S.C.A. § 595(c).

2 5 U.S.C.A. § 595(b).

3 5 U.S.C.A. § 595(a).

2 Am. Jur. 2d Administrative Law I B Refs.

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

B. Administrative Procedure Acts

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1, 310

A.L.R. Library

A.L.R. Index, Administrative Law
West's A.L.R. Digest, Administrative Law and Procedure 4.1, 310

End of Document

2 Am. Jur. 2d Administrative Law § 11

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

B. Administrative Procedure Acts

1. Federal Administrative Procedure Act

§ 11. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1

Treatises and Practice Aids

As to what the Administrative Procedure Act is, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

The Federal Administrative Procedure Act[1] is a remedial statute,[2] designed to insure uniformity, impartiality, and fairness in the procedures employed by federal administrative agencies.[3] Its enactment was meant to bring uniformity to a field full of variation and diversity.[4] The Act does not create substantive rights on which a claim for relief can be based.[5]

The provisions of the Act embody a comprehensive regulatory scheme, governing such aspects of agency action as investigations,[6] adjudications,[7] rulemaking,[8] licensing,[9] and open meeting and disclosure requirements,[10] as well as providing for judicial review of administrative proceedings.[11] Provision is also made for the representation of parties before administrative agencies.[12]

Footnotes

1 5 U.S.C.A. §§ 551 to 559.

2 Pan-Atlantic S. S. Corp. v. Atlantic Coast Line R. Co., 353 U.S. 436, 77 S. Ct. 999, 1 L. Ed. 2d 963 (1957); Home Loan Bank Bd. v. Mallonee, 196 F.2d 336 (9th Cir. 1952).

3 Morton v. Ruiz, 415 U.S. 199, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974).

4 Dickinson v. Zurko, 527 U.S. 150, 119 S. Ct. 1816, 144 L. Ed. 2d 143 (1999).

5 Furlong v. Shalala, 156 F.3d 384 (2d Cir. 1998); Walker v. Secretary of Treasury, I.R.S., 713 F. Supp. 403 (N.D. Ga. 1989).

6 §§ 101 to 109.

7 §§ 258 to 262.

8 §§ 147 to 162.

9 §§ 241 to 257.

10 §§ 88 to 100.

11 §§ 383 to 397.

12 §§ 309 to 313.

End of Document

2 Am. Jur. 2d Administrative Law § 12

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

B. Administrative Procedure Acts

1. Federal Administrative Procedure Act

§ 12. Construction

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1

Being a remedial statute,[1] the Federal Administrative Procedure Act[2] must be given a liberal interpretation,[3] in the light of, and to give effect to, its purposes.[4] The Act is not violative of the 14th Amendment to the United States Constitution.[5]

The provisions of the Act do not limit or repeal additional requirements imposed by statute or otherwise recognized by law.[6] Even in circumstances where an adjudication is not required to be held pursuant to the provisions of the Act, as where the proceedings are not contemplated by or are beyond the scope of the Act, an agency is nevertheless constitutionally required to observe the essentials of due process.[7] Similarly, even though the circumstances may be such that an agency is not required to comply with the hearing requirements of the Act, where the statute under which the agency is acting permits such action only "after hearing," the agency is required to accord the hearing specified.[8] It is always within an agency's discretion to afford parties more procedure than required by the Act.[9]

Observation:

Subsequent statutes may not be held to supersede or modify the provisions of the Administrative Procedure Act except to the extent that they do so expressly.[10] This provision forbids amendments of the Act by implication.[11]

Footnotes

1 § 11.

2 5 U.S.C.A. §§ 551 to 559.

3 Shaughnessy v. Pedreiro, 349 U.S. 48, 75 S. Ct. 591, 99 L. Ed. 868 (1955).

4 Pan-Atlantic S. S. Corp. v. Atlantic Coast Line R. Co., 353 U.S. 436, 77 S. Ct. 999, 1 L. Ed. 2d 963 (1957).

5 Silverton v. Department of Treasury, 449 F. Supp. 1004 (C.D. Cal. 1978), judgment aff'd, 644 F.2d 1341 (9th Cir. 1981).

6 5 U.S.C.A. § 559.

7 U.S. v. Libby, McNeil & Libby, 14 Alaska 37, 107 F. Supp. 697 (Terr. Alaska 1952).
As to adjudications, generally, see §§ 258 to 382.

8 U.S. v. Florida East Coast Ry. Co., 410 U.S. 224, 93 S. Ct. 810, 35 L. Ed. 2d 223 (1973).

9 Chrysler Corp. v. Brown, 441 U.S. 281, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979).

10 5 U.S.C.A. § 559.

11 Five Points Road Joint Venture v. Johanns, 542 F.3d 1121 (7th Cir. 2008).

End of Document

2 Am. Jur. 2d Administrative Law § 13

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

B. Administrative Procedure Acts

1. Federal Administrative Procedure Act

§ 13. Definitions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1

The Federal Administrative Procedure Act provides definitions of various terms used in the Act, including:[1]

• agency

• person

• party

• rule and rulemaking

• order

• adjudication

• license and licensing

• sanction

• relief

• agency proceeding

• agency action

• ex parte communication

The definitions of terms included in the Federal Administrative Procedure Act may on occasion provide a basis for

determining what is meant by similar terms used in other statutes relating to administrative procedure.[2]

Footnotes

1 5 U.S.C.A. § 551.

2 U.S. v. Florida East Coast Ry. Co., 410 U.S. 224, 93 S. Ct. 810, 35 L. Ed. 2d 223 (1973).

2 Am. Jur. 2d Administrative Law § 14

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

B. Administrative Procedure Acts

2. State Administrative Procedure Acts

§ 14. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1

States have enacted administrative procedure statutes based on various Model Acts. The Model State Administrative Procedure Act was issued in 1981.[1]The Revised Model State Administrative Procedure Act was issued in 2010.[2]

Comment:

The 2010 Act is shorter and less detailed than the 1981 Act. The 2010 Act is designed to ensure fairness in administrative proceedings, increase public access to the law administered by agencies, and promote efficiency in agency proceedings by providing for the extensive use of electronic technology by state governments. The 2010 Act is streamlined when compared to the 1981 Act and has been drafted to be less detailed and less comprehensive.[3]

The 2010 Act provides for a uniform minimum set of procedures to be followed by agencies subject to the Act.[4]The Act applies to an agency unless the agency is expressly exempted by a statute of the enacting state.[5]The 2010 Act creates only procedural rights and imposes only procedural duties.[6]

Similarly, the 1981 revision of the Model Act states that it applies to all agencies and all proceedings not expressly exempted[7]and that it creates only procedural rights and imposes only procedural duties.[8]An administrative procedure statute thus does not create substantive legal rights on which a claim for relief can be based; rather, such substantive legal rights must exist either by statutory language, by the agency's rules and regulations, or by some constitutional command.[9]

Footnotes

1 Model State Administrative Procedure Act §§ 1-101 to 5-205 (1981).

2 Revised Model State Administrative Procedure Act §§ 101 to 803 (2010).

3 Prefatory Note to: Revised Model State Administrative Procedure Act (2010).

4 Prefatory Note to: Revised Model State Administrative Procedure Act (2010).

5 Revised Model State Administrative Procedure Act § 103(a) (2010).

6 Prefatory Note to: Revised Model State Administrative Procedure Act (2010).

7 Model State Administrative Procedure Act § 1-103(a) (1981).

8 Model State Administrative Procedure Act § 1-103(b) (1981).

9 Romer v. Board of County Com'rs of County of Pueblo, Colo., 956 P.2d 566 (Colo. 1998), as modified on other grounds on denial of reh'g, (Apr. 27, 1998).

End of Document

2 Am. Jur. 2d Administrative Law § 15

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

B. Administrative Procedure Acts

2. State Administrative Procedure Acts

§ 15. Purposes and functions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1, 310

A state administrative procedure act may have several purposes. Such an act may be designed to achieve uniformity among the various agencies of the State with respect to the development of suitable procedural safeguards[1] and to simplify the administrative process and provide the public with a more certain administrative procedure, thereby insuring that the public will receive due process and significantly improve the fairness of treatment.[2] Such an act seeks to balance a state's interest in efficient administration against individuals' interest in fairness.[3] It provides a standard framework of fair and appropriate procedures for agencies that are responsible for both the administration and adjudication of their respective statutes.[4] The passing of an administrative procedure statute will ensure that those persons or entities whom a regulation will affect have a voice in its creation, as well as notice of the law's requirements so that they can conform their conduct accordingly.[5]

Footnotes

1 Villani v. Berle, 91 Misc. 2d 603, 398 N.Y.S.2d 796 (Sup 1977); In re Board of County Com'rs, Sublette County, 2001 WY 91, 33 P.3d 107 (Wyo. 2001) (due process).

2 School Bd. of Palm Beach County v. Survivors Charter Schools, Inc., 3 So. 3d 1220, 242 Ed. Law Rep. 962 (Fla. 2009).

3 Department of Health and Mental Hygiene v. Chimes, Inc., 343 Md. 336, 681 A.2d 484 (1996).

4 Coleman v. Anne Arundel County Police Dept., 369 Md. 108, 797 A.2d 770 (2002).

5 Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557, 59 Cal. Rptr. 2d 186, 927 P.2d 296 (1996).

End of Document

2 Am. Jur. 2d Administrative Law § 16

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

B. Administrative Procedure Acts

2. State Administrative Procedure Acts

§ 16. Construction

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1

A state administrative procedure act ought to be construed to achieve the purposes intended by the legislature.[1]The legislature is assumed to have intended for all of the provisions in the state administrative procedure statute to have a field of operation.[2]If the act is applicable to a particular agency, both the act and statutes specific to that agency should be read together and harmonized to the extent possible; however, if a provision of the act and the agency's statute conflict, the agency-specific provision controls.[3]

Throughout the Revised Model State Administrative Procedure Act, there are provisions that refer generally to other state laws governing related topics. When specific state laws are inconsistent with the provisions of the 2010 Act, those specific state laws will be controlling.[4]

The 1981 version of the Model State Administrative Procedure Act states that the procedural rights and duties created by the Act are in addition to those created and imposed by other statutes. To the extent that any other statute would diminish a right created or duty imposed by the Act, the other statute is superseded by the Act unless the other statute expressly provides otherwise.[5]An agency may grant procedural rights to persons in addition to those conferred by the Act so long as rights conferred upon other persons by any provision of law are not substantially prejudiced.[6]

Footnotes

1 Powell v. North Carolina Dept. of Transp., 209 N.C. App. 284, 704 S.E.2d 547 (2011); Basin Elec. Power Co-op. v. Bowen, 979 P.2d 503 (Wyo. 1999).

2 Ex parte Nixon, 729 So. 2d 277 (Ala. 1998).

[3] V Bar Ranch LLC v. Cotten, 233 P.3d 1200 (Colo. 2010).

[4] Prefatory Note to: Revised Model State Administrative Procedure Act (2010).

[5] Model State Administrative Procedure Act § 1-103(b) (1981).

[6] Model State Administrative Procedure Act § 1-103(c) (1981).

End of Document

2 Am. Jur. 2d Administrative Law § 17

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

B. Administrative Procedure Acts

2. State Administrative Procedure Acts

§ 17. Construction—Severance of provisions for invalidity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1

Pursuant to the Model State Administrative Procedure Act, if any provision of the Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application. For this purpose, the provisions of the Act are severable.[1]

Footnotes

[1] Model State Administrative Procedure Act § 1-109 (1981).

2 Am. Jur. 2d Administrative Law § 18

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

B. Administrative Procedure Acts

2. State Administrative Procedure Acts

§ 18. Definitions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1

Both the Model Administrative Procedure Act and the Revised Model Administrative Procedure Act provide definitions of key terms used throughout the respective Acts. Both Acts define the following terms:[1]

• agency

• agency action

• agency head

• license

• order

• party

• person

• law or provision of law

• rule and rulemaking

The list of definitions in the 2010 Act is a more extensive list than that provided in the 1981 Act.[2] Many of the new definitions result from the technological development of the Internet and the widespread use of electronic media by governmental entities.[3]

Footnotes

1 Model State Administrative Procedure Act § 1-102 (1981); Revised Model State Administrative Procedure Act § 102 (2010).

2 Revised Model State Administrative Procedure Act § 102(1) to (33) (2010).

3 Prefatory Note to: Revised Model State Administrative Procedure Act (2010).

End of Document

2 Am. Jur. 2d Administrative Law § 19

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

I. Introduction

B. Administrative Procedure Acts

2. State Administrative Procedure Acts

§ 19. Suspension of Act by Governor or Attorney General; emergency rule

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1

The 1981 version of the Model State Administrative Procedure Act provides that a state act may adopt a provision allowing or requiring the Governor by executive order or the Attorney General by rule, as the state statute designates, to suspend, in whole or in part, one or more provisions of the Act, to the extent necessary to avoid a denial of funds or services from the United States which would otherwise be available to the State. The Governor by executive order or the Attorney General by rule must declare the termination of a suspension as soon as it is no longer necessary to prevent the loss of funds or services from the United States.[1] An executive order applicable to such suspension may be made subject to the requirements applicable to the adoption and effectiveness of a rule.[2] If any provision of the Act is so suspended, the Governor or the Attorney General must promptly report the suspension to the legislature or other designated authority. The report must include recommendations concerning any desirable legislation that may be necessary to conform the Act to federal law.[3]

Observation:

The Revised Model State Administrative Procedure Act invokes the emergency rule in this situation; if an agency finds that the loss of federal funding for an agency program requires the immediate adoption of an emergency rule and publishes in a record its reasons for that finding, the agency, without prior notice or hearing or on any abbreviated notice and hearing that it finds practicable, may adopt an emergency rule without complying with the statutory requirements.[4]

Footnotes

1 Model State Administrative Procedure Act § 1-104(a) (1981).

2 Model State Administrative Procedure Act § 1-104(b) (1981).
As to requirements for the adoption and effectiveness of rules, see §§ 183 to 206.

3 Model State Administrative Procedure Act § 1-104(c) (1981).

4 Revised Model State Administrative Procedure Act § 309 (2010).

End of Document

2 Am. Jur. 2d Administrative Law II A Refs.

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

A. Introduction

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 5 to 7, 101 to 108

A.L.R. Library

A.L.R. Index, Administrative Law
West's A.L.R. Digest, Administrative Law and Procedure 5 to 7, 101 to 108

End of Document

2 Am. Jur. 2d Administrative Law § 20

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

A. Introduction

1. In General

§ 20. Creation and establishment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 5, 101 to 104

An agency must be created by constitution,[1] by statute,[2] by agency action,[3] or by executive order.[4] Congress,[5] state legislatures,[6] and municipal corporations[7] may create administrative agencies. The executive also may create administrative agencies, especially investigative agencies and particularly under statutes so providing.[8] Sometimes, as in the field of labor relations, federal statutes creating administrative agencies have a parallel in state statutes.[9]

Footnotes

1 League General Ins. Co. v. Michigan Catastrophic Claims Ass'n, 435 Mich. 338, 458 N.W.2d 632 (1990); Petition of Rhode Island Bar Ass'n, 118 R.I. 489, 374 A.2d 802 (1977).

2 Kentucky Retirement Systems v. Bowens, 281 S.W.3d 776 (Ky. 2009); League General Ins. Co. v. Michigan Catastrophic Claims Ass'n, 435 Mich. 338, 458 N.W.2d 632 (1990); Petition of Rhode Island Bar Ass'n, 118 R.I. 489, 374 A.2d 802 (1977).

3 League General Ins. Co. v. Michigan Catastrophic Claims Ass'n, 435 Mich. 338, 458 N.W.2d 632 (1990).

4 Petition of Rhode Island Bar Ass'n, 118 R.I. 489, 374 A.2d 802 (1977).

5 Wiener v. U.S., 357 U.S. 349, 78 S. Ct. 1275, 2 L. Ed. 2d 1377 (1958).

6 East Jeffersontown Imp. Ass'n v. Louisville & Jefferson County Planning & Zoning Commission, 285 S.W.2d 507 (Ky. 1955); Molina v. Games Management Services, 58 N.Y.2d 523, 462 N.Y.S.2d 615, 449 N.E.2d 395, 40 A.L.R.4th 655 (1983); Wall v. Fenner, 76 S.D. 252, 76 N.W.2d 722 (1956).

[7] Northwestern Laundry v. City of Des Moines, 239 U.S. 486, 36 S. Ct. 206, 60 L. Ed. 396 (1916).

[8] Peters v. Hobby, 349 U.S. 331, 75 S. Ct. 790, 99 L. Ed. 1129 (1955).

[9] Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234 (1947).

End of Document

2 Am. Jur. 2d Administrative Law § 21

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

A. Introduction

1. In General

§ 21. Definition of "agency" under Federal Administrative Procedure Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 5, 103.1

Treatises and Practice Aids

As to administrative agencies and their powers, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

For purposes of the Federal Administrative Procedure Act, the term "agency" means each authority of the government of the United States whether or not it is within or subject to review by another agency[1] and whether or not Congress labels it an agency.[2] Certain entities are expressly excluded from the Act[3] while others have been deemed excluded by the courts.[4]

Observation:

The President of the United States is not considered an agency within the meaning of the Administrative Procedure Act.[5]

CUMULATIVE SUPPLEMENT

Cases:

The State Department is an agency for purposes of the Administrative Procedure Act (APA). 5 U.S.C.A. § 551 et seq. Emami v. Nielsen, 365 F. Supp. 3d 1009 (N.D. Cal. 2019).

[END OF SUPPLEMENT]

Footnotes

1 5 U.S.C.A. § 551(1).

2 Government Nat. Mortg. Ass’n v. Terry, 608 F.2d 614, 51 A.L.R. Fed. 863 (5th Cir. 1979).

3 5 U.S.C.A. § 551(1)(A) to (H).

4 Munoz-Mendoza v. Pierce, 711 F.2d 421 (1st Cir. 1983); Southwest Williamson County Community Ass’n, Inc. v. Slater, 173 F.3d 1033, 1999 FED App. 0158P (6th Cir. 1999); Fund for Animals, Inc. v. Florida Game and Fresh Water Fish Com’n, 550 F. Supp. 1206 (S.D. Fla. 1982).

5 Franklin v. Massachusetts, 505 U.S. 788, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992); Motions Systems Corp. v. Bush, 437 F.3d 1356 (Fed. Cir. 2006).

2 Am. Jur. 2d Administrative Law § 22

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

A. Introduction

1. In General

§ 22. Definition of “agency” under state administrative procedure acts

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Administrative Law and Procedure 5, 103.1

The Revised Model State Administrative Procedure Act defines an “agency” as a state board, authority, commission, institution, department, division, office, officer, or other state entity that is authorized by state law to make rules or to adjudicate. The term does not include the Governor, the legislature body, or the judiciary.[1]

Pursuant to the Model State Administrative Procedure Act, the term “agency” means a board, commission, department, officer, or other administrative unit of the State, including the agency head and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf or under the authority of the agency head. The term does not include the legislature or the courts or the Governor, as the particular state statute dictates, in the exercise of powers derived directly and exclusively from the constitution of the state. The term does not include a political subdivision of the State or any of the administrative units of a political subdivision but it does include a board, commission, department, officer, or other administrative unit created or appointed by joint or concerted action of an agency and one or more political subdivisions of the State or any of their units. To the extent it purports to exercise authority subject to any provision of the Act, an administrative unit otherwise qualifying as an “agency” must be treated as a separate agency even if the unit is located within or subordinate to another agency.[2]

Under some authority, an “administrative agency” is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.[3]Some state acts require that the agency have statewide jurisdiction.[4]Other state versions define “agency” in terms of particular state programs. In such cases, an “agency” is a body in which the legislature has proposed general powers of administration of a particular state program in connection with which it has been given statutory authority to act for the State in the implementation of that program.[5]Under other state statutes, state entities with the power to hire and fire employees effectively engage in the resolution of contested cases and thus are “agencies” as defined under the statute.[6]

Footnotes

1 Revised Model State Administrative Procedure Act § 102(3) (2010).

2 Model State Administrative Procedure Act § 1-102(1) (1981).

3 Blakely v. Lancaster County, 284 Neb. 659, 825 N.W.2d 149 (2012).

4 Staeheli v. City of St. Paul, 732 N.W.2d 298 (Minn. Ct. App. 2007).

5 Catholic Family and Community Services v. Commission on Human Rights and Opportunities, 3 Conn. App. 464, 489 A.2d 408 (1985).

6 Krentz v. Robertson, 228 F.3d 897 (8th Cir. 2000) (applying Missouri law).

End of Document

2 Am. Jur. 2d Administrative Law § 23

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

A. Introduction

1. In General

§ 23. Definition of "agency" under state administrative procedure acts—Agencies as state, not local, entities

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 5, 103.1

The state administrative procedure acts generally apply to state entities and not local ones.[1] In fact, the Model State Administrative Procedure Act expressly excludes a political subdivision of the State or any of the administrative units of a political subdivision unless joint or concerted action is involved.[2] Accordingly, governmental entities established by municipalities[3] or counties[4] to perform in a wholly local capacity and to deal with problems on a local basis and which are independent from any statewide system are not state agencies within the meaning of the state acts. For instance, a city council is not an agency under such an act.[5]

Whether an entity is a state agency may depend on the level of state control over the agency. State status is determined by a review of all the relevant characteristics which, when considered together, indicate the overall character of the entity. The fact that an entity is created by statute does not dispositively indicate state status.[6] Nor does the fact that an entity is made an instrumentality of the State for limited purposes make it a state agency; instead, this indicates that the entity should remain independent unless brought within the scope of the directive at issue.[7]

Footnotes

1 Basurto v. Imperial Irrigation District, 211 Cal. App. 4th 866, 150 Cal. Rptr. 3d 145 (4th Dist. 2012); In re City of Shelley, 151 Idaho 289, 255 P.3d 1175 (2011); Lipscomb v. Tucker County Com'n, 197 W. Va. 84, 475 S.E.2d 84 (1996).

2 § 22.

3 Gibson v. Ada County Sheriff's Dept., 139 Idaho 5, 72 P.3d 845 (2003); Hammann v. City of Omaha, 227 Neb. 285,

417 N.W.2d 323 (1987); Izydore v. City of Durham (Durham Bd. of Adjustment), 746 S.E.2d 324 (N.C. Ct. App. 2013), review denied, 749 S.E.2d 851 (N.C. 2013).

4 Rubinstein v. Sarasota County Public Hosp. Bd., 498 So. 2d 1012 (Fla. 2d DCA 1986); Terrazas v. Blaine County ex rel. Bd. of Com'rs, 147 Idaho 193, 207 P.3d 169 (2009); Vitek v. Bon Homme County Bd. of Com'rs, 2002 SD 100, 650 N.W.2d 513 (S.D. 2002).

5 Hawkeye Outdoor Advertising, Inc. v. Board of Adjustment of City of Algona, 356 N.W.2d 544 (Iowa 1984).

6 League General Ins. Co. v. Michigan Catastrophic Claims Ass'n, 435 Mich. 338, 458 N.W.2d 632 (1990).
As to the creation of administrative agencies by statute, see § 20.

7 Cohen v. Board of Trustees of University of Medicine and Dentistry of New Jersey, 240 N.J. Super. 188, 572 A.2d 1191, 59 Ed. Law Rep. 1105 (Ch. Div. 1989).

End of Document

2 Am. Jur. 2d Administrative Law § 24

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

A. Introduction

1. In General

§ 24. Agencies as judicial bodies or courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 107

Administrative agencies are not courts.[1] They are not part of the judicial system, nor are they judicial bodies or tribunals.[2] Administrative agencies have no general judicial powers.[3]

A board or tribunal exercises a judicial function, however, if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner.[4] Judicial functions performed by administrative agencies or political subdivisions are those with which a court might have been charged in the first instance or functions courts have historically performed or did perform prior to the creation of an administrative body.[5]

Observation:

Administrative agencies often perform judicial or quasi-judicial functions in response to the complexities of modern government, economy, and technology, and this delegation of administrative decisional authority is not only possible but also desirable.[6]

Footnotes

1 Dickinson v. U.S., 346 U.S. 389, 74 S. Ct. 152, 98 L. Ed. 132 (1953); State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995); Ohio Fresh Eggs, L.L.C. v. Boggs, 183 Ohio App. 3d 511, 2009-Ohio-3551, 917 N.E.2d 833

(10th Dist. Franklin County 2009).

[2] People v. Western Air Lines, 42 Cal. 2d 621, 268 P.2d 723 (1954) (public service commission); State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995).

[3] Murray v. Neth, 279 Neb. 947, 783 N.W.2d 424 (2010).

[4] Hawkins v. City of Omaha, 261 Neb. 943, 627 N.W.2d 118 (2001).

[5] Brown v. Board of Educ., Unified School Dist. No. 333, Cloud County, 261 Kan. 134, 928 P.2d 57, 114 Ed. Law Rep. 1221 (1996).

[6] Mitchell v. Nixon, 351 S.W.3d 676 (Mo. Ct. App. W.D. 2011).
As to quasi-judicial functions in this regard, see § 25.

End of Document

2 Am. Jur. 2d Administrative Law § 25

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

A. Introduction

1. In General

§ 25. Agencies as judicial bodies or courts—Quasi-judicial functions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 108

Administrative proceedings may be considered quasi-judicial if a hearing is held, both parties may participate, the presiding officer has subpoena power over witnesses, and the body has the power to take remedial action.[1] An administrative agency acts in a quasi-judicial manner when the agency hears the view of opposing sides presented in the form of written and oral testimony, examines the record, and makes findings of fact.[2]

As a general matter, whenever an entity which normally acts as a legislative body applies general policy to particular persons in their private capacities, instead of passing on general policy or the rights of individuals in the abstract, it is functioning in a quasi-judicial capacity.[3] A function that is not a true judicial function may be a quasi-judicial function, which involves a discretionary act of a judicial nature taken by a body empowered to investigate facts, weigh evidence, and draw conclusions as the basis for official actions.[4]

Footnotes

1 Boice v. Unisys Corp., 50 F.3d 1145 (2d Cir. 1995) (applying New York law).

2 In re North Metro Harness, Inc., 711 N.W.2d 129 (Minn. Ct. App. 2006).

3 Cabana v. Kenai Peninsula Borough, 21 P.3d 833 (Alaska 2001).
When an administrative board has the power to hear and determine whether a certain state of facts warrants the application of a certain law, it is acting in a quasi-judicial manner. A. Miner Contracting, Inc. v. Toho-Tolani County Imp. Dist., 233 Ariz. 249, 311 P.3d 1062 (Ct. App. Div. 1 2013), review denied, (Mar. 21, 2014).

4 Brown v. Board of Educ., Unified School Dist. No. 333, Cloud County, 261 Kan. 134, 928 P.2d 57, 114 Ed. Law Rep. 1221 (1996).

Quasi-judicial decisions are characterized by: (1) the investigation into a disputed claim and the weighing of evidentiary facts; (2) the application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim. In re Jensen Field Relocation Claims Jensen Field, Inc., 817 N.W.2d 724, 282 Ed. Law Rep. 666 (Minn. Ct. App. 2012).

End of Document

2 Am. Jur. 2d Administrative Law § 26

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

A. Introduction

1. In General

§ 26. Agencies as legislative or executive

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 105, 106

While administrative agencies are separate from the judicial branch of the government, they do not clearly belong in all cases to either of the other two branches of government although certain administrative agencies are considered agents of the legislative branch of the government.[1]An administrative agency's action is quasi-legislative in nature if it appears that the agency determination is intended to have wide coverage encompassing a large segment of the regulated or general public rather than an individual or a narrow select group.[2]"Quasi-legislative actions," those undertaken by an agency in its legislative capacity, entail the formulation of a rule to be applied to all future cases.[3]

In other cases, specific administrative agencies,[4]or administrative agencies generally,[5]are deemed to be agents of the executive. According to some state courts, an administrative agency can play a dual role: in overseeing and managing its internal operations, it may act in an executive or administrative capacity, and in looking to the future and changing existing conditions by making a new rule to be applied thereafter within some area of its power, an agency exercises a legislative function.[6]

CUMULATIVE SUPPLEMENT

Cases:

While courts have the negative power to disregard an unconstitutional enactment by Congress, they cannot re-write Congress's work by creating offices, terms, and the like; such editorial freedom belongs to the Legislature, not the Judiciary. (Per Chief Justice Roberts, with two justices concurring and four justices concurring in the judgment.) Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020).

[END OF SUPPLEMENT]

Footnotes

1 Nathanson v. N. L. R. B., 344 U.S. 25, 73 S. Ct. 80, 97 L. Ed. 23 (1952); Central R. Co. of N. J. v. Department of Public Utilities, 7 N.J. 247, 81 A.2d 162 (1951).

2 Northwest Covenant Medical Center v. Fishman, 167 N.J. 123, 770 A.2d 233 (2001).

3 Coachella Valley Unified School Dist. v. State, 176 Cal. App. 4th 93, 98 Cal. Rptr. 3d 9, 247 Ed. Law Rep. 381 (1st Dist. 2009).

4 Brennan v. Black, 34 Del. Ch. 380, 104 A.2d 777 (1954) (school district); State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995) (Commission on Law Enforcement and Criminal Justice); Dunham v. Ottinger, 243 N.Y. 423, 154 N.E. 298 (1926) (investigations by attorney general).

5 Barrett v. Tennessee Occupational Safety and Health Review Com'n, 284 S.W.3d 784 (Tenn. 2009).

6 Brown v. Board of Educ., Unified School Dist. No. 333, Cloud County, 261 Kan. 134, 928 P.2d 57, 114 Ed. Law Rep. 1221 (1996).
As to independent agencies, generally, see § 27.

End of Document

2 Am. Jur. 2d Administrative Law § 27

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

A. Introduction

1. In General

§ 27. Agencies as independent or subordinate

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 5, 104

The term "independent" agency or commission is often used[1] to designate an agency independent of the executive branch.[2] Unlike those federal agencies which are subject to presidential supervision through consultation with the cabinet officers, the many independent agencies are charged by Congress to remain independent of the rest of the executive branch. However, independence does not mean that a commission or agency must ignore or reject positions espoused by the President in order to make an informed decision on matters of national interest.[3] A federal regulatory commission, although independent of executive-branch control, may be required to give consideration to matters which are the responsibility of other federal agencies so that consultation with officials of cabinet departments is encouraged in some instances.[4]

Alternatively, the term "independent" is used to indicate an agency not subject to a superior head of a department or in contrast to "subordinate,"[5] the latter term being applied to bodies whose action is subject to administrative review or revision.[6]

Footnotes

1 Com. ex rel. Banks v. Cain, 345 Pa. 581, 28 A.2d 897, 143 A.L.R. 1473 (1942); Chapel v. Com., 197 Va. 406, 89 S.E.2d 337 (1955).

2 Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 72 S. Ct. 800, 96 L. Ed. 1081 (1952).

3 Westinghouse Elec. Corp. v. U.S. Nuclear Regulatory Com'n, 598 F.2d 759 (3d Cir. 1979).

4 Public Service Commission of State of N. Y. v. Federal Energy Regulatory Commission, 589 F.2d 542 (D.C. Cir. 1978).

5 Cofman v. Ousterhous, 40 N.D. 390, 168 N.W. 826, 18 A.L.R. 219 (1918).

[6] Joseph Burstyn, Inc. v. Wilson, 303 N.Y. 242, 101 N.E.2d 665 (1951), judgment rev'd on other grounds, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952).

End of Document

2 Am. Jur. 2d Administrative Law § 28

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

A. Introduction

2. Statutes Relating to Agencies

§ 28. Validity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 5, 7

Vesting two agencies with the same power does not necessarily render a statute uncertain and therefore unconstitutional. However, conflict or confusion may arise from possible concurrent exercise of the power.[1]

The general rule that a statute may be constitutional in one part and unconstitutional in another, and if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected,[2]has been applied in the case of statutes relating to administrative agencies.[3]However, where it is not possible to separate that part which is constitutional from that which is unconstitutional, the whole statute must fall.[4]A provision in an administrative law statute that valid portions will be enforced even though it is judicially determined that some part or parts of the statute are invalid is generally carried out by the courts.[5]

Footnotes

1 School Dist. No. 3 of Town of Adams v. Callahan, 237 Wis. 560, 297 N.W. 407, 135 A.L.R. 1081 (1941).

2 Am. Jur. 2d, Constitutional Law § 199.

3 Champlin Refining Co. v. Corporation Com'n of State of Okl., 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, 86 A.L.R. 403 (1932) (invalid provision for fine and imprisonment); State v. Marana Plantations, Inc., 75 Ariz. 111, 252 P.2d 87 (1953) (unconstitutional delegation of legislative power); Vissering Mercantile Co. v. Annunzio, 1 Ill. 2d 108, 115 N.E.2d 306, 39 A.L.R.2d 728 (1953).

4 Am. Jur. 2d, Constitutional Law § 199.

5 Oklahoma v. U.S. Civil Service Com'n, 330 U.S. 127, 67 S. Ct. 544, 91 L. Ed. 794 (1947); Thornbrough v. Williams,

225 Ark. 709, 284 S.W.2d 641 (1955); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955).
As to the severability provision found in the Model State Administrative Procedure Act, see § 17.

End of Document

2 Am. Jur. 2d Administrative Law § 29

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

A. Introduction

2. Statutes Relating to Agencies

§ 29. Defects in administration as ground for attacking statute

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 5 to 7

A clear distinction must be made between charges that an act as passed by the legislature is discriminatory, and charges that a commission is enforcing the act in a discriminatory manner.[1] A provision not objectionable on its face may be adjudged unconstitutional because of its effect in operation.[2] However, a statute which is not invalid on its face may not be attacked because of anticipated improper or invalid action in its administration.[3] The possibility that administrative officers will act in defiance of the policy and standards stated in the delegation of authority is not a ground for objection to the delegation.[4] In addition, the failure of a commission to follow necessary procedure in a particular case would at most justify an objection to the administrative determination rather than to the statute itself.[5]

Footnotes

1 Duhame v. State Tax Commission, 65 Ariz. 268, 179 P.2d 252, 171 A.L.R. 684 (1947) (overruled on other grounds by, Valencia Energy Co. v. Arizona Dept. of Revenue, 191 Ariz. 565, 959 P.2d 1256 (1998)).

2 Am. Jur. 2d, Constitutional Law § 177.

3 Yakus v. U. S., 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944); Senior Citizens League v. Department of Social Sec. of Wash., 38 Wash. 2d 142, 228 P.2d 478 (1951).

4 Walls v. City of Guntersville, 253 Ala. 480, 45 So. 2d 468 (1950); Ours Properties, Inc. v. Ley, 198 Va. 848, 96 S.E.2d 754 (1957).

5 American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 67 S. Ct. 133, 91 L. Ed. 103 (1946).

End of Document

2 Am. Jur. 2d Administrative Law § 30

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

A. Introduction

2. Statutes Relating to Agencies

§ 30. Standing to attack constitutionality

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 5 to 7

The elementary doctrine that the constitutionality of a legislative act is open to attack only by a person whose rights are affected thereby[1] applies to statutes relating to administrative agencies.[2] The validity of such statutes may not be called into question in the absence of a showing of substantial harm, actual or impending, to a legally protected interest[3] and which directly results from enforcement of the statute.[4]

Footnotes

1 Am. Jur. 2d, Constitutional Law § 136.

2 Plymouth Coal Co. v. Com. of Pennsylvania, 232 U.S. 531, 34 S. Ct. 359, 58 L. Ed. 713 (1914); State v. Friedkin, 244 Ala. 494, 14 So. 2d 363 (1943); State ex rel. State Bd. of Mediation v. Pigg, 362 Mo. 798, 244 S.W.2d 75 (1951).

3 Gange Lumber Co. v. Rowley, 326 U.S. 295, 66 S. Ct. 125, 90 L. Ed. 85 (1945).

4 Board of Trade of City of Chicago v. Olsen, 262 U.S. 1, 43 S. Ct. 470, 67 L. Ed. 839 (1923); Ex parte Anderson, 191 Or. 409, 229 P.2d 633, 29 A.L.R.2d 1051 (1951).
As to when a public officer may question the constitutionality of a statute or ordinance imposing duties upon him or her, see Am. Jur. 2d, Constitutional Law § 150.

End of Document

2 Am. Jur. 2d Administrative Law II B Refs.

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

B. Members and Officers

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 103.1, 109 to 115, 314

A.L.R. Library

A.L.R. Index, Administrative Law
West's A.L.R. Digest, Administrative Law and Procedure 103.1, 109 to 115, 314

End of Document

2 Am. Jur. 2d Administrative Law § 31

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

B. Members and Officers

1. In General

§ 31. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 109 to 113

An administrative agency may come into existence before a majority of its members are appointed.[1] Administrative functions may be vested in interested persons[2] and in private persons.[3] Ex officio members of a public body are members for all purposes.[4]

Observation:

A state constitution does not prohibit the appointment of legislators to administrative boards and commissions. These boards and commissions, once members are appointed pursuant to valid legislative enactments in which the principles of bicameralism and presentment have been fulfilled, then may exercise all the powers that administrative agencies have traditionally exercised in both the federal and state systems of government.[5]

Footnotes

1 Liquefied Petroleum Gas Commission v. E. R. Kiper Gas Corp., 229 La. 640, 86 So. 2d 518 (1956).

2 Slocum v. Delaware, L. & W.R. Co., 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950).

[3] Caminetti v. Pacific Mut. Life Ins. Co. of Cal., 22 Cal. 2d 344, 139 P.2d 908 (1943).
As to the number of members necessary to exercise power, see §§ 79, 80.

[4] Louisville & Jefferson County Planning & Zoning Com'n v. Ogden, 307 Ky. 362, 210 S.W.2d 771 (1948).

[5] Almond v. Rhode Island Lottery Com'n, 756 A.2d 186 (R.I. 2000).

End of Document

2 Am. Jur. 2d Administrative Law § 32

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

B. Members and Officers

1. In General

§ 32. Appointment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 109, 110

In cases where members of an administrative agency are appointed, the members must be appointed in accordance with the constitution[1] and the applicable statutes.[2] The appointing power determines the fitness of the applicant: whether or not he or she is the proper one to discharge the duties of the position. The executive power to appoint members of an agency is unaffected by the rule that the discretion entrusted to an agency must be circumscribed by reasonably definite standards. Likewise, the courts have no general supervising power over appointments.[3] However, appointments must meet the minimal legal standards necessary to comply with the requirements of the statute, and whether such requirements have been met is subject to judicial review.[4]

Footnotes

1 Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954); Metropolitan Life Ins. Co. v. Boland, 281 N.Y. 357, 23 N.E.2d 532 (1939).

2 Webb v. Workers' Compensation Com'n, 292 Ark. 349, 730 S.W.2d 222 (1987); Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954); Metropolitan Life Ins. Co. v. Boland, 281 N.Y. 357, 23 N.E.2d 532 (1939).

3 Sanza v. Maryland State Bd. of Censors, 245 Md. 319, 226 A.2d 317 (1967).

4 Webb v. Workers' Compensation Com'n, 292 Ark. 349, 730 S.W.2d 222 (1987).

End of Document

Works.

2 Am. Jur. 2d Administrative Law § 33

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

B. Members and Officers

1. In General

§ 33. Status

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 103.1

Particular officers and members of administrative agencies or bodies which exercise determinative powers have been declared to be executive,[1] administrative, or ministerial officers.[2] For most purposes, there is no distinction between these classifications. The terms are used interchangeably[3] in stating the general rule that such officers are not judicial officers[4] or judges.[5]

Footnotes

1 Southern Ry. Co. v. Commonwealth of Virginia ex rel. Shirley, 290 U.S. 190, 54 S. Ct. 148, 78 L. Ed. 260 (1933).

2 State v. Loechner, 65 Neb. 814, 91 N.W. 874 (1902).
As to the status of agencies in this regard, see §§ 24 to 26.

3 Southern Ry. Co. v. Commonwealth of Virginia ex rel. Shirley, 290 U.S. 190, 54 S. Ct. 148, 78 L. Ed. 260 (1933).

4 Pigeon v. Employers' Liability Assur. Corp., 216 Mass. 51, 102 N.E. 932 (1913); State v. Loechner, 65 Neb. 814, 91 N.W. 874 (1902).

5 Kentucky & I. Bridge Co. v. Louisville & N.R. Co., 37 F. 567 (C.C.D. Ky. 1889).
Administrative law judges are not subject to the constitutional requirement of elected judges. Wooley v. State Farm Fire and Cas. Ins. Co., 893 So. 2d 746 (La. 2005).

Works.

2 Am. Jur. 2d Administrative Law § 34

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

B. Members and Officers

1. In General

§ 34. Effect of change in membership

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 114.1, 115

Questions with regard to the effect of a change of membership or personnel arise in connection with the power of an agency to act initially.[1] It has been found that an agency remains the same although its members' terms of office expire, and the board is reconstituted.[2] A change in personnel occurring during the course of or at the close of an administrative hearing does not as such give rise to constitutional repugnance in a decision or order made by the administrative tribunal on the basis of the previous hearing.[3]

Footnotes

1 Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954).

2 Raymond v. Fish, 51 Conn. 80, 1883 WL 1592 (1883).

3 Wilburn v. Astrue, 626 F.3d 999 (8th Cir. 2010).

2 Am. Jur. 2d Administrative Law § 35

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

B. Members and Officers

2. Disqualification

a. In General

§ 35. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

A.L.R. Library

When will member of federal regulatory board, commission, authority, or similar body be enjoined from participating in rulemaking or adjudicatory proceeding because of "personal bias or other disqualification" under 5 U.S.C.A. sec. 556(b), 51 A.L.R. Fed. 400

The appropriate remedy for any bias, conflict of interest, or appearance of impropriety is the recusal or disqualification of the tainted adjudicator.[1]An administrative officer may be disqualified by express provision of a statute applicable to the administrative proceeding at issue.[2]In addition, although the applicable due process standards for the disqualification of administrators do not rise to the heights of those prescribed for judicial disqualification,[3]the common-law rule of disqualification extends to administrative officers exercising judicial or quasi-judicial functions[4]such that the mere appearance of impropriety by an administrative officer is to be avoided although that alone is not sufficient to mandate recusal.[5]

The Federal Administrative Procedure Act specifically provides that, in the context of a hearing, a presiding or participating employee may at any time disqualify him- or herself.[6]The Revised Model State Administrative Procedure Act provides that a presiding officer or agency head acting as a final decision maker is subject to disqualification for bias, prejudice, financial interest, ex parte communications, or any other factor that would cause a reasonable person to question the impartiality of the presiding officer or agency head.[7]The Model State Administrative Procedure Act provides that any person serving or designated to serve alone or with others as a presiding officer is subject to disqualification for bias, prejudice, interest, or any

other cause provided for in the Act or for which a judge is or may be disqualified.[8]

Practice Tip:

The party asserting grounds for the disqualification of a tainted adjudicator must timely present the objection either before the commencement of the proceeding or as soon as the disqualifying facts become known.[9]

Although agency members may be disqualified from rulemaking proceedings as well, the standards for disqualification are not always the same as in the case of adjudication. The burden of proof on parties seeking to disqualify agency members from rulemaking proceedings is higher because of the constitutionally mandated deference to an administrative agency's legislative prerogatives. Parties must support their motion to disqualify by clear and convincing evidence.[10]

Footnotes

1 In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (2000).

2 In re Weston Benefit Assessment Special Road Dist. of Platte County, 294 S.W.2d 353 (Mo. Ct. App. 1956).

3 Spitz v. Board of Examiners of Psychologists, 127 Conn. App. 108, 12 A.3d 1080 (2011).
As to the disqualification of judges to act in a particular case, generally, see Am. Jur. 2d, Judges §§ 86 to 167.

4 Regan v. State Bd. of Chiropractic Examiners, 355 Md. 397, 735 A.2d 991 (1999).

5 Grant v. Senkowski, 146 A.D.2d 948, 537 N.Y.S.2d 323 (3d Dep't 1989).
As to the disqualification of hearing officers for bias, see §§ 305, 306.

6 5 U.S.C.A. § 556(b).
As to the procedure for disqualification, see § 306.
As to administrative hearings, generally, see §§ 289 to 345.

7 Revised Model State Administrative Procedure Act § 402(c) (2010).
As to disqualification for bias, generally, see §§ 38 to 40.

8 Model State Administrative Procedure Act § 4-202(b) (1981).

9 In re Public Utilities Com'n, 125 Haw. 210, 257 P.3d 223 (Ct. App. 2011).

10 Tennessee Cable Television Ass'n v. Tennessee Public Service Com'n, 844 S.W.2d 151 (Tenn. Ct. App. 1992).

End of Document

2 Am. Jur. 2d Administrative Law § 36

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

B. Members and Officers

2. Disqualification

a. In General

§ 36. Effect of disqualification

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

The general rule in the federal courts has been that, except in limited circumstances, Congress did not contemplate a grant of jurisdiction to the courts to prevent abuse or misuse of power by prior constraint,[1] and where issues relative to disqualification are essentially questions of fact, rather than law, proper occasion for court involvement is upon judicial review of agency action in order to avoid undue delay in the administrative determination. Nevertheless, some courts have found that where the issues in question are purely legal,[2] continued participation would amount to a denial of due process;[3] or upon balancing the variable factors in the case, and equity so requires,[4] an injunction is appropriate.

Some state courts adopt a less restrictive approach to injunctions. Such courts find that disqualification may furnish grounds for compelling the officer to recuse him- or herself from sitting in the proceeding if he or she does not voluntarily retire,[5] or for enjoining an officer from participation,[6] or for prohibiting a board, one member of which is disqualified, from proceeding.[7]

A determination made or participated in by a disqualified officer is merely voidable where only the common-law rule as to disqualification is violated,[8] and the proceeding is reviewable.[9] However, if participation by a disqualified officer is prohibited by statute, the determination may be void.[10]

Footnotes

1 Securities and Exchange Commission v. R. A. Holman & Co., 323 F.2d 284 (D.C. Cir. 1963).

2 Davis v. Secretary, Dept. of Health, Ed. and Welfare, 262 F. Supp. 124 (D. Md. 1967), judgment aff'd, 386 F.2d 429 (4th Cir. 1967).

[3] Amos Treat & Co. v. Securities and Exchange Commission, 306 F.2d 260 (D.C. Cir. 1962).

[4] Davis v. Secretary, Dept. of Health, Ed. and Welfare, 262 F. Supp. 124 (D. Md. 1967), judgment aff'd, 386 F.2d 429 (4th Cir. 1967); Leyden v. Federal Aviation Administration, 315 F. Supp. 1398 (E.D. N.Y. 1970).

[5] State v. Aldridge, 212 Ala. 660, 103 So. 835, 39 A.L.R. 1470 (1925).

[6] Sussel v. City and County of Honolulu Civil Service Com'n, 71 Haw. 101, 784 P.2d 867 (1989).

[7] State ex rel. Barnard v. Board of Educ. of City of Seattle, 19 Wash. 8, 52 P. 317 (1898).

[8] City of Naperville v. Wehrle, 340 Ill. 579, 173 N.E. 165, 71 A.L.R. 535 (1930); Stahl v. Board of Sup'rs of Ringgold County, 187 Iowa 1342, 175 N.W. 772, 11 A.L.R. 185 (1920).

[9] Carr v. Duhme, 167 Ind. 76, 78 N.E. 322 (1906).

[10] Stahl v. Board of Sup'rs of Ringgold County, 187 Iowa 1342, 175 N.W. 772, 11 A.L.R. 185 (1920); In re Weston Benefit Assessment Special Road Dist. of Platte County, 294 S.W.2d 353 (Mo. Ct. App. 1956).

End of Document

2 Am. Jur. 2d Administrative Law § 37

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

B. Members and Officers

2. Disqualification

a. In General

§ 37. Effect of disqualification—Continuation of proceedings; application of "rule of necessity"

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

A.L.R. Library

Construction and Application of Rule of Necessity Providing that Administrative or Quasi-judicial Officer Is Not Disqualified to Determine a Matter Because of Bias or Personal Interest if Case Cannot Be Heard Otherwise, 28 A.L.R.6th 175

Due process considerations do not require a biased administrative agency to forego making a decision which no other entity is authorized to make.[1] Under such circumstances, the so-called "rule of necessity" permits an adjudicative body to proceed in spite of its possible bias or self-interest.[2] The rule of necessity not only allows but also requires a decision maker to act in a proceeding when he or she would otherwise be disqualified if jurisdiction is exclusive, and no provision exists for substitution.[3]

Observation:

The rule of necessity applies only in situations where the sole adjudicatory body would be precluded from carrying out its function because of disqualifications.[4] It is not implicated where recusals based on bias do not deprive the administrative body of a quorum.[5]

There are ways of relieving the injustice of permitting a biased administrative decision. Whenever the rule of necessity is invoked and the administrative decision is reviewable, the reviewing court, without altering the law about scope of review, may and probably should review with special intensity. It makes no sense to show the extreme deference of viewing the evidence in the light most favorable to an administrative body which is not completely impartial.[6]However, this does not mean that the court should undertake a de novo review.[7]The court's standard of review should be deferential, but it should also compensate for the possibility that bias may have tainted the agency's exercise of its expertise. Accordingly, the decision of a biased administrative agency acting under the rule of necessity should be upheld if the evidence presented at the administrative hearing would have entitled an objective decision maker to reach the same conclusion.[8]

Footnotes

1 Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52 (Mo. Ct. App. E.D. 1990).

2 In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (2000); Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52 (Mo. Ct. App. E.D. 1990).

3 In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (2000).

4 Valley v. Rapides Parish School Bd., 118 F.3d 1047, 38 Fed. R. Serv. 3d 408 (5th Cir. 1997); In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (2000).

5 Valley v. Rapides Parish School Bd., 118 F.3d 1047, 38 Fed. R. Serv. 3d 408 (5th Cir. 1997).

6 Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52 (Mo. Ct. App. E.D. 1990).

7 Barker v. Secretary of State's Office of Missouri, 752 S.W.2d 437 (Mo. Ct. App. W.D. 1988).

8 Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52 (Mo. Ct. App. E.D. 1990).

2 Am. Jur. 2d Administrative Law § 38

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

B. Members and Officers

2. Disqualification

b. Particular Grounds

§ 38. Bias

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

A.L.R. Library

Bias or Interest of Administrative Officer Sitting in Zoning Proceeding as Necessitating Disqualification of Officer or Affecting Validity of Zoning Decision, 4 A.L.R.6th 263

When will member of federal regulatory board, commission, authority, or similar body be enjoined from participating in rulemaking or adjudicatory proceeding because of "personal bias or other disqualification" under 5 U.S.C.A. sec. 556(b), 51 A.L.R. Fed. 400

Administrative decision makers must be impartial.[1]The right to a hearing before an unbiased and impartial administrative decision maker is the basic requirement of due process and of the statutes.[2]The Federal Administrative Procedure Act provides that in administrative hearings, the functions of presiding employees and of employees participating in decisions must be conducted in an impartial manner.[3]The Revised Model State Administrative Procedure Act and the Model State Administrative Procedure Act likewise provide for the disqualification of presiding officers due to bias.[4]

Actual bias, rather than the mere potential for bias, must be shown in order to disqualify a hearing tribunal.[5]Generally, the test for bias is whether the circumstances of the case could reasonably be interpreted as having the likely capacity to tempt the official to depart from a strong public duty.[6]Bias or prejudice of an agency decision maker related to an issue of law or policy is not disqualifying; however, personal bias or prejudice going beyond sincere political and philosophical views is another matter.[7]Not all allegations of bias or prejudice are of the type that render a proceeding fundamentally unfair or require the disqualification of a decision maker.[8]To be disqualifying, the alleged bias of an administrative law judge must stem from an

extrajudicial source or must demonstrate a deep-seated antagonism or favoritism that would make a fair judgment impossible[9]and result in an opinion on the merits on some basis other than what the judge learned from participation in the case.[10]A substantial showing of personal bias is required to disqualify a hearing officer.[11]

Observation:

The test for bias in rulemaking proceedings is different than in adjudication because rulemaking is the type of proceeding where an agency member's policy biases gained from experience and expertise become an integral part of the process.[12]

CUMULATIVE SUPPLEMENT

Cases:

Due process requires that administrative proceedings in New Mexico be administered by fair and impartial triers of fact who are at a minimum, disinterested and from any form of bias or predisposition regarding outcome of case. U.S.C.A. Const.Amend. 14. Lujan v. City of Santa Fe, 89 F. Supp. 3d 1109 (D.N.M. 2015).

The rule of necessity provides a limited exception to the requirement of an unbiased adjudicator for an administrative proceeding by requiring a biased adjudicator to decide a case if and only if the dispute cannot otherwise be heard. Zlotnick v. City of Saratoga Springs, 122 A.D.3d 1210, 997 N.Y.S.2d 809 (3d Dep't 2014).

[END OF SUPPLEMENT]

Footnotes

1 Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52 (Mo. Ct. App. E.D. 1990).

2 § 292.

3 5 U.S.C.A. § 556(b).
As to disqualification for bias in the hearing context, generally, see § 305.
As to the procedure for disqualification for bias in the hearing context, see § 306.

4 § 35.

5 Jones v. Connecticut Medical Examining Bd., 129 Conn. App. 575, 19 A.3d 1264 (2011), judgment aff'd, 309 Conn. 727, 72 A.3d 1034 (2013); Felder v. Charleston County School Dist., 327 S.C. 21, 489 S.E.2d 191, 120 Ed. Law Rep. 616 (1997).

6 Matter of Bergen County Utilities Authority, 230 N.J. Super. 411, 553 A.2d 849 (App. Div. 1989).

7 Colao v. County Council of Prince George's County, 109 Md. App. 431, 675 A.2d 148 (1996), aff'd, 346 Md. 342, 697 A.2d 96 (1997).

[8] Alb. Bernalillo Co. Water Utility Authority v. NMPRC, 2010-NMSC-013, 148 N.M. 21, 229 P.3d 494 (2010).

[9] Reddy v. Commodity Futures Trading Com'n, 191 F.3d 109 (2d Cir. 1999).

[10] First Nat. Monetary Corp. v. Weinberger, 819 F.2d 1334 (6th Cir. 1987).

[11] Head v. Chicago School Reform Bd. of Trustees, 225 F.3d 794 (7th Cir. 2000); St. Anthony Hosp. v. U.S. Dept. of Health and Human Services, 309 F.3d 680 (10th Cir. 2002).

[12] Tennessee Cable Television Ass'n v. Tennessee Public Service Com'n, 844 S.W.2d 151 (Tenn. Ct. App. 1992).

End of Document

2 Am. Jur. 2d Administrative Law § 39

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

B. Members and Officers

2. Disqualification

b. Particular Grounds

§ 39. Bias—Prejudgment of law or facts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

The standard for disqualification due to prejudgment is different in adjudication proceedings and rulemaking proceedings.[1] An administrative officer exercising judicial or quasi-judicial power is disqualified or incompetent to sit in a proceeding in which he or she has prejudged the case.[2] Any administrative decision maker who has made an unalterable prejudgment of operative adjudicative facts is considered biased.[3] The test for disqualification is whether a disinterested observer may conclude that the agency, or its members, have in some measure adjudged the facts, as well as the law, of a case in advance of hearing it.[4]

Observation:

Administrative officials may question witnesses and possess preconceived views on the legal and policy issues before them.[5] In the course of adjudicative proceedings, decision makers frequently make preliminary or collateral determinations against a party, and absent persuasive evidence of factual bias, there is no reason to assume that these decision makers thereby lose their objectivity.[6]

In rulemaking proceedings, the standard for prejudgment is not the same as in adjudications. Bias in the form of a crystallized point of view on issues of law or policy is rarely, if ever, sufficient to disqualify.[7] The standard for disqualifying an agency official from participating in rulemaking proceedings for prejudgment is substantial, and potentially disqualifying statements by an official must be considered as a whole.[8]

Footnotes

1 Tennessee Cable Television Ass'n v. Tennessee Public Service Com'n, 844 S.W.2d 151 (Tenn. Ct. App. 1992).

2 Head v. Chicago School Reform Bd. of Trustees, 225 F.3d 794 (7th Cir. 2000); Kramarski v. Board of Trustees of Village of Orland Park Police Pension Fund, 402 Ill. App. 3d 1040, 341 Ill. Dec. 954, 931 N.E.2d 851 (1st Dist. 2010).

3 Valley v. Rapides Parish School Bd., 118 F.3d 1047, 38 Fed. R. Serv. 3d 408 (5th Cir. 1997); Financial Solutions and Associates v. Carnahan, 316 S.W.3d 518 (Mo. Ct. App. W.D. 2010).

4 Board of Educ. of Rich Tp. High School Dist. No. 227 v. Illinois State Bd. of Educ., 2011 IL App (1st) 110182, 358 Ill. Dec. 285, 965 N.E.2d 13, 279 Ed. Law Rep. 391 (App. Ct. 1st Dist. 2011).

5 In re Rattee, 145 N.H. 341, 761 A.2d 1076 (2000).

6 Dodds v. Commission on Judicial Performance, 12 Cal. 4th 163, 48 Cal. Rptr. 2d 106, 906 P.2d 1260 (1995).

7 Tennessee Cable Television Ass'n v. Tennessee Public Service Com'n, 844 S.W.2d 151 (Tenn. Ct. App. 1992).

8 Housing Study Group v. Kemp, 736 F. Supp. 321 (D.D.C. 1990), order clarified, 739 F. Supp. 633 (D.D.C. 1990).

End of Document

2 Am. Jur. 2d Administrative Law § 40

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

B. Members and Officers

2. Disqualification

b. Particular Grounds

§ 40. Bias—Proof and presumptions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

It is assumed that administrative decision makers will serve with fairness and integrity.[1] There is a presumption that they are objective[2] and capable of fairly judging a particular controversy on the basis of its own circumstances.[3] In addition, there is a presumption of honesty, integrity,[4] good faith,[5] and impartiality[6] in those serving as adjudicators, which presumption is only rebutted by a showing of some substantial countervailing reason to conclude that a decision maker is actually biased with respect to the factual issues being adjudicated.[7] To overcome the presumption of impartiality, the plaintiff must demonstrate either actual bias[8] or the existence of circumstances indicating a probability of bias too high to be constitutionally tolerable.[9]

CUMULATIVE SUPPLEMENT

Cases:

County employee failed to overcome presumption that hearing officer was free from bias and establish that officer prejudged charges against employee by administrator of nursing home, notwithstanding that officer presided over prior related hearing for employee. Bruso v. Clinton County, 139 A.D.3d 1169, 31 N.Y.S.3d 277 (3d Dep't 2016).

[END OF SUPPLEMENT]

Footnotes

1 Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 136 Ill. Dec. 47, 544 N.E.2d 733 (1989).

2 Simko v. Ervin, 234 Conn. 498, 661 A.2d 1018 (1995); In re Cross, 617 A.2d 97 (R.I. 1992); Voeltz v. John Morrell & Co., 1997 SD 69, 564 N.W.2d 315 (S.D. 1997).

3 Lichoulas v. F.E.R.C., 606 F.3d 769 (D.C. Cir. 2010); Kramarski v. Board of Trustees of Village of Orland Park Police Pension Fund, 402 Ill. App. 3d 1040, 341 Ill. Dec. 954, 931 N.E.2d 851 (1st Dist. 2010).

4 Hasie v. Office of Comptroller of Currency of U.S., 633 F.3d 361 (5th Cir. 2011); Fleming v. Civil Service Com'n of Douglas County, 280 Neb. 1014, 792 N.W.2d 871 (2011); Champlin's Realty Associates v. Tikoian, 989 A.2d 427 (R.I. 2010).

5 Head v. Chicago School Reform Bd. of Trustees, 225 F.3d 794 (7th Cir. 2000).

6 Gottstein v. State, Dept. of Natural Resources, 223 P.3d 609 (Alaska 2010); Morongo Band of Mission Indians v. State Water Resources Control Bd., 45 Cal. 4th 731, 88 Cal. Rptr. 3d 610, 199 P.3d 1142 (2009); State ex rel. Praxair, Inc. v. Missouri Public Service Com'n, 344 S.W.3d 178 (Mo. 2011).

7 Harline v. Drug Enforcement Admin., 148 F.3d 1199 (10th Cir. 1998).
A party seeking to disqualify an adjudicator in administrative agency proceedings on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality. Fleming v. Civil Service Com'n of Douglas County, 280 Neb. 1014, 792 N.W.2d 871 (2011).

8 Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975); Bunnell v. Barnhart, 336 F.3d 1112 (9th Cir. 2003); Clisham v. Board of Police Com'rs of Borough of Naugatuck, 223 Conn. 354, 613 A.2d 254 (1992).

9 Transportation General, Inc. v. Department of Ins., State of Conn., 236 Conn. 75, 670 A.2d 1302 (1996); Northwestern Bell Telephone Co., Inc. v. Stofferahn, 461 N.W.2d 129 (S.D. 1990).

End of Document

2 Am. Jur. 2d Administrative Law § 41

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

B. Members and Officers

2. Disqualification

b. Particular Grounds

§ 41. Improper receipt of evidence

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

Although an administrative official does not become impartial or unfair merely through becoming familiar with the facts of the case through the performance of a statutory or administrative duty,[1] disqualification may result from evidence being improperly received. In such a situation, disqualification depends on the facts and circumstances of each case.[2] Some courts allow a decision maker to have a dual role as a witness at one step of the proceedings and as a member of a reviewing body at a later stage of the same proceedings.[3]

Footnotes

1 Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 96 S. Ct. 2308, 49 L. Ed. 2d 1 (1976); Matter of Carberry, 114 N.J. 574, 556 A.2d 314 (1989).

2 Collura v. Board of Police Com'rs of Village of Itasca, 113 Ill. 2d 361, 101 Ill. Dec. 640, 498 N.E.2d 1148 (1986).

3 Mountain States Tel. and Tel. Co. v. Public Utilities Com'n of State of Colo., 763 P.2d 1020 (Colo. 1988).

End of Document

2 Am. Jur. 2d Administrative Law § 42

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

B. Members and Officers

2. Disqualification

b. Particular Grounds

§ 42. Involvement in investigation or prosecution

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

There is authority to the effect that an administrative officer may be disqualified from adjudication where he or she is on the investigative or prosecuting staff in the case.[1] In fact, pursuant to both the Revised Model State Administrative Procedure Act and the Model State Administrative Procedure Act, a person who has served as an investigator, prosecutor, or advocate in a contested case, or an adjudicative proceeding or in its preadjudicative stage, as the case may be, or persons subject to the authority, direction, or discretion of such person may not serve as a presiding officer or assist or advise a presiding officer in the same proceeding.[2]

Under some authority, however, agency members who participate in an investigation, particularly a nonadversarial one, are not in all cases disqualified from adjudicating.[3] When an assertion of bias is premised solely on an administrative adjudicator's exercise of both investigative and adjudicative functions, the party claiming bias must show that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.[4]

Footnotes

1 Amos Treat & Co. v. Securities and Exchange Commission, 306 F.2d 260 (D.C. Cir. 1962).

2 Model State Administrative Procedure Act § 4-214(a), (b) (1981); Revised Model State Administrative Procedure Act § 402(b) (2010).

[3] Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).

[4] Hasie v. Office of Comptroller of Currency of U.S., 633 F.3d 361 (5th Cir. 2011); Moncier v. Board of Professional Responsibility, 406 S.W.3d 139 (Tenn. 2013).

End of Document

2 Am. Jur. 2d Administrative Law § 43

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

B. Members and Officers

2. Disqualification

b. Particular Grounds

§ 43. Personal or pecuniary interest

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

A.L.R. Library

Bias or Interest of Administrative Officer Sitting in Zoning Proceeding as Necessitating Disqualification of Officer or Affecting Validity of Zoning Decision, 4 A.L.R.6th 263

Members of an administrative agency must be able to perform the duties of office free of an interest, personal or pecuniary, having the potential to influence their judgment.[1] Thus, an administrative officer generally is disqualified from acting as a decision maker if he or she has a personal or pecuniary interest in the proceedings.[2] The Revised Model State Administrative Procedure Act requires disqualification for "financial interest," and the Model State Administrative Procedure Act requires disqualification for "interest."[3]

A direct, personal, and substantial pecuniary interest exists requiring the disqualification of a judge or temporary administrative hearing officer when the income from judging depends upon the volume of cases an adjudicator hears and when frequent litigants are free to choose among adjudicators, preferring those who render favorable decisions.[4] A personal interest need not be pecuniary; rather, it is any interest which can be viewed as having a potentially debilitating effect on the impartiality of the decision maker.[5] An administrative official also may be disqualified where he or she has a familial relationship with one of the parties[6] or where he or she is biased, is prejudiced, or labors under personal animosity toward a party.[7]

Footnotes

1 Matter of Bergen County Utilities Authority, 230 N.J. Super. 411, 553 A.2d 849 (App. Div. 1989).

2 In re Khan, 804 N.W.2d 132 (Minn. Ct. App. 2011); Fulce v. Public Employees Retirement System of Mississippi, 759 So. 2d 401 (Miss. 2000); Appeal of the Local Government Center, Inc., 85 A.3d 388 (N.H. 2014).

3 § 35.

4 Haas v. County of San Bernardino, 27 Cal. 4th 1017, 119 Cal. Rptr. 2d 341, 45 P.3d 280 (2002).

5 Waste Management of Illinois, Inc. v. Pollution Control Bd., 175 Ill. App. 3d 1023, 125 Ill. Dec. 524, 530 N.E.2d 682 (2d Dist. 1988).

6 In re Interest of A.M., Jr., 281 Neb. 482, 797 N.W.2d 233 (2011).

7 Head v. Chicago School Reform Bd. of Trustees, 225 F.3d 794 (7th Cir. 2000).

End of Document

2 Am. Jur. 2d Administrative Law § 44

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

B. Members and Officers

2. Disqualification

b. Particular Grounds

§ 44. Target of criticism by party involved

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 314

Where the adjudicator in an administrative proceeding has been the target of personal abuse or criticism by an involved party, the probability of actual bias is too high to be constitutionally tolerable[1] and is grounds for disqualification.[2] Vituperative criticism of an adjudicator by a charged party prior to the filing of administrative charges may present an unacceptably high risk of creating bias on the part of the adjudicator. However, a contentious atmosphere can be expected in many administrative hearings, and an attitude bordering on partisanship, or even hostility, as reflected in exchanges between the adjudicator and the charged party does not in and of itself prove bias.[3]

Footnotes

1 Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).

2 Matter of Carberry, 114 N.J. 574, 556 A.2d 314 (1989).

3 Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52 (Mo. Ct. App. E.D. 1990).

End of Document

2 Am. Jur. 2d Administrative Law II C Refs.

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 8, 103.1, 301 to 309.1, 316, 318, 322.1 to 328, 331, 428 to 437

A.L.R. Library

A.L.R. Index, Administrative Law
West's A.L.R. Digest, Administrative Law and Procedure 8, 103.1, 301 to 309.1, 316, 318, 322.1 to 328, 331, 428 to 437

End of Document

2 Am. Jur. 2d Administrative Law § 45

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

1. In General

§ 45. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 301 to 309.1

The primary function of administrative agencies is to carry into effect the will of the State as expressed by its legislation.[1]Administrative agencies are vested with the responsibility to consistently interpret guidelines to avoid arbitrary and capricious results.[2]Broadly speaking, agencies are expected to consider reasonable alternatives to proposed actions[3]and, in doing so, are permitted to assess the wisdom of their policies on a continuing basis.[4]

While some agencies act merely as investigative or advisory bodies,[5]administrative agencies may have executive, administrative, investigative, legislative, or adjudicative powers.[6]In addition, some statutory schemes provide for or permit administrative enforcement,[7]and some agencies are given express authority to reconsider, amend, correct, or modify orders that would otherwise be final or to monitor conditions over time to best implement a particular statutory scheme.[8]

Whether a particular administrative agency has a certain power is primarily a matter of statutory construction.[9]The fact that an asserted power is novel and unprecedented does not mean that it does not exist.[10]An agency may act within its authority even if its action is later determined to be legally erroneous.[11]

CUMULATIVE SUPPLEMENT

Cases:

Agencies are not permitted to act unlawfully even in pursuit of desirable ends. Alabama Association of Realtors v. Department of Health and Human Services, 141 S. Ct. 2485 (2021).

[END OF SUPPLEMENT]

Footnotes

1 Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A.L.R. 1217 (1941); Rosenthal v. State Emp. Retirement System, 30 N.J. Super. 136, 103 A.2d 896 (App. Div. 1954).

2 Biloxi HMA, Inc. v. Singing River Hosp., 743 So. 2d 979 (Miss. 1999).

3 Central Maine Power Co. v. F.E.R.C., 252 F.3d 34 (1st Cir. 2001).

4 SKF USA Inc. v. U.S., 254 F.3d 1022 (Fed. Cir. 2001).

5 Hannah v. Larche, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960); Town of Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243, 168 A.L.R. 1181 (1945); In re Di Brizzi, 303 N.Y. 206, 101 N.E.2d 464 (1951).

6 Yesson v. San Francisco Municipal Transportation Agency, 224 Cal. App. 4th 108, 168 Cal. Rptr. 3d 212 (1st Dist. 2014).

7 Allen v. Grand Central Aircraft Co., 347 U.S. 535, 74 S. Ct. 745, 98 L. Ed. 933 (1954).

8 1000 Friends of Oregon v. Land Conservation and Development Com'n, 301 Or. 622, 724 P.2d 805 (1986).

9 State ex rel. Com'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).
As to the administrative construction of statutes, see §§ 67 to 73.

10 U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950); State ex rel. Com'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

11 Custer County Action Ass'n v. Garvey, 256 F.3d 1024 (10th Cir. 2001).

End of Document

2 Am. Jur. 2d Administrative Law § 46

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

1. In General

§ 46. Characterization and classification of administrative powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 326

Administrative powers are executive, legislative, or judicial in nature although not specifically allocated.[1]Administrative power is the power to administer or enforce a law, as opposed to the legislative power to make a law.[2]Administration has to do with the carrying of laws into effect, that is, their practical application to current affairs, in accordance with and in execution of the principles prescribed by the lawmaker.[3]Thus, regulatory and control powers of an administrative agency are frequently described as "administrative."[4]The power of an administrative agency to make rules to carry out a policy is administrative.[5]The application of such rules in particular cases is executive or administrative in nature.[6]

Observation:

The issue of an administrative body's authority presents a question of law and not a question of fact.[7]

Footnotes

1 Guiseppi v. Walling, 144 F.2d 608, 155 A.L.R. 761 (C.C.A. 2d Cir. 1944), judgment aff'd, 324 U.S. 244, 65 S. Ct. 605, 89 L. Ed. 921 (1945).

2 Citizens' Utility Ratepayer Bd. v. State Corp. Com'n of State of Kan., 264 Kan. 363, 956 P.2d 685 (1998).

[3] Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U.S. 247, 33 S. Ct. 916, 57 L. Ed. 1472 (1913); Robertson v. Schein, 305 Ky. 528, 204 S.W.2d 954 (1947).

[4] Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 70 S. Ct. 403, 94 L. Ed. 381 (1950); Guthrie v. Curlin, 263 S.W.2d 240 (Ky. 1953).

[5] U.S. v. Grimaud, 220 U.S. 506, 31 S. Ct. 480, 55 L. Ed. 563 (1911); Knudsen Creamery Co. of Cal. v. Brock, 37 Cal. 2d 485, 234 P.2d 26 (1951); Department of Public Welfare v. National Help "U" Ass'n, 197 Tenn. 8, 270 S.W.2d 337 (1954).

[6] Gulf, M. & O. R. Co. v. Railroad and Public Utilities Com'n, 38 Tenn. App. 212, 271 S.W.2d 23 (1954).

[7] County of Knox ex rel. Masterson v. Highlands, L.L.C., 188 Ill. 2d 546, 243 Ill. Dec. 224, 723 N.E.2d 256 (1999).

End of Document

2 Am. Jur. 2d Administrative Law § 47

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

1. In General

§ 47. Source of powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305

Being creatures of the legislature,[1] administrative agencies have no general or common-law powers[2] but only those powers conferred upon them by statute or constitution.[3] An agency must act in accordance with the applicable statutes and its own regulations.[4] Apart from the instances in which an administrative agency is created and empowered by a provision of a state constitution or an executive order,[5] the source of the powers of administrative agencies lies in statutes,[6] and administrative agencies must find within the statutes warrant for the exercise of any authority which they claim.[7]

CUMULATIVE SUPPLEMENT

Cases:

Administrative agencies have no general or common-law powers, but only such as have been conferred upon them by law expressly or by implication. PNGI Charles Town Gaming, LLC v. West Virginia Racing Com'n, 765 S.E.2d 241 (W. Va. 2014).

[END OF SUPPLEMENT]

Footnotes

1 In re Hubbard, 778 N.W.2d 313 (Minn. 2010); New York State Superfund Coalition, Inc. v. New York State Dept. of

Environmental Conservation, 18 N.Y.3d 289, 938 N.Y.S.2d 266, 961 N.E.2d 657 (2011); Texas Natural Resource Conservation Com'n v. Lakeshore Utility Co., Inc., 164 S.W.3d 368 (Tex. 2005).

2 Woodard v. Jefferson County, 18 Fed. Appx. 706 (10th Cir. 2001); Gaffney v. Board of Trustees of Orland Fire Protection Dist., 2012 IL 110012, 360 Ill. Dec. 549, 969 N.E.2d 359 (Ill. 2012).
As to implied and inherent powers, generally, see § 54.

3 § 51.

4 Paralyzed Veterans of America v. West, 138 F.3d 1434 (Fed. Cir. 1998).

5 § 20.

6 Florida Elections Commission v. Davis, 44 So. 3d 1211 (Fla. 1st DCA 2010); Adamson v. Correctional Medical Services, Inc., 359 Md. 238, 753 A.2d 501 (2000).
The terms of the enabling statute establish the scope of agency authority. Yeboah v. U.S. Dept. of Justice, 345 F.3d 216 (3d Cir. 2003).

7 M & J Garage and Towing, Inc. v. West Virginia State Police, 227 W. Va. 344, 709 S.E.2d 194 (2010); Exxon Mobil Corp. v. Wyoming Dept. of Revenue, 2011 WY 161, 266 P.3d 944 (Wyo. 2011).
As to statutes relating to administrative agencies, generally, see §§ 28 to 30.

End of Document

2 Am. Jur. 2d Administrative Law § 48

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

1. In General

§ 48. Source of powers—Legislative standards

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 301, 305

A statute or ordinance placing discretionary power in an administrative agency must furnish standards for those who administer such power.[1]The law must enunciate standards to guide the administrative officers where the legislature delegates to an administrative agency the power to determine a fact or state of things upon which an application of the law depends.[2]The standards which must accompany such a grant of power must not be unlimited, be unreasonable, or permit arbitrary action by the administrative body.[3]Failure to determine such standards may render the statute void.[4]

Observation:

While adequate standards must be included in the delegating legislation,[5]the realities of modern legislation dealing with complex economic and social problems have led to judicial approval of broad standards for administrative actions.[6]Detailed standards are not required, especially in regulatory enactments under the police power.[7]

CUMULATIVE SUPPLEMENT

Cases:

Scope of provision of Affordable Care Act (ACA) prohibiting Department of Health and Human Services (HHS) from promulgating regulation that creates unreasonable barrier to ability of individuals to obtain appropriate medical care was not limited to ACA. 42 U.S.C.A. § 18114. State v. Azar, 385 F. Supp. 3d 960 (N.D. Cal. 2019), stay pending appeal denied, 2019 WL 2029066 (N.D. Cal. 2019) and stay pending appeal denied, 2019 WL 2996441 (N.D. Cal. 2019).

The Legislature may constitutionally delegate its legislative powers to an administrative body so long as it sets forth a policy, rule, or standard for guidance and does not vest them with an arbitrary and uncontrolled discretion. State v. Spady, 2015 MT 218, 380 Mont. 179, 354 P.3d 590 (2015).

To withstand the charge of unconstitutional delegation of legislative power to an administrative agency, a statute must establish reasonable standards to govern the achievement of its purpose and the execution of the power that it confers to the agency. Chittenden County Sheriff's Department v. Department of Labor, 2020 VT 4, 228 A.3d 85 (Vt. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Hobbs v. Jones, 2012 Ark. 293, 412 S.W.3d 844 (2012); Texas Workers' Compensation Com'n v. Patient Advocates of Texas, 136 S.W.3d 643 (Tex. 2004).
As to discretionary power in this regard, see §§ 55, 56.

2 In re McClain, 741 S.E.2d 893 (N.C. Ct. App. 2013), review denied, 743 S.E.2d 188 (N.C. 2013); Fahn v. Cowlitz County, 93 Wash. 2d 368, 610 P.2d 857 (1980), opinion amended on other grounds, 621 P.2d 1293 (Wash. 1981).

3 State v. Union Tank Car Co., 439 So. 2d 377 (La. 1983).

4 Balmoral Racing Club, Inc. v. Illinois Racing Bd., 151 Ill. 2d 367, 177 Ill. Dec. 419, 603 N.E.2d 489 (1992).

5 Hobbs v. Jones, 2012 Ark. 293, 412 S.W.3d 844 (2012); Elizabeth River Crossings OpCo, LLC v. Meeks, 286 Va. 286, 749 S.E.2d 176 (2013).

6 Kaufman v. State Dept. of Social and Rehabilitative Services, 248 Kan. 951, 811 P.2d 876 (1991); State ex rel. Com'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

7 State ex rel. Com'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

2 Am. Jur. 2d Administrative Law § 49

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

1. In General

§ 49. Source of powers—Ratification and validation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1

Acts of administrative agencies unauthorized at the time may become valid and binding by ratification[1] unless the attempted ratification is made at a time when the ratifying authority could not lawfully do the act, or there are substantial intervening rights.[2] The fact that a validating act is retroactive does not, in itself, render it ineffective.[3] When the legislature ratifies the act, it becomes the act of the legislature, eliminating any question of delegation.[4]

Ratification may be implied as well as express.[5] However, whether there is an implied ratification depends on the circumstances of the case. Implied ratification is insufficient to show a delegation of authority to take action within an area of questionable constitutionality[6] or to eliminate limitations upon the powers of an agency.[7]

Footnotes

1 Ex parte Mitsuye Endo, 323 U.S. 283, 65 S. Ct. 208, 89 L. Ed. 243 (1944); Haggerty v. City of Oakland, 161 Cal. App. 2d 407, 326 P.2d 957, 66 A.L.R.2d 718 (1st Dist. 1958) (disapproved of on other grounds by, Wong v. Di Grazia, 60 Cal. 2d 525, 35 Cal. Rptr. 241, 386 P.2d 817 (1963)).

2 Forbes Pioneer Boat Line v. Board of Com'rs of Everglades Drainage Dist., 258 U.S. 338, 42 S. Ct. 325, 66 L. Ed. 647 (1922).

3 Swayne & Hoyt v. U.S., 300 U.S. 297, 57 S. Ct. 478, 81 L. Ed. 659 (1937).

4 City of Harrison v. Snyder, 217 Ark. 528, 231 S.W.2d 95 (1950).

5 See Hirabayashi v. U.S., 320 U.S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943).

[6] Greene v. McElroy, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959).

[7] Peters v. Hobby, 349 U.S. 331, 75 S. Ct. 790, 99 L. Ed. 1129 (1955).

End of Document

2 Am. Jur. 2d Administrative Law § 50

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

1. In General

§ 50. Construction of statutes granting powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305

Some courts find that statutes granting powers to agencies must be strictly construed as conferring only those powers stated or necessarily implied,[1] in order to preclude the exercise of a power which is not expressly granted.[2] However, other courts consider that authority given to an agency should be liberally construed in order to permit the agency to carry out its statutory responsibilities[3] and that incidental powers should be readily implied.[4] Moreover, where the agency is concerned with protecting the public health and welfare, the delegation of authority to the agency is liberally construed.[5]

CUMULATIVE SUPPLEMENT

Cases:

Whether judicial power is reasonably necessary as an incident to accomplishment of the purposes for which an administrative office or agency was created must be determined in each instance in light of the purpose for which agency was established and in light of nature and extent of judicial power undertaken to be conferred. West's N.C.G.S.A. Const. Art. 4, § 3. Kindsgrab v. State Bd. of Barber Examiners, 763 S.E.2d 913 (N.C. Ct. App. 2014).

[END OF SUPPLEMENT]

Footnotes

1 In re Indiana Michigan Power Co., 297 Mich. App. 332, 824 N.W.2d 246 (2012), appeal denied, 493 Mich. 946, 827 N.W.2d 723 (2013); Governor's Policy Research Office v. KN Energy, 264 Neb. 924, 652 N.W.2d 865 (2002); Mayland v. Flitner, 2001 WY 69, 28 P.3d 838 (Wyo. 2001).

2 Racine Fire and Police Commission v. Stanfield, 70 Wis. 2d 395, 234 N.W.2d 307 (1975).

3 In re Adoption of N.J.A.C. 7:15-5.24(b), 420 N.J. Super. 552, 22 A.3d 94 (App. Div. 2011).

4 § 54.

5 Pennsylvania Builders Ass'n v. Department of Labor and Industry, 4 A.3d 215 (Pa. Commw. Ct. 2010); City of Columbia v. Board of Health and Environmental Control, 292 S.C. 199, 355 S.E.2d 536 (1987).

End of Document

2 Am. Jur. 2d Administrative Law § 51

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

1. In General

§ 51. General limitations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305 to 307

A determination of the limits of an agency's authority requires the construction of the agency's enabling statute.[1]An administrative agency only has those powers expressly conferred upon it by statute[2]or constitution[3]and such as are implied by their grant of authority.[4]Confining delegated lawmaking authority within its intended bounds helps to assure that ultimate control over policymaking rests with the legislative branch of government rather than with unelected administrative officials.[5]

An agency has no power to act in conflict with the authority granted to it by the legislature[6]or outside of its own regulations.[7]In addition, an agency may not exceed its statutory authority[8]or constitutional limitations,[9]and administrative actions exceeding authority delegated by law are void.[10]An agency cannot expand its granted powers by its own authority,[11]nor can it confer jurisdiction upon itself.[12]

Observation:

Concern that agency interpretation of a statute exceeds the limits of power granted by Congress is heightened where the interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.[13]

CUMULATIVE SUPPLEMENT

Cases:

Courts expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance. Alabama Association of Realtors v. Department of Health and Human Services, 141 S. Ct. 2485 (2021).

Unlike an agency's interpretation of ambiguous statutory terms or its own regulations, an agency has no special competence or role in interpreting a judicial decision. Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376 (2d Cir. 2015).

When Congress directs an agency to consider only certain factors in reaching an administrative decision, the agency is not free to trespass beyond the bounds of its statutory authority by taking other factors into account. Murray Energy Corporation v. Environmental Protection Agency, 936 F.3d 597 (D.C. Cir. 2019).

Subject to equitable defenses including laches, a governmental action may be challenged at any time, as ultra vires, when the action itself is beyond the jurisdiction or authority of the administrative body to act. Dubois Livestock, Inc. v. Town of Arundel, 2014 ME 122, 103 A.3d 556 (Me. 2014).

Agency may rely upon grant of authority that is explicit but broad when undertaking agency action, and such explicit but broad grant of authority complies with statutory provision that no agency may implement or enforce any standard, requirement, or threshold, including as term or condition of any license issued by agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or rule. Wis. Stats § 227.10(2m). Clean Wisconsin, Inc. v. Wisconsin Department of Natural Resources, 2021 WI 71, 961 N.W.2d 346 (Wis. 2021).

[END OF SUPPLEMENT]

Footnotes

1 Brzowski v. Maryland Home Imp. Com'n, 114 Md. App. 615, 691 A.2d 699 (1997).
As to the construction of statutes granting powers, see § 50.

2 Stiger v. Flippin, 201 Cal. App. 4th 646, 135 Cal. Rptr. 3d 168 (4th Dist. 2011), review denied, (Mar. 14, 2012); Doe v. Sex Offender Registry Bd., 459 Mass. 603, 947 N.E.2d 9 (2011).

3 American Federation of Labor v. Unemployment Ins. Appeals Bd., 13 Cal. 4th 1017, 56 Cal. Rptr. 2d 109, 920 P.2d 1314 (1996); Oklahoma Public Employees Ass'n v. Oklahoma Dept. of Central Services, 2002 OK 71, 55 P.3d 1072 (Okla. 2002); US West Communications, Inc. v. Wyoming Public Service Com'n, 907 P.2d 343 (Wyo. 1995).

4 § 54.

5 Martin v. State, Agency of Transp. Dept. of Motor Vehicles, 175 Vt. 80, 2003 VT 14, 819 A.2d 742 (2003).

6 State ex rel. Brant v. Bank of America, 272 Kan. 182, 31 P.3d 952 (2001); Benson & Gold Chevrolet, Inc. v. Louisiana Motor Vehicle Commission, 403 So. 2d 13 (La. 1981).

7 Nolan v. U.S., 44 Fed. Cl. 49 (1999).

8 District of Columbia Office of Tax and Revenue v. Shuman, 82 A.3d 58 (D.C. 2013); Walsh v. Champaign County Sheriff's Merit Com'n, 404 Ill. App. 3d 933, 344 Ill. Dec. 826, 937 N.E.2d 1167 (4th Dist. 2010).
As to the rulemaking power of agencies, generally, see §§ 127 to 131.

9 Castro v. Viera, 207 Conn. 420, 541 A.2d 1216 (1988).

10 Diageo-Guinness USA, Inc. v. State Bd. of Equalization, 205 Cal. App. 4th 907, 140 Cal. Rptr. 3d 358 (3d Dist. 2012); Pereira v. State Bd. of Educ., 304 Conn. 1, 37 A.3d 625, 278 Ed. Law Rep. 347 (2012); Delgado v. Board of

Election Com'rs of City of Chicago, 224 Ill. 2d 481, 309 Ill. Dec. 820, 865 N.E.2d 183 (2007).

11 District of Columbia v. Brookstowne Community Development Co., 987 A.2d 442 (D.C. 2010); Buddy Gregg Motor Homes, Inc. v. Marathon Coach, Inc., 320 S.W.3d 912 (Tex. App. Austin 2010).

12 Southern New England Telephone Co. v. Department of Public Utility Control, 261 Conn. 1, 803 A.2d 879 (2002); In re Campaign for Ratepayers' Rights, 162 N.H. 245, 27 A.3d 726 (2011).

13 Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001).

End of Document

2 Am. Jur. 2d Administrative Law § 52

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

1. In General

§ 52. Limitations on manner of exercise

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305, 307

The power of an administrative agency must be exercised in accordance with and in the mode prescribed by the statute or other law bestowing such power.[1] Agency adjudicative power extends only to the ascertainment of facts and the application of existing law to the facts in order to resolve issues within areas of agency expertise.[2] Not only must powers be exercised in the manner directed but also by the officer specified.[3] One dealing with public officials, boards, or commissions must take notice of their authority to act, and the law charges him or her with the knowledge of any and all limitations upon such power.[4]

An agency may not assert the general power given to it and at the same time disregard the essential conditions imposed upon its exercise.[5] Thus, for example, the Federal Administrative Procedure Act states that a sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.[6] Regardless of how serious the problem an administrative agency seeks to address, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.[7]

CUMULATIVE SUPPLEMENT

Cases:

Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Michigan v. E.P.A., 135 S. Ct. 2699 (2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S. v. Chicago, M., St. P. & P.R. Co., 282 U.S. 311, 51 S. Ct. 159, 75 L. Ed. 359 (1931); Ethics Com'n of Town of Glastonbury v. Freedom of Information Com'n, 302 Conn. 1, 23 A.3d 1211 (2011).

2 Mikel v. Pott Industries/St. Louis Ship, 896 S.W.2d 624 (Mo. 1995).

3 Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954); Roper v. Winner, 244 S.W.2d 355 (Tex. Civ. App. San Antonio 1951).

4 Com. v. Whitworth, 74 S.W.3d 695 (Ky. 2002).

5 Edgerton v. International Co., 89 So. 2d 488 (Fla. 1956); State ex rel. Public Service Commission v. Northern Pac. Ry. Co., 75 N.W.2d 129 (N.D. 1956).

6 5 U.S.C.A. § 558(b).

7 Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002); Verizon v. F.C.C., 740 F.3d 623 (D.C. Cir. 2014).

End of Document

2 Am. Jur. 2d Administrative Law § 53

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

1. In General

§ 53. Limitations on manner of exercise—Fundamental fairness and due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 301 to 303.1, 305

General due process considerations of fairness directly limit the manner in which an agency may exercise its designated responsibilities.[1] A practice which violates due process cannot be excused because of mere administrative inconvenience.[2] However, the full rights of due process present in a court of law do not automatically attach.[3]

An administrative agency's actions may be only investigatory, only adjudicatory, or a combination of both, and the due process that must be accorded in an administrative proceeding depends upon the nature of the administrative agency's actions.[4] The level of due process required in an administrative setting must be decided under the facts and circumstances of each case.[5] In addition, any administrative agency in determining how best to effectuate public policy is limited by principles of fundamental fairness.[6] There are no simple answers as to what constitutes fundamental fairness, and each case must be considered and evaluated on its merits, giving weight to the effect of the decision on the agency's public policy.[7]

Observation:

Under the *Mathews* balancing test to determine whether an administrative procedure satisfies due process, a court must weigh: (1) the private interest that will be affected by an official action; (2) the risk of erroneous deprivation of such interest or procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.[8]

CUMULATIVE SUPPLEMENT

Cases:

The fundamental rights approach to a due process claim under the Fifth Amendment is applied when the plaintiff challenges the concerted action of several agency employees, undertaken pursuant to broad government policies, which is akin to a challenge to legislative action. U.S. Const. Amend. 5. Maehr v. United States Department of State, 5 F.4th 1100 (10th Cir. 2021).

The Supreme Court reviews the administrative proceedings to ensure procedural fairness at the administrative hearing; nonetheless, procedural due process requires fundamental fairness, which, at a minimum, necessitates notice and a meaningful opportunity for a hearing appropriate to the nature of the case. U.S.C.A. Const.Amend. 14. Schlittenhart v. North Dakota Dept. of Transp., 2015 ND 179, 2015 WL 4184107 (N.D. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Appeal of Morin, 140 N.H. 515, 669 A.2d 207 (1995); Appleby v. State ex rel. Wyoming Workers' Safety and Compensation Div., 2002 WY 84, 47 P.3d 613 (Wyo. 2002).

2 State ex rel. Ormet Corp. v. Industrial Com'n of Ohio, 54 Ohio St. 3d 102, 561 N.E.2d 920 (1990).

3 Medeiros v. Hawaii County Planning Com'n, 8 Haw. App. 183, 797 P.2d 59 (1990).

4 State ex rel. Hoover v. Smith, 198 W. Va. 507, 482 S.E.2d 124 (1997).

5 Bragunier Masonry Contractors, Inc. v. Maryland Com'r of Labor and Industry, 111 Md. App. 698, 684 A.2d 6 (1996).

6 State, Dept. of Environmental Protection v. Stavola, 103 N.J. 425, 511 A.2d 622 (1986); State ex rel. White v. Parsons, 199 W. Va. 1, 483 S.E.2d 1, 66 A.L.R.5th 737 (1996).

7 State, Dept. of Environmental Protection v. Stavola, 103 N.J. 425, 511 A.2d 622 (1986).

8 American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir. 1995).

2 Am. Jur. 2d Administrative Law § 54

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

1. In General

§ 54. Implied and inherent powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305, 325

Generally, administrative agencies have the implied powers that are reasonably necessary in order to carry out the powers expressly granted.[1]The reason for an agency's implied powers is that, as a practical matter, the legislature cannot foresee all the problems incidental to carrying out the duties and responsibilities of the agency.[2]

Courts disagree as to how much latitude administrative agencies have with respect to implied powers. Some courts find wide latitude must be given to administrative agencies in fulfilling their duties.[3]Some of these courts even say that the authority does not have to be "necessary" to effectuate the expressly delegated authority but only "appropriate."[4]Other courts find that powers should not be extended by implication beyond what may be necessary for their just and reasonable execution.[5]Still other courts find that implied powers are "necessarily implied,"[6]meaning an implication which yields so strong a probability of intent to allow these powers that any intention to the contrary cannot be supposed.[7]

An administrative agency has no inherent powers[8]because any authority it has comes from statutes or the constitution.[9]Under some authority, however, implied powers may sometimes be called "inherent."[10]

Footnotes

1 Kaleikini v. Thielen, 124 Haw. 1, 237 P.3d 1067 (2010); Vickers v. Lowe, 150 Idaho 439, 247 P.3d 666 (2011); State ex rel. J.S., 202 N.J. 465, 998 A.2d 409 (2010); Texas Mun. Power Agency v. Public Utility Com'n of Texas, 253 S.W.3d 184 (Tex. 2007).
As to the express grant of powers, generally, see §§ 47, 51.

2 Kaleikini v. Thielen, 124 Haw. 1, 237 P.3d 1067 (2010); Vickers v. Lowe, 150 Idaho 439, 247 P.3d 666 (2011).

[3] Lake County Bd. of Review v. Property Tax Appeal Bd. of State of Ill., 119 Ill. 2d 419, 116 Ill. Dec. 567, 519 N.E.2d 459 (1988).

[4] Matter of Request for Solid Waste Utility Customer Lists, 106 N.J. 508, 524 A.2d 386 (1987).

[5] State ex rel. Com'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

[6] Walker v. Arkansas State Bd. of Educ., 2010 Ark. 277, 365 S.W.3d 899, 280 Ed. Law Rep. 505 (2010); Sullivan Financial Group, Inc. v. Wrynn, 94 A.D.3d 90, 939 N.Y.S.2d 761 (3d Dep't 2012).

[7] Mississippi Public Service Com'n v. Columbus & Greenville Ry. Co., 573 So. 2d 1343 (Miss. 1990).

[8] Ethics Com'n of Town of Glastonbury v. Freedom of Information Com'n, 302 Conn. 1, 23 A.3d 1211 (2011); Dialysis Solution, LLC v. Mississippi State Dept. of Health, 31 So. 3d 1204 (Miss. 2010); Davidson Serles & Associates v. Central Puget Sound Growth Management Hearings Bd., 159 Wash. App. 148, 244 P.3d 1003 (Div. 1 2010).

[9] Belanger & Sons, Inc. v. Department of State, 176 Mich. App. 59, 438 N.W.2d 885 (1989).

[10] Jones v. Keller, 364 N.C. 249, 698 S.E.2d 49 (2010).

End of Document

2 Am. Jur. 2d Administrative Law § 55

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

1. In General

§ 55. Discretionary powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305, 324

Agencies generally are given broad discretion to exercise their regulatory authority.[1]While the right to exercise discretion is frequently conferred expressly,[2]the duties of administrative agencies also necessarily include the right to exercise discretion.[3]The rationale for agency discretion is that administrative bodies possess experience and specialization that place them at an advantage in making decisions within an agency's areas of expertise.[4]

An agency has broad discretion to determine when and how to hear and decide the matters that come before it,[5]as well as whether or not to prosecute or enforce, through either civil or criminal process.[6]The matter of recusal is generally left to the discretion of the adjudicator, and abuse of that discretion must be shown to reverse a decision not to allow a recusal.[7]Additionally, the decision whether or not to impose a sanction is discretionary.[8]

The question of how best to handle related, yet discrete, issues in terms of procedures is a matter committed to agency discretion.[9]Administrative agencies generally have wide discretion in selecting the means to fulfill the legislature's goals.[10]Administrative authorities are permitted, consistent with the obligations of due process, to adopt rules and policies to carry out statutory duties[11]and to adapt their rules and policies to the demands of changing circumstances.[12]

Observation:

By virtue of its specialized knowledge and authority, an administrative agency alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by the legislature and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.[13]

CUMULATIVE SUPPLEMENT

Cases:

Under the fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts, courts cannot impose limits on an agency's discretion that are not supported by the text of the statute. Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).

Where existing methodology or research in a new area of regulation is deficient, an administrative agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information. Center for Sustainable Economy v. Jewell, 779 F.3d 588 (D.C. Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

[1] Doe v. Sex Offender Registry Bd., 456 Mass. 612, 925 N.E.2d 533 (2010); Unified Sportsmen of Pennsylvania ex rel. their Members v. Pennsylvania Game Commission (PGC), 18 A.3d 373 (Pa. Commw. Ct. 2011).

[2] United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954); Ex parte Anderson, 191 Or. 409, 229 P.2d 633, 29 A.L.R.2d 1051 (1951).

[3] I. C. C. v. Parker, 326 U.S. 60, 65 S. Ct. 1490, 89 L. Ed. 2051 (1945); Handlon v. Town of Belleville, 4 N.J. 99, 71 A.2d 624, 16 A.L.R.2d 1118 (1950); State ex rel. Shafer v. Ohio Turnpike Commission, 159 Ohio St. 581, 50 Ohio Op. 465, 113 N.E.2d 14 (1953).

[4] Save Park County v. Board of County Com'rs of County of Park, 990 P.2d 35 (Colo. 1999).

[5] Tennessee Valley Mun. Gas Ass'n v. F.E.R.C., 140 F.3d 1085 (D.C. Cir. 1998).

[6] J.C. & Associates v. Board of Appeals and Review, 778 A.2d 296 (D.C. 2001).

[7] Herridge v. Board of Registration in Medicine, 420 Mass. 154, 648 N.E.2d 745 (1995).

[8] Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595 (Iowa 1997); Larsen v. Commission on Medical Competency, 1998 ND 193, 585 N.W.2d 801 (N.D. 1998).

[9] Northern Border Pipeline Co. v. F.E.R.C., 129 F.3d 1315 (D.C. Cir. 1997).

[10] Zatz v. U.S., 149 F.3d 144 (2d Cir. 1998); County of Hudson v. Department of Corrections, 152 N.J. 60, 703 A.2d 268 (1997).

[11] Coalition For Fair and Equitable Regulation of Docks on Lake of the Ozarks v. F.E.R.C., 297 F.3d 771 (8th Cir. 2002); In re Public Service Elec. and Gas Company's Rate Unbundling, 167 N.J. 377, 771 A.2d 1163 (2001).

[12] In re Permian Basin Area Rate Cases, 390 U.S. 747, 88 S. Ct. 1344, 20 L. Ed. 2d 312 (1968).

[13] In re Morgan, 144 N.H. 44, 742 A.2d 101 (1999).

End of Document

2 Am. Jur. 2d Administrative Law § 56

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

1. In General

§ 56. Discretionary powers—Limitations on discretion

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 305, 324

While deference is appropriately shown to agency action because of the expertise and superior knowledge of agencies in their specialized fields, that discretion is not unbounded and must be exercised in a manner that will facilitate judicial review.[1]Thus, the language in a rule allowing for agency discretion does not create unlimited discretion.[2]The discretion which is afforded to administrative agency discretion may not justify the agency in altering, modifying, or extending the reach of the law created by the legislature.[3]Discretion must be exercised according to fair and legal considerations,[4]in accordance with established principles of justice, and not arbitrarily or capriciously,[5]fraudulently, or without factual basis.[6]

Observation:

An agency which has been granted discretion by statute may limit its own discretion in its regulations.[7]

CUMULATIVE SUPPLEMENT

Cases:

First Amendment barred abortion providers and their supporters from recovering damages for abortion opponents' breach of

exhibit agreements flowing from opponents' publication of surreptitiously recorded conversations at providers' conferences and facilities and with providers' targeted staff, obtained through deception by opponents in effort to advance their goal of interfering with women's access to legal abortion, where those damages were caused by subsequent publication of videos and not from breach of agreements themselves. U.S. Const. Amend. 1. Planned Parenthood Federation of America, Inc. v. Center for Medical Progress, 402 F. Supp. 3d 615 (N.D. Cal. 2019).

[END OF SUPPLEMENT]

Footnotes

1 In re Kim, 403 N.J. Super. 378, 958 A.2d 485 (App. Div. 2008).

2 Inova Alexandria Hosp. v. Shalala, 244 F.3d 342 (4th Cir. 2001).

3 State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768 (1998).

4 American Broadcasting Co. v. F.C.C., 179 F.2d 437 (D.C. Cir. 1949); Handlon v. Town of Belleville, 4 N.J. 99, 71 A.2d 624, 16 A.L.R.2d 1118 (1950).

5 Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 70 S. Ct. 403, 94 L. Ed. 381 (1950); State Bd. of Medical Examiners v. Beatty, 220 La. 1, 55 So. 2d 761 (1951); Handlon v. Town of Belleville, 4 N.J. 99, 71 A.2d 624, 16 A.L.R.2d 1118 (1950).

6 McDonough v. Goodcell, 13 Cal. 2d 741, 91 P.2d 1035, 123 A.L.R. 1205 (1939).

7 McBride v. Motor Vehicle Div. of Utah State Tax Com'n, 1999 UT 9, 977 P.2d 467 (Utah 1999).

End of Document

2 Am. Jur. 2d Administrative Law § 57

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

1. In General

§ 57. Ministerial powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 328

If an agency, through rulemaking, decides to remove discretion from its determinations, then it appropriately relegates to itself a ministerial role.[1] A ministerial duty is one in respect to which nothing is left to discretion. It is a simple, definite duty arising under conditions admitted or proved to exist and imposed by law.[2] It is a duty absolute, certain, and imperative, involving mere execution of a specific act arising from fixed and designated facts.[3]

The fact that a necessity may exist for the ascertainment of the facts or conditions, upon the existence of which the performance of an act becomes a clear and specific duty, does not convert a ministerial act into a discretionary one.[4]

Footnotes

1 Maryland Transit Admin. v. Surface Transp. Bd., 700 F.3d 139 (4th Cir. 2012).

2 Bronaugh v. Murray, 294 Ky. 715, 172 S.W.2d 591 (1943); Texas State Bd. of Dental Examiners v. Fieldsmith, 242 S.W.2d 213, 26 A.L.R.2d 990 (Tex. Civ. App. Dallas 1951), writ refused n.r.e.

3 People v. May, 251 Ill. 54, 95 N.E. 999 (1911); State ex rel. School Dist. of Scottsbluff v. Ellis, 163 Neb. 86, 77 N.W.2d 809 (1956).
As to the delegation of ministerial powers, see § 65.

4 Independent School Dist. of Danbury v. Christiansen, 242 Iowa 963, 49 N.W.2d 263 (1951); State ex rel. School Dist. of Scottsbluff v. Ellis, 163 Neb. 86, 77 N.W.2d 809 (1956).
As to discretionary powers, generally, see §§ 55, 56.

End of Document

2 Am. Jur. 2d Administrative Law § 58

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

1. In General

§ 58. Power to charge fees for services

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 327

A.L.R. Library

Measure of fees assessable by agency under 31 U.S.C.A. sec. 483a providing that federal agencies shall be self-sustaining to full extent possible, 51 A.L.R. Fed. 588

Congress has stated its intention that federal agencies (except mixed-ownership government corporations), in order to be self-sustaining to the extent possible, should be able to charge fees for each service or thing of value provided to a person (except a person on official business of the United States government).[1] This ability to charge "fees" does not include an ability to levy taxes.[2] Entire agencies are not among those who may be assessed since the statute reaches only to specific charges for specific services to specific individuals or companies.[3]

The head of each agency may prescribe regulations establishing the charge for a service or thing of value provided by the agency. These regulations are subject to policies prescribed by the President and must be as uniform as practicable. Each charge must be fair and based on the costs to the government, the value of the service or thing to the recipient, the public policy or interest served, and other relevant facts.[4]

This power does not affect a law of the United States prohibiting the determination and collection of charges and the disposition of those charges and prescribing bases for determining charges although a charge may be redetermined under this provision consistent with the prescribed base.[5]

Footnotes

1 31 U.S.C.A. § 9701(a).

2 National Cable Television Ass'n, Inc. v. U. S., 415 U.S. 336, 94 S. Ct. 1146, 39 L. Ed. 2d 370 (1974).

3 Federal Power Commission v. New England Power Co., 415 U.S. 345, 94 S. Ct. 1151, 39 L. Ed. 2d 383 (1974).

4 31 U.S.C.A. § 9701(b).

5 31 U.S.C.A. § 9701(c).

End of Document

2 Am. Jur. 2d Administrative Law § 59

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

2. Separation of Powers of Government

§ 59. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 8, 103.1, 301

The doctrine of separation of powers declares that governmental powers are divided among the three separate and independent branches of government and broadly operates to distribute the power to make law to the legislature, the power to execute law to the executive, and the power to interpret law to the judiciary. The doctrine ensures that the three branches of government are distinct unto themselves and that they, exclusively, exercise the rights and responsibilities reserved unto them.[1]However, the doctrine of separation of powers is grounded in flexibility and practicality,[2]and administrative agencies combine to a certain extent the three powers of government.[3]Legislative authority may be delegated to an administrative body where sufficient standards are set forth in statutes[4]that establish the manner and circumstance of the exercise of such power.[5]Even broad delegations of authority are permissible under these circumstances.[6]

Nevertheless, the doctrine of separation of powers affects administrative agencies. It is one of the bases for the principle that courts may not usurp the functions of an administrative agency.[7]In addition, separation of powers may be violated where Congress tries to control the execution of its enactment directly instead of indirectly by passing new legislation.[8]Congress' authority to delegate portions of its powers to administrative agencies provides no support for the argument that Congress can constitutionally control the administration of the laws by way of a congressional veto.[9]

Observation:

States often, if not always, decide how power will be distributed among their governmental agencies,[10]and a state constitution may unite legislative and judicial powers in a single entity without constraint by the United States Constitution.[11]

CUMULATIVE SUPPLEMENT

Cases:

Department of Health (DOH) had statutory authority to adopt conflict-of-interest rule, prohibiting evaluator who determines a child's eligibility for early intervention services, and the private agency which employs the evaluator, from providing services to that child under contract with DOH, and did not violate separation of powers doctrine in promulgating it. McKinney's Public Health Law § 2550; McKinney's Public Health Law § 2544(3)(b); McKinney's Public Health Law § 2541(12); 10 NYCRR subpart 69–4. Agencies for Children's Therapy Services, Inc. v. New York State Dept. of Health, 22 N.Y.S.3d 524 (App. Div. 2d Dep't 2015).

[END OF SUPPLEMENT]

Footnotes

1 Am. Jur. 2d, Constitutional Law §§ 237, 238.

2 Am. Jur. 2d, Constitutional Law § 242.

3 Sylvester v. Tindall, 154 Fla. 663, 18 So. 2d 892 (1944); Quesenberry v. Estep, 142 W. Va. 426, 95 S.E.2d 832 (1956).
As to the status of agencies in this regard, generally, see §§ 24 to 26.

4 Kaufman v. State Dept. of Social and Rehabilitative Services, 248 Kan. 951, 811 P.2d 876 (1991); Sullivan v. Board of License Com'rs for Prince George's County, 293 Md. 113, 442 A.2d 558 (1982).
As to legislative standards governing administrative action, see § 48.

5 Kaufman v. State Dept. of Social and Rehabilitative Services, 248 Kan. 951, 811 P.2d 876 (1991).

6 Sullivan v. Board of License Com'rs for Prince George's County, 293 Md. 113, 442 A.2d 558 (1982).

7 American Trucking Ass'ns v. U.S., 344 U.S. 298, 73 S. Ct. 307, 97 L. Ed. 337 (1953).

8 Bowsher v. Synar, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986).

9 I.N.S. v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

10 Sweezy v. State of N.H. by Wyman, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957).

11 Keller v. Potomac Electric Power Co., 261 U.S. 428, 43 S. Ct. 445, 67 L. Ed. 731 (1923).

2 Am. Jur. 2d Administrative Law § 60

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

2. Separation of Powers of Government

§ 60. Encroachment by agency on adjudicative functions of judicial branch

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 8, 103.1, 301

The United States Constitution[1] and some state constitutions have provisions vesting judicial powers in the courts.[2] However, administrative agencies may make factual determinations and even adjudicate rights of the parties without running afoul of the constitutional separation of powers.[3] For instance, Congress can establish under Article I "legislative courts"[4] to serve as special tribunals to examine and determine various matters arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.[5]

Observation:

Under some authority, it is where an agency purports to enter enforceable judgments that the court has drawn the line of permissibility. This is so because it is the power to render enforceable judgments which is the essence of judicial power.[6] However, some statutes confer power to punish for civil contempt or imply a power to hold persons in criminal contempt.[7]

Footnotes

1 U.S. Const. Art. III, § 1.

2 Am. Jur. 2d, Courts § 5.

[3] Alakai Na Keiki, Inc. v. Matayoshi, 127 Haw. 263, 277 P.3d 988, 280 Ed. Law Rep. 450 (2012); State ex rel. Keasling by Keasling v. Keasling, 442 N.W.2d 118 (Iowa 1989).
As to administrative agencies as judicial bodies or courts, see §§ 24, 25.

[4] Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982).

[5] Crowell v. Benson, 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598 (1932).

[6] State ex rel. Keasling by Keasling v. Keasling, 442 N.W.2d 118 (Iowa 1989).

[7] Kennedy v. Kenney Mfg. Co., 519 A.2d 585 (R.I. 1987).

End of Document

2 Am. Jur. 2d Administrative Law § 61

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

2. Separation of Powers of Government

§ 61. Combining investigative, prosecutorial, and judicial powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 8, 103.1, 301

Some administrative agencies investigate violations of the law and act as accusers or act as advocate or prosecutor as well as judge in the same proceeding.[1] It is typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the administrative procedure act, and it does not violate due process of law.[2]

Observation:

When the legislature gives decision-making authority to an administrative board without violating the separation of powers doctrine embodied in the constitution, that board has a dual character in which some of its acts are within the legislative or administrative area, and others have the effect of a judgment. Such an administrative board is permitted to resolve issues of fact and render decisions affecting private rights that have the same force of obligation and finality as judicial ones.[3]

The danger of unfairness is particularly great in an agency in which there is a high degree of concentration of both prosecuting and judicial functions.[4] Nevertheless, the combination of functions has not been held to violate constitutional rights, such as due process of law,[5] or to deny a fair hearing.[6] However, the interested party in such a case must have the right to cross-examine witnesses and present proof,[7] and a court may determine from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.[8]

Footnotes

1 U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950); People v. Western Air Lines, 42 Cal. 2d 621, 268 P.2d 723 (1954); Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248 (1954).
As to the status of agencies in this regard, generally, see §§ 24 to 26.

2 Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).

3 McKay v. New Hampshire Compensation Appeals Bd., 143 N.H. 722, 732 A.2d 1025 (1999).

4 Mazza v. Cavicchia, 15 N.J. 498, 105 A.2d 545 (1954).
As to the separation of prosecutorial or investigative and adjudicative functions, see §§ 303, 304.

5 Morongo Band of Mission Indians v. State Water Resources Control Bd., 45 Cal. 4th 731, 88 Cal. Rptr. 3d 610, 199 P.3d 1142 (2009).

6 Matter of Permits to Drain related to Stone Creek Channel Improvements and White Spur Drain, 424 N.W.2d 894 (N.D. 1988).

7 Matter of Carberry, 114 N.J. 574, 556 A.2d 314 (1989).

8 Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975).

End of Document

2 Am. Jur. 2d Administrative Law § 62

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

3. Acting Through Other Persons; Delegation to Subordinates

§ 62. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 322.1, 323, 331

The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions.[1] Statutes often expressly provide for such delegation by the persons in whom the powers of the agency are directly vested.[2]

The authority to subdelegate need not be expressed in the statute but may be implied if there is a reasonable basis for such implication.[3] However, state courts, in specific instances, have found that the statutory authority of a commission to employ persons as may be necessary to perform its duties does not give the commission authority, either directly or by implication, to deputize those matters which are quasi-judicial in character.[4] Moreover, under certain circumstances, the subdelegation of power may be beyond the scope of authority of an administrative agency or invalid on constitutional grounds.[5]

CUMULATIVE SUPPLEMENT

Cases:

A federal official's sub-delegation to a subordinate official is presumptively permissible, absent affirmative evidence in the original delegation of a contrary intent. Mobley v. C.I.A., 806 F.3d 568 (D.C. Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Barr v. Matteo, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959); Pistachio Group of the Ass'n of Food Industries, Inc. v. U.S., 11 Ct. Int'l Trade 668, 671 F. Supp. 31 (1987).

2 L.P. Steuart & Bro. v. Bowles, 322 U.S. 398, 64 S. Ct. 1097, 88 L. Ed. 1350 (1944); U. S. Health Club, Inc. v. Major, 292 F.2d 665 (3d Cir. 1961); Berkshire Life Ins. Co. v. Maryland Ins. Admin., 142 Md. App. 628, 791 A.2d 942 (2002).

3 § 64.

4 Apice v. American Woolen Co., 74 R.I. 425, 60 A.2d 865 (1948); State Tax Commission of Utah v. Katsis, 90 Utah 406, 62 P.2d 120, 107 A.L.R. 1477 (1936).

5 Warren v. Marion County, 222 Or. 307, 353 P.2d 257 (1960).

End of Document

2 Am. Jur. 2d Administrative Law § 63

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

3. Acting Through Other Persons; Delegation to Subordinates

§ 63. Delegation under federal law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 322.1, 323, 331

Pursuant to federal law, in addition to the authority to delegate conferred by other law, the head of an agency may delegate to subordinate officials the authority vested in him or her by law to take final action on matters pertaining to the employment, direction, and general administration of personnel under his or her agency,[1] as well as the authority to authorize the publication of advertisements, notices, or proposals.[2] Thus, for instance, agency heads may delegate the authority to issue and promulgate regulations dealing with the discharge of personnel.[3]

The failure of an executive order to name the office of one to whom authority is delegated does not vitiate that order if the person named is an officer appointed by the President and confirmed by the Senate.[4]

Footnotes

1 5 U.S.C.A. § 302(b)(1).

2 5 U.S.C.A. § 302(b)(2).

3 Reed v. Franke, 297 F.2d 17 (4th Cir. 1961).

4 U.S. v. Chemical Foundation, 272 U.S. 1, 47 S. Ct. 1, 71 L. Ed. 131 (1926).

End of Document

2 Am. Jur. 2d Administrative Law § 64

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

3. Acting Through Other Persons; Delegation to Subordinates

§ 64. Delegation implied from statute or nature of agency

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 322.1, 323, 331

The authority to subdelegate need not be expressed in the statute but may be implied if there is a reasonable basis for such implication.[1]The authority of an agency to delegate a particular function may be found in the power conferred upon an agency to issue regulations or orders as may be deemed necessary or proper in order to carry out its purposes unless by express provision of the statute or by implication it has been withheld.[2]In addition, the authority of an administrative agency to delegate its powers, including its discretionary or quasi-judicial powers, to subordinates within the agency may be implied from the nature of the agency.[3]

Where Congress confers power upon the President of the United States, even if there is no express authority to act by deputies, such authority is implied.[4]Powers bestowed upon the President must, of necessity, be exercised through the various executive departments.[5]Moreover, the necessity of performance of duties in the federal executive departments through subordinates is recognized, and acts of an acting secretary[6]or an assistant secretary[7]or other subordinates[8]are deemed to be acts of the secretary when they are done under his or her sanction and approval.

The same principles have been applied to uphold delegations by lesser federal[9]and by state[10]administrative agencies which, in view of the magnitude of their tasks, are deemed not to have been intended to exercise their discretion personally; further, the same principles which will admit of delegation by an administrative agency in any case may suffice to justify a redelegation by its delegate.[11]

Footnotes

1 Warren v. Marion County, 222 Or. 307, 353 P.2d 257 (1960).
As to implied powers, generally, see § 54.

[2] Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 67 S. Ct. 1129, 91 L. Ed. 1375 (1947).
An agency may impliedly delegate administrative authority if it is consistent with the legislative purpose. Santaniello v. New Jersey Dept. of Health and Senior Services, 416 N.J. Super. 445, 5 A.3d 804 (App. Div. 2010).

[3] Kimm v. Rosenberg, 363 U.S. 405, 80 S. Ct. 1139, 4 L. Ed. 2d 1299 (1960).

[4] Shreveport Engraving Co. v. U.S., 143 F.2d 222 (C.C.A. 5th Cir. 1944).

[5] U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 70 S. Ct. 309, 94 L. Ed. 317 (1950).

[6] Morgan v. U.S., 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936).

[7] Hannibal Bridge Co v. U S, 221 U.S. 194, 31 S. Ct. 603, 55 L. Ed. 699 (1911).

[8] United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954).

[9] Louisiana Forestry Ass'n Inc. v. Secretary U.S. Dept. of Labor, 745 F.3d 653 (3d Cir. 2014); Papagianakis v. The Samos, 186 F.2d 257 (4th Cir. 1950).

[10] Krug v. Lincoln Nat. Life Ins. Co., 245 F.2d 848 (5th Cir. 1957).

[11] Shreveport Engraving Co. v. U.S., 143 F.2d 222 (C.C.A. 5th Cir. 1944).

End of Document

2 Am. Jur. 2d Administrative Law § 65

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

3. Acting Through Other Persons; Delegation to Subordinates

§ 65. Type of power, as affecting whether power may be delegated

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 322.1, 323, 331

In all cases of delegated authority, where personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to judgment or discretion, the authority is purely personal and cannot be delegated to another unless there is a special power of substitution either express or necessarily implied.[1] Accordingly, apart from statute, whether administrative officers in whom certain powers are vested or upon whom certain duties are imposed may deputize others to exercise such powers or perform such duties usually depends upon whether the particular act or duty sought to be delegated is ministerial or discretionary or quasi-judicial in nature.[2] Merely administrative and ministerial functions may be delegated to assistants whose employment is authorized,[3] but there generally is no authority to delegate acts discretionary or quasi-judicial in nature.[4]

CUMULATIVE SUPPLEMENT

Cases:

When Labor Commission, through its administrative law judges (ALJs), acts in quasi-judicial role in workers' compensation cases, it cannot delegate its adjudicative authority without running afoul of provision in Utah Constitution, stating that judicial power of the state shall be vested in a Supreme Court, in a trial court of general jurisdiction known as the district court, and in such other courts as the legislature by statute may establish. Utah Const. art. 8, § 1. Ramos v. Cobblestone Centre, 2020 UT 55, 472 P.3d 910 (Utah 2020).

[END OF SUPPLEMENT]

Footnotes

1 Anderson v. Grand River Dam Authority, 1968 OK 143, 446 P.2d 814 (Okla. 1968).

2 Riverhead Park Corp. v. Cardinale, 881 F. Supp. 2d 376 (E.D. N.Y. 2012) (applying New York law); Washington Federation of State Employees v. State Dept. of General Admin., 152 Wash. App. 368, 216 P.3d 1061 (Div. 2 2009). As to the distinction between discretionary and ministerial powers, see §§ 55, 57.

3 Krug v. Lincoln Nat. Life Ins. Co., 245 F.2d 848 (5th Cir. 1957); School Dist. No. 3 of Town of Adams v. Callahan, 237 Wis. 560, 297 N.W. 407, 135 A.L.R. 1081 (1941).

4 Riverhead Park Corp. v. Cardinale, 881 F. Supp. 2d 376 (E.D. N.Y. 2012) (applying New York law); Gabrilson v. Flynn, 554 N.W.2d 267, 113 Ed. Law Rep. 894 (Iowa 1996).

End of Document

2 Am. Jur. 2d Administrative Law § 66

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

3. Acting Through Other Persons; Delegation to Subordinates

§ 66. Delegation to private parties

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 318, 322.1, 323, 331

When Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor,[1] and such delegations to nongovernmental entities may be assumed to be improper absent an affirmative showing of congressional authorization.[2] Delegations of administrative authority are suspect when they are made to private parties, particularly to entities whose objectivity may be questioned on the grounds of conflict of interest.[3] An agency abdicates its role as a rational decision maker if it does not exercise its own judgment and instead cedes near total deference to private parties' estimates even if the parties agree unanimously as to the estimated amount.[4] However, subdelegations by federal agencies to private parties are not invalid if the federal agency or official retains final reviewing authority.[5]

Observation:

Whether a state agency may exercise internal management discretion and determine to perform its constitutional or statutory duty using an independent contractor depends upon whether the agency possesses express or implied authority to make such a decision in a particular circumstance.[6]

Footnotes

1 Perot v. Federal Election Com'n, 97 F.3d 553 (D.C. Cir. 1996).

[2] Gentiva Healthcare Corp. v. Sebelius, 723 F.3d 292 (D.C. Cir. 2013).

[3] Pistachio Group of the Ass'n of Food Industries, Inc. v. U.S., 11 Ct. Int'l Trade 668, 671 F. Supp. 31 (1987).

[4] Texas Office of Public Utility Counsel v. F.C.C., 265 F.3d 313 (5th Cir. 2001).

[5] United Black Fund, Inc. v. Hampton, 352 F. Supp. 898 (D.D.C. 1972).

[6] Oklahoma Public Employees Ass'n v. Oklahoma Dept. of Central Services, 2002 OK 71, 55 P.3d 1072 (Okla. 2002).

End of Document

2 Am. Jur. 2d Administrative Law § 67

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

4. Interpretation of Laws

a. Power of Agencies; In General

§ 67. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 316, 428 to 437

Administrative agencies are generally clothed with the power to construe the law as a necessary precedent to administrative action.[1]Even so, it is axiomatic that an administrative agency has no power to declare a statute void or otherwise unenforceable[2]and has no authority to invalidate a statute on constitutional grounds or to question its validity.[3]

Observation:

An administrative agency has the power and the duty to interpret its own legislative rules just as it has the power and duty to interpret the statutes that it enforces.[4]

Agencies cannot by interpretation enlarge the scope of or change a properly enacted statute.[5]An agency cannot modify, abridge, or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power.[6]Although an administrative agency has the authority and duty to determine its own limits of statutory authority, it is the function of the judiciary to finally decide the limits of the authority of the agency.[7]

CUMULATIVE SUPPLEMENT

Cases:

Where Congress has explicitly provided a definition for a term, and that definition is clear, an agency must follow it when exercising its discretion. Safer Chemicals, Healthy Families v. U.S. Environmental Protection Agency, 943 F.3d 397 (9th Cir. 2019), for additional opinion, see, 2019 WL 6041996 (9th Cir. 2019).

To determine whether the Legislature clearly vested an agency with authority to interpret particular statutes, the appellate court considers the phrases or statutory provisions to be interpreted, their context, the purpose of the statute, and other practical considerations as well as the functions of and duties imposed on the agency. Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015).

[END OF SUPPLEMENT]

Footnotes

1 City of North Las Vegas v. State Local Government Employee-Management Relations Bd., 261 P.3d 1071, 127 Nev. Adv. Op. No. 57 (Nev. 2011); J.R. Simplot Co., Inc. v. Idaho State Tax Com'n, 120 Idaho 849, 820 P.2d 1206 (1991); Dean v. State, 250 Kan. 417, 826 P.2d 1372 (1992).

2 Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249 (Fla. 1987); HOH Corp. v. Motor Vehicle Industry Licensing Bd., Dept. of Commerce and Consumer Affairs, 69 Haw. 135, 736 P.2d 1271 (1987).

3 Delgado v. Board of Election Com'rs of City of Chicago, 224 Ill. 2d 481, 309 Ill. Dec. 820, 865 N.E.2d 183 (2007); In re Worker's Compensation Claim of Shryack, 3 P.3d 850 (Wyo. 2000).
As to constitutional questions and claims before agencies, see § 68.

4 Hoctor v. U.S. Dept. of Agriculture, 82 F.3d 165 (7th Cir. 1996).

5 Metheny v. Hammonds, 216 F.3d 1307 (11th Cir. 2000) (applying Georgia law); Ex parte State Health Planning and Development Agency, 855 So. 2d 1098 (Ala. 2002); United Ass'n Local Union 246, AFL-CIO v. Occupational Safety and Health Appeals Bd., 199 Cal. App. 4th 273, 131 Cal. Rptr. 3d 74 (3d Dist. 2011).

6 Castro v. Viera, 207 Conn. 420, 541 A.2d 1216 (1988).

7 Moderate Income Housing, Inc. v. Board of Review of Pottawattamie County, 393 N.W.2d 324 (Iowa 1986).

End of Document

2 Am. Jur. 2d Administrative Law § 68

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

4. Interpretation of Laws

a. Power of Agencies; In General

§ 68. Constitutional questions and claims before agencies

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 316, 430

As a general rule, administrative agencies have no jurisdiction to decide issues of constitutional law.[1] The power delegated by the legislature to an agency generally does not include the inherent authority to decide whether a particular statute or regulation that the agency is charged with enforcing is constitutional.[2]

While some courts have declared that challenges to the constitutionality of a statute or regulation promulgated by an agency are generally beyond the power or jurisdiction of the agency,[3] other courts have found that administrative agencies may consider constitutional claims, although they lack the authority to deal with them dispositively, as the final say on constitutional matters rests with the courts.[4] Yet other authority has found that administrative agencies have the power to declare statutes and rules unconstitutional, when done with care,[5] or that administrative agencies have the power to pass on constitutional questions where relevant and necessary to the resolution of a question concededly within their jurisdiction.[6]

CUMULATIVE SUPPLEMENT

Cases:

Although an agency lacks power to decide constitutionality of its enabling statutes and regulations, it can and should make factual findings necessary to address a constitutional question closely intertwined with the facts of a specific case subject to agency adjudication and apply its expertise to construction and application of any related statutes or regulations in light of constitutional question; this process compiles an appropriate record for the Superior Court to consider on appeal in determining whether the agency's determinations were made in compliance with or in violation of constitutional provisions. Mass. Gen. Laws Ann. ch. 30A, § 14(7)(a). Doe v. Sex Offender Registry Board, 488 Mass. 15, 170 N.E.3d 1143 (2021).

[END OF SUPPLEMENT]

Footnotes

1 Reed v. Arvis Harper Bail Bonds, Inc., 2010 Ark. 338, 368 S.W.3d 69 (2010); Stinemetz v. Kansas Health Policy Authority, 45 Kan. App. 2d 818, 252 P.3d 141 (2011).

2 Doe v. Sex Offender Registry Bd., 459 Mass. 603, 947 N.E.2d 9 (2011).
As a rule, an administrative agency lacks authority to decide the constitutionality of a statute. Edwards Aquifer Authority v. Day, 369 S.W.3d 814 (Tex. 2012).

3 Gilbert v. National Transp. Safety Bd., 80 F.3d 364 (9th Cir. 1996).

4 Singh v. Reno, 182 F.3d 504 (7th Cir. 1999), as amended on other grounds on denial of reh'g, (Aug. 10, 1999).

5 Outdoor Media Dimensions Inc. v. State, 331 Or. 634, 20 P.3d 180 (2001).

6 New Jersey Dept. of Envir. Prot. v. Huber, 213 N.J. 338, 63 A.3d 197 (2013).

End of Document

2 Am. Jur. 2d Administrative Law § 69

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

4. Interpretation of Laws

a. Power of Agencies; In General

§ 69. Purpose of administrative interpretation; clarifying ambiguity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 430, 432

When there is internal conflict in a statute's mandates, the job of the agency administrator is to implement the central aim of the statute.[1] When a legislative prescription is ambiguous, the administrator of such a statute must choose between conflicting reasonable interpretations.[2] Although the secretary of an executive department is free to adopt a reasonable interpretation of an ambiguous statute, the secretary is not free to disregard an unambiguous aspect of a statute to clarify and effect an ambiguous one.[3]

Caution:

Ambiguity anywhere in a statute is not a license to the administrative agency that interprets the statute to roam about that statute looking for other provisions to narrow or expand through the process of definition; rather, the delegated authority to interpret an ambiguous statutory term extends only to the specific subject matter covered by the ambiguous term.[4]

In order to justify construction by either an administrative agency or court, it must first appear that construction is necessary,[5] for while administrative agencies have the authority to interpret the laws which they administer, such interpretation cannot be contrary to clear legislative intent.[6] An unambiguous statute may not be supplemented[7] or altered[8] in the guise of interpretation. If the intent of a statute is clear, both the court and the agency charged with administering the statute must give effect to the unambiguously expressed will of the legislature.[9]

CUMULATIVE SUPPLEMENT

Cases:

When an administrative agency's interpretation of a statute is inconsistent with the statute itself, or when the statute is unambiguous, such administrative interpretation carries little weight. Lancaster County v. Pennsylvania Labor Relations Bd., 124 A.3d 1269 (Pa. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Massachusetts ex rel. Div. of Marine Fisheries v. Daley, 170 F.3d 23 (1st Cir. 1999).

2 Holly Farms Corp. v. N.L.R.B., 517 U.S. 392, 116 S. Ct. 1396, 134 L. Ed. 2d 593 (1996).

3 Mt. Emmons Min. Co. v. Babbitt, 117 F.3d 1167 (10th Cir. 1997).

4 Bower v. Federal Exp. Corp., 96 F.3d 200, 17 A.D.D. 735, 1996 FED App. 0306P (6th Cir. 1996).

5 Cullinan v. McColgan, 80 Cal. App. 2d 976, 183 P.2d 115 (3d Dist. 1947).

6 Abramson v. Florida Psychological Ass'n, 634 So. 2d 610 (Fla. 1994).
Administrative orders and rules that are contrary to legislative intent must be rejected. Dababnah v. West Virginia Bd. of Medicine, 207 W. Va. 621, 535 S.E.2d 220 (2000).

7 Cullinan v. McColgan, 80 Cal. App. 2d 976, 183 P.2d 115 (3d Dist. 1947).

8 Helvering v. Sabine Transp. Co., 318 U.S. 306, 63 S. Ct. 569, 87 L. Ed. 773 (1943); In re Loeb's Estate, 400 Pa. 368, 162 A.2d 207 (1960).

9 American Federation of Government Employees v. Rumsfeld, 262 F.3d 649 (7th Cir. 2001); Haug v. Bank of America, N.A., 317 F.3d 832 (8th Cir. 2003).

End of Document

2 Am. Jur. 2d Administrative Law § 70

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

4. Interpretation of Laws

a. Power of Agencies; In General

§ 70. Requirement that agency follow courts; nonacquiescence

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 430

Federal agencies are required to abide by the law of the relevant federal judicial circuit in matters arising within the jurisdiction of that circuit's court of appeals until and unless it is changed by that court of appeals or reversed by the United States Supreme Court.[1] In order to establish agency nonacquiescence, the evidence must demonstrate that the agency has deliberately failed to follow the law of the circuits whose courts have jurisdiction over the cause of action. Where the agency does not formally announce that it will nonacquiesce in a particular decision, the agency's conduct cannot be considered nonacquiescence unless there are substantial differences between agency policy and court holdings and unless these differences have influenced the agency's adjudication of individual cases.[2]

Observation:

Despite the rule regarding the obligation of agencies to follow court precedent, an agency does not have to incorporate dicta as policy, nor does it have to apply a holding beyond the scope of the decision itself. In addition, if the agency finds a principled distinction between a particular set of factual circumstances and the case in which the court articulated its holding, and if the agency believes in good faith that the decision should not be applied in those circumstances, it is entitled to set out the circumstances where the decision would be controlling and where the agency has decided it should not be applied.[3]

Caution:

An agency is bound to follow higher authority only when it acts as an adjudicator and not when it litigates.[4]

Footnotes

1 Industrial TurnAround Corp. v. N.L.R.B., 115 F.3d 248 (4th Cir. 1997).

2 Stieberger v. Sullivan, 738 F. Supp. 716 (S.D. N.Y. 1990).

3 Stieberger v. Sullivan, 738 F. Supp. 716 (S.D. N.Y. 1990).

4 National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs, 260 F.3d 1365 (Fed. Cir. 2001).

End of Document

2 Am. Jur. 2d Administrative Law § 71

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

4. Interpretation of Laws

a. Power of Agencies; In General

§ 71. Methods of interpretation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 430

The power of an administrative agency to construe and interpret the law is applied in several different ways. The administrative agencies may interpret and construe the law through issuing rules and regulations.[1]An administrative agency may also render interpretations of the law in the course of exercising its adjudicating powers.[2]When, as an incident to its adjudicatory function, an agency interprets a statute, it may apply that new interpretation in the proceeding before it.[3]

As an alternative to acting formally through rulemaking or adjudication, administrative agencies may act informally.[4]In fact, informal action constitutes the bulk of the activity of most administrative agencies.[5]It is action that is neither adjudication nor rulemaking and includes investigating, publicizing, planning, and supervising a regulated industry.[6]In addition, an agency may, even without the statutory authorization to do so, specifically issue interpretations, rulings, or opinions upon the law it administers.[7]

Observation:

The various kinds of action can overlap, and the line between agency rulemaking and adjudication on the one hand and informal action on the other can become blurred.[8]

Footnotes

1 § 127.

2 § 258.

3 Clark-Cowlitz Joint Operating Agency v. F.E.R.C., 826 F.2d 1074 (D.C. Cir. 1987).

4 R & R Marketing, L.L.C. v. Brown-Forman Corp., 158 N.J. 170, 729 A.2d 1 (1999).

5 Matter of Request for Solid Waste Utility Customer Lists, 106 N.J. 508, 524 A.2d 386 (1987).

6 Northwest Covenant Medical Center v. Fishman, 167 N.J. 123, 770 A.2d 233 (2001).

7 Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944); Utah Hotel Co. v. Industrial Commission, 107 Utah 24, 151 P.2d 467, 153 A.L.R. 1176 (1944).

8 Matter of Request for Solid Waste Utility Customer Lists, 106 N.J. 508, 524 A.2d 386 (1987).

End of Document

2 Am. Jur. 2d Administrative Law § 72

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

4. Interpretation of Laws

a. Power of Agencies; In General

§ 72. Effect of interpretation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305, 430, 435

Construction and interpretation by an administrative agency of the law under which it acts provide a practical guide as to how the agency will seek to apply the law.[1] An agency to which the legislative branch has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.[2] However, despite the fact that the interpretation given to statutes and regulations by administrative agencies is given great weight by the courts,[3] one who chooses to rely upon an interpretative regulation does so at his or her own peril and stands the risk of its not being followed by the courts.[4] An erroneous construction of a statute by a state department cannot operate to confer a legal right in accordance with such construction.[5]

Footnotes

1 Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944).

2 City of Albuquerque v. New Mexico Public Regulation Com'n, 2003-NMSC-028, 134 N.M. 472, 79 P.3d 297 (2003).

3 § 74.

4 Sawyer v. Central Louisiana Elec. Co., 136 So. 2d 153 (La. Ct. App. 3d Cir. 1961); Utah Hotel Co. v. Industrial Commission, 107 Utah 24, 151 P.2d 467, 153 A.L.R. 1176 (1944).

5 Department of Insurance of Indiana v. Church Members Relief Ass'n, 217 Ind. 58, 26 N.E.2d 51, 128 A.L.R. 635 (1940).

End of Document

2 Am. Jur. 2d Administrative Law § 73

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

4. Interpretation of Laws

a. Power of Agencies; In General

§ 73. Change in construction

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 430, 434, 435

A construction of a statute by those administering it, even though long continued, is not binding on them or their successors if thereafter they become satisfied that a different construction should be given.[1]This is especially true where the earlier construction was clearly erroneous[2]but also applies when the prior construction is merely no longer sound or appropriate.[3]Agencies have leeway to change their interpretations of laws, as well as of their own regulations, provided they explain the reasons for such change and provided that those reasons meet the applicable standard of review.[4]While an agency is not locked into the first interpretation of a statute it embraces, it cannot simply adopt inconsistent positions without presenting some reasoned analysis.[5]An agency may change its interpretation of an underlying statutory provision even absent any alteration in that provision so long as the reason for the change is explained, and the change does not conflict with the underlying statute.[6]

Footnotes

1 Alstate Const. Co. v. Durkin, 345 U.S. 13, 73 S. Ct. 565, 97 L. Ed. 745 (1953); Faingnaert v. Moss, 295 N.Y. 18, 64 N.E.2d 337 (1945).

2 Calbeck v. Travelers Ins. Co., 370 U.S. 114, 82 S. Ct. 1196, 8 L. Ed. 2d 368 (1962).

3 New York Tel. Co. v. F. C. C., 631 F.2d 1059 (2d Cir. 1980).

4 Saint Fort v. Ashcroft, 329 F.3d 191 (1st Cir. 2003).

5 Huntington Hosp. v. Thompson, 319 F.3d 74 (2d Cir. 2003).

[6] Paralyzed Veterans of America v. Secretary of Veterans Affairs, 345 F.3d 1334 (Fed. Cir. 2003).

End of Document

2 Am. Jur. 2d Administrative Law § 74

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

4. Interpretation of Laws

b. Effect Given by Courts

§ 74. Generally; deference rule

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 431

A.L.R. Library

Construction and Application of "Chevron Deference" to Administrative Action by United States Supreme Court, 3 A.L.R. Fed. 2d 25

Generally, permissible[1] constructions given to ambiguous statutes[2] by agencies responsible for their administration are entitled to great weight[3] or deference[4] by the courts if neither irrational[5] nor unreasonable.[6] Reviewing courts must respect the judgment of an agency empowered to apply an ambiguous law to varying fact patterns even if the issue, with equal reason, is capable of being resolved one way rather than another.[7]

Observation:

A court must defer to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority, that is, its jurisdiction; no matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority.[8]

On the other hand, where the administrative construction is manifestly wrong or clearly erroneous,[9] arbitrary,[10] or unreasonable,[11] it is not binding and will not be followed.

In any event, the construction of statutes and other laws is a matter which ultimately is for the courts.[12]

CUMULATIVE SUPPLEMENT

Cases:

In the usual course, when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable, and this principle is implemented by the two-step analysis set forth in *Chevron*. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016).

Administrative interpretations of statutory provisions qualify for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Anna Jacques Hosp. v. Burwell, 797 F.3d 1155 (D.C. Cir. 2015).

When a provision of law vests interpretive discretion in an agency, court may reverse only if the agency's interpretation was irrational, illogical, or wholly unjustifiable. Iowa Code Ann. § 17A.19(10)(l). United Electrical, Radio & Machine Workers of America v. Iowa Public Employment Relations Board, 928 N.W.2d 101 (Iowa 2019).

For purposes of giving weight to the positions of administrative agencies, it does not matter whether an agency has been consistent in its rulings; this is because an agency's prior rulings and policies themselves are not entitled to great weight, unless expressed in regulations. Nielsen Co. (US), LLC v. County Bd. of Arlington County, 767 S.E.2d 1 (Va. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

2 Presley v. Etowah County Com'n, 502 U.S. 491, 112 S. Ct. 820, 117 L. Ed. 2d 51 (1992); Eid v. Thompson, 740 F.3d 118 (3d Cir. 2014); Combs v. Chapal Zenray, Inc., 357 S.W.3d 751 (Tex. App. Austin 2011), reh'g overruled, (Jan. 25, 2012) and review denied, (Dec. 14, 2012).

3 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); Fishburn v. Indiana Public Retirement System, 2 N.E.3d 814 (Ind. Ct. App. 2014); Avenue Nursing Home and Rehabilitation Centre v. Shah, 112 A.D.3d 1178, 977 N.Y.S.2d 774 (3d Dep't 2013).

4 Negusie v. Holder, 555 U.S. 511, 129 S. Ct. 1159, 173 L. Ed. 2d 20 (2009); Nativi v. Deutsche Bank National Trust Company, 223 Cal. App. 4th 261, 167 Cal. Rptr. 3d 173 (6th Dist. 2014), review denied, (Apr. 30, 2014); Federal Nat. Mortg. Ass'n v. Sundquist, 2013 UT 45, 311 P.3d 1004 (Utah 2013), petition for certiorari filed, 82 U.S.L.W. 3453 (U.S. Jan. 14, 2014).

5 Democko v. Iowa Dept. of Natural Resources, 840 N.W.2d 281 (Iowa 2013); Lumpkin v. Department of Social Services, 45 N.Y.2d 351, 408 N.Y.S.2d 421, 380 N.E.2d 249 (1978).

6 Presley v. Etowah County Com'n, 502 U.S. 491, 112 S. Ct. 820, 117 L. Ed. 2d 51 (1992); Federal Nat. Mortg. Ass'n v. Sundquist, 2013 UT 45, 311 P.3d 1004 (Utah 2013), petition for certiorari filed, 82 U.S.L.W. 3453 (U.S. Jan. 14, 2014).

7 Holly Farms Corp. v. N.L.R.B., 517 U.S. 392, 116 S. Ct. 1396, 134 L. Ed. 2d 593 (1996).

8 City of Arlington, Tex. v. F.C.C., 133 S. Ct. 1863 (2013).

9 Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 78 S. Ct. 851, 2 L. Ed. 2d 926 (1958); Iowa Federation of Labor, AFL-CIO v. Iowa Dept. of Job Service, 427 N.W.2d 443 (Iowa 1988); Durrett v. Bryan, 14 Kan. App. 2d 723, 799 P.2d 110 (1990).

10 Eid v. Thompson, 740 F.3d 118 (3d Cir. 2014); In re S.H., 2013 PA Super 165, 71 A.3d 973 (2013), appeal denied, 80 A.3d 778 (Pa. 2013).

11 Crittenden v. Cook County Com'n of Human Rights, 2013 IL 114876, 371 Ill. Dec. 783, 990 N.E.2d 1161 (Ill. 2013); Avenue Nursing Home and Rehabilitation Centre v. Shah, 112 A.D.3d 1178, 977 N.Y.S.2d 774 (3d Dep't 2013).

12 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); Hollinrake v. Iowa Law Enforcement Academy, Monroe County, 452 N.W.2d 598 (Iowa 1990); Durrett v. Bryan, 14 Kan. App. 2d 723, 799 P.2d 110 (1990).

End of Document

2 Am. Jur. 2d Administrative Law § 75

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

4. Interpretation of Laws

b. Effect Given by Courts

§ 75. “Practical” construction

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Administrative Law and Procedure 303.1, 431, 433

Practical construction, as distinguished from judicial construction, is the interpretation put upon statutes by the actual administration of them by government departments.[1] The practical construction placed on a statute by an agency, if reasonable, is highly persuasive.[2] An actual,[3] proven[4] construction by the administrative agency[5] subsequent to the adoption of a statute[6] is essential to invoke the rule that the courts will give weight to a practical construction by administrative agencies in determining the true meaning of a statute.[7] On the other hand, the court may decline to give force to a construction represented by acts insufficient in rank, frequency, and duration to constitute a settled practice.[8]

Footnotes

1 Department of Insurance of Indiana v. Church Members Relief Ass’n, 217 Ind. 58, 26 N.E.2d 51, 128 A.L.R. 635 (1940).

2 Wiese v. Freedom of Information Com’n, 82 Conn. App. 604, 847 A.2d 1004, 187 Ed. Law Rep. 933 (2004).

3 Railroad Commission v. Houston Natural Gas Corp., 186 S.W.2d 117 (Tex. Civ. App. Austin 1945), writ refused w.o.m.

4 Hunstock v. Estate Development Corp., 22 Cal. 2d 205, 138 P.2d 1, 148 A.L.R. 968 (1943).

5 E. C. Olsen Co. v. State Tax Commission, 109 Utah 563, 168 P.2d 324 (1946).

6 U.S. v. Townsley, 323 U.S. 557, 65 S. Ct. 413, 89 L. Ed. 454 (1945).

[7] Smith v. North Dakota Workers Compensation Bureau, 447 N.W.2d 250, 56 Ed. Law Rep. 1008 (N.D. 1989).

[8] Manning v. Seeley Tube & Box Co. of New Jersey, 338 U.S. 561, 70 S. Ct. 386, 94 L. Ed. 346 (1950); In re Porterfield, 28 Cal. 2d 91, 168 P.2d 706, 167 A.L.R. 675 (1946).

End of Document

2 Am. Jur. 2d Administrative Law § 76

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

4. Interpretation of Laws

b. Effect Given by Courts

§ 76. General limitations on deference

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305, 431 to 433

The deference granted an agency's interpretation of a statute is not absolute.[1]There are general limitations on deference, including—
— the statute must be one subject to construction, that is, ambiguous.[2]
— judicial construction must be wanting.[3]
— the administrative construction must be decisive of the interpretation proposed to the court.[4]
— the administrative construction must be confidently asserted.[5]
— the administrative construction must be made in the discharge of official duty.[6]
— the administrative construction must be reasonable.[7]
— the administrative construction must not enlarge nor restrict the scope of the statute.[8]
— the administrative construction must not conflict with the expressed purpose of the statute and the intention of the legislature.[9]
The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.[10]Thus, the judiciary must reject administrative constructions which are contrary to clear congressional intent,[11]such as where the legislative history or the purpose and structure of the statute clearly reveal a contrary legislative intent.[12]

CUMULATIVE SUPPLEMENT

Cases:

Chevron deference is not warranted where the regulation is procedurally defective, that is, where the agency errs by failing to follow the correct procedures in issuing the regulation. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016).

A party might be foreclosed in some instances from challenging the procedures used by an agency to promulgate a given rule, but where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016).

An unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice, and an arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016).

Unexplained inconsistency between agency actions is a reason for holding an agency's interpretation to be an arbitrary and capricious change under the Administrative Procedure Act (APA). Western Watersheds Project v. Bernhardt, 428 F. Supp. 3d 327 (D. Or. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Department of Natural Resources v. Wingfield Development Co., 581 So. 2d 193 (Fla. 1st DCA 1991).

2 Haggar Co. v. Helvering, 308 U.S. 389, 60 S. Ct. 337, 84 L. Ed. 340 (1940); Combs v. Chapal Zenray, Inc., 357 S.W.3d 751 (Tex. App. Austin 2011), reh'g overruled, (Jan. 25, 2012) and review denied, (Dec. 14, 2012).

3 Sanford's Estate v. Commissioner of Internal Revenue, 308 U.S. 39, 60 S. Ct. 51, 84 L. Ed. 20 (1939); E. C. Olsen Co. v. State Tax Commission, 109 Utah 563, 168 P.2d 324 (1946).

4 Propper v. Clark, 337 U.S. 472, 69 S. Ct. 1333, 93 L. Ed. 1480 (1949).

5 Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316, 81 S. Ct. 1611, 6 L. Ed. 2d 869 (1961).

6 State v. Mutual Life Ins. Co. of New York, 175 Ind. 59, 93 N.E. 213 (1910).

7 Stewart Park and Reserve Coalition, Inc. (SPARC) v. Slater, 352 F.3d 545 (2d Cir. 2003); Stanford v. Butler, 142 Tex. 692, 181 S.W.2d 269, 153 A.L.R. 1054 (1944).

8 Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, 325 U.S. 161, 65 S. Ct. 1063, 89 L. Ed. 1534 (1945); Ex parte State Health Planning and Development Agency, 855 So. 2d 1098 (Ala. 2002).

9 Harris v. Alcoholic Beverage Control Appeals Bd., 228 Cal. App. 2d 1, 39 Cal. Rptr. 192 (2d Dist. 1964); Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886, 52 A.L.R.2d 875 (1955).

10 K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988).

11 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

12 Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 105 S. Ct. 1102, 84 L. Ed. 2d 90 (1985); In re Township of Warren, 132 N.J. 1, 622 A.2d 1257 (1993).

End of Document

2 Am. Jur. 2d Administrative Law § 77

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

4. Interpretation of Laws

b. Effect Given by Courts

§ 77. Implied legislative approval of administrative construction

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305, 434, 436

Reenactment of a statutory provision without material change indicates legislative approval of its administrative construction.[1] This is especially true where there are repeated reenactments, as in the case of the former federal revenue acts;[2] where the administrative construction has also had judicial approval;[3] or where there is evidence that the legislature considered the administrative history of the statute or was advised of the construction[4] as where there is a long-standing interpretation of the statute by the agency.[5]

The legislature may also adopt an administrative construction of a statute when, subsequent to such construction, it amends the statute.[6] A congressional failure to revise or repeal an agency's interpretation of a statute when amending that statute is persuasive evidence that the interpretation is the one intended by Congress.[7]

CUMULATIVE SUPPLEMENT

Cases:

Re-enactment doctrine, by which Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt it when re-enacting a statute without change, is merely an interpretive tool fashioned by the courts for their own use in construing an ambiguous legislation. Mize v. Pompeo, 482 F. Supp. 3d 1317 (N.D. Ga. 2020).

Consideration of the principle that Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change is secondary to consideration of the text of the statute itself and inapplicable where the court has already found the statutory language itself to be sufficient to establish

its clear meaning. Kiviti v. Pompeo, 467 F. Supp. 3d 293 (D. Md. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Helvering v. Wilshire Oil Co., 308 U.S. 90, 60 S. Ct. 18, 84 L. Ed. 101 (1939); Fajardo v. U.S. Atty. Gen., 659 F.3d 1303 (11th Cir. 2011); Wilson v. State, 272 S.W.3d 686 (Tex. App. Austin 2008).

2 Cammarano v. U.S., 358 U.S. 498, 79 S. Ct. 524, 3 L. Ed. 2d 462 (1959).

3 N.L.R.B. v. Gullett Gin Co., 340 U.S. 361, 71 S. Ct. 337, 95 L. Ed. 337 (1951).

4 Service v. Dulles, 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957).

5 Federal Deposit Ins. Corp. v. Philadelphia Gear Corp., 476 U.S. 426, 106 S. Ct. 1931, 90 L. Ed. 2d 428 (1986).

6 Federal Housing Administration v. Darlington, Inc., 358 U.S. 84, 79 S. Ct. 141, 3 L. Ed. 2d 132 (1958); In re Stupack, 274 N.Y. 198, 8 N.E.2d 485, 110 A.L.R. 1158 (1937).

7 Young v. Community Nutrition Institute, 476 U.S. 974, 106 S. Ct. 2360, 90 L. Ed. 2d 959 (1986).

End of Document

2 Am. Jur. 2d Administrative Law § 78

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

II. Administrative Agencies

C. Powers and Functions

4. Interpretation of Laws

b. Effect Given by Courts

§ 78. Effect of subsequent acts of legislature

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 303.1, 305, 435, 436

The courts will not apply an administrative construction which has been prohibited by subsequent legislative enactments of the same nature.[1] However, the legislature may adopt an administrative construction of a statute when, subsequent to such construction, it amends the statute or reenacts it without overriding such construction.[2] Ratification with positive legislation makes an administrative construction virtually conclusive,[3] and reenactment of a statute is persuasive evidence of legislative approval.[4]

Footnotes

1 U.S. v. Gilmore, 75 U.S. 330, 19 L. Ed. 396, 1869 WL 11571 (1869).

2 § 77.

3 Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986).

4 C.I.R. v. Sternberger's Estate, 348 U.S. 187, 75 S. Ct. 229, 99 L. Ed. 246 (1955).

End of Document

2 Am. Jur. 2d Administrative Law III A Refs.

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

A. Meetings; in General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

A.L.R. Library

A.L.R. Index, Administrative Law
West's A.L.R. Digest, Administrative Law and Procedure 124 to 126

End of Document

2 Am. Jur. 2d Administrative Law § 79

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

A. Meetings; in General

§ 79. Number of members necessary to act; time of meetings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124, 125

A.L.R. Library

Validity of Super-Majority Voting Requirements in Constitutional, Statutory, and Other Public Provisions, 28 A.L.R.6th 439

Forms

Forms relating to meetings and hearings, generally, see Am. Jur. Pleading and Practice Forms, Administrative Law [Westlaw® Search Query]

A "quorum" is the number of members of a larger body that must participate for the valid transaction of business.[1] A quorum generally consists of a simple majority of a collective body; in the absence of a statutory provision contrary to the common law, a majority of such a quorum is empowered to act for the body.[2] However, a supermajority of those present may be required by statute.[3] All members of the collective body must have had notice and the opportunity to act.[4]

Observation:

Vacancies in membership caused by the death, resignation, ineligibility, failure to qualify, abstention, or incapacity of individual

members do not affect the legality of acts of a public body so long as they are authorized by a majority of its membership constituting a quorum.[5]

Footnotes

1 New Process Steel, L.P. v. N.L.R.B., 560 U.S. 674, 130 S. Ct. 2635, 177 L. Ed. 2d 162 (2010).

2 F.T.C. v. Flotill Products, Inc., 389 U.S. 179, 88 S. Ct. 401, 19 L. Ed. 2d 398 (1967); Aziken v. District of Columbia Alcoholic Beverage Control Bd., 29 A.3d 965 (D.C. 2011); Barton v. South Carolina Dept. of Probation Parole and Pardon Services, 404 S.C. 395, 745 S.E.2d 110 (2013).

3 Mix v. City of New Orleans, 126 So. 2d 1 (La. Ct. App. 4th Cir. 1960) (two-thirds required).

4 Brown v. District of Columbia, 23 Ct. Cl. 505, 127 U.S. 579, 8 S. Ct. 1314, 32 L. Ed. 262 (1888); Carroll v. Alabama Public Service Commission, 281 Ala. 559, 206 So. 2d 364 (1968).

5 U.S. Vision, Inc. v. Board of Examiners for Opticians, 15 Conn. App. 205, 545 A.2d 565 (1988); Hawaii Electric Light Co., Inc. v. Department of Land and Natural Resources, 102 Haw. 257, 75 P.3d 160 (2003), as amended on other grounds, (Aug. 25, 2003).

End of Document

2 Am. Jur. 2d Administrative Law § 80

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

A. Meetings; in General

§ 80. What members are counted

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

Ex officio members of a board are counted in determining the presence of a quorum.[1] In addition, a substitute member duly designated in accordance with a statute in place of an absent or disqualified member is a member whose vote counts in determining the required number of votes.[2]

For purposes of determining whether a legal quorum is present, a member who is disqualified whether because of interest, bias, prejudice, or other good cause or because he or she has voluntarily recused him- or herself is not counted.[3] The fact that the member is physically present and his or her name is on the final decision is irrelevant in such a case.[4] One who merely abstains, however, is counted towards the quorum.[5]

Footnotes

1 Louisville & Jefferson County Planning & Zoning Com'n v. Ogden, 307 Ky. 362, 210 S.W.2d 771 (1948).

2 Real Properties v. Board of Appeal of Boston, 311 Mass. 430, 42 N.E.2d 499 (1942).

3 Garris v. Governing Bd. of South Carolina Reinsurance Facility, 333 S.C. 432, 511 S.E.2d 48 (1998).
As to disqualification of members and officers, generally, see §§ 35 to 44.

4 King v. New Jersey Racing Com'n, 103 N.J. 412, 511 A.2d 615 (1986).

5 Walker Pontiac, Inc. v. Department of State, Bureau of Professional and Occupational Affairs, 136 Pa. Commw. 54, 582 A.2d 410 (1990).

Works.

2 Am. Jur. 2d Administrative Law III B Refs.

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

A.L.R. Library

A.L.R. Index, Administrative Law
West's A.L.R. Digest, Administrative Law and Procedure 124 to 126

End of Document

2 Am. Jur. 2d Administrative Law § 81

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

1. State Law

§ 81. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

A.L.R. Library

Validity, construction, and application of statutes making public proceedings open to the public, 38 A.L.R.3d 1070 (sec. 6(b) superseded in part by Attorney-client exception under state law making proceedings by public bodies open to the public, 34 A.L.R.5th 591)

There is no common-law right to attend meetings of government bodies.[1] However, many states have enacted public meeting statutes, often termed "Sunshine Acts" or "Open Meeting Acts," that provide that meetings of public entities within the state must be open to the public at large.[2] The purpose of such statutes is to promote openness and accountability in government[3] and to prevent the government from conducting the public's business in secret.[4]

Observation:

Sunshine acts are subject to a broad or liberal interpretation that is most favorable to the public.[5]

A violation of the statute may occur not only where the meeting is private but also where the meeting is held in an

inconvenient location[6]or in a room so small as to make it inaccessible for public attendance.[7]However, the law does not require public bodies to conduct public meetings within municipal limits; rather, the only restriction is that meetings be conducted with minimum cost or delay to the public.[8]

Some courts find that official action taken in violation of these statutes is not invalidated,[9]at least in the absence of prejudice,[10]although there is also authority invalidating such action.[11]An invalid act passed in violation of an open meetings act may be ratified in an open meeting although the ratification will only be effective from the date of the meeting in which the valid action was taken.[12]

Under some authority, voluntary committees formed for the purposes of making recommendations to a board are not subject to the state open meetings statute, in the absence of a statute, ordinance, or official act by the board designating the committee as a public or subsidiary body.[13]However, an advisory committee is subject to a state sunshine act where it is officially sanctioned by a governmental body, and such committee takes actions sufficiently similar to the types of formal action found in the sunshine act.[14]

CUMULATIVE SUPPLEMENT

Cases:

While the Open Meetings Law (OML) does not require public bodies to meet, the remedy of voiding certain actions taken without meeting applies to a public body, even if its regulations or practices do not require a meeting. Colo. Rev. Stat. Ann. § 24-6-401. Wisdom Works Counseling Services, P.C. v. Colorado Department of Corrections, 2015 COA 118, 360 P.3d 262 (Colo. App. 2015).

An evaluation team appointed by the Department of Revenue, whose job was to evaluate bid proposals from vendors seeking award of contract to manage the Department's child-support program and to share their evaluations with a negotiation team, had no obligation under the Sunshine Law to conduct open, public meetings; each evaluation team member individually evaluated the competitors' proposals, individually assigned scores, and individually submitted their scores for consideration by others, but never met, collaborated, or discussed the competing proposals, ranked the competitors, or excluded any from consideration by the ultimate decider, the Department's negotiation team. Fla. Const. art. 1, § 23; Fla. Stat. Ann. § 286.011. Carlson v. State, 227 So. 3d 1261 (Fla. 1st DCA 2017).

A court is to analyze the coverage of the Public Meetings Law broadly and its exemptions narrowly. West's Or.Rev. Stat. Ann. § 192.610 et seq. Handy v. Lane County, 274 Or. App. 644, 362 P.3d 867 (2015).

[END OF SUPPLEMENT]

Footnotes

1 Abood v. League of Women Voters of Alaska, 743 P.2d 333 (Alaska 1987); Smith v. Cleveland, 94 Ohio App. 3d 780, 641 N.E.2d 828 (8th Dist. Cuyahoga County 1994).

2 Sarasota Citizens For Responsible Government v. City of Sarasota, 48 So. 3d 755 (Fla. 2010); EarthResources, LLC v. Morgan County, 281 Ga. 396, 638 S.E.2d 325 (2006); Zehner v. Board of Educ. of Jordan-Elbridge Cent. School Dist., 91 A.D.3d 1349, 937 N.Y.S.2d 510, 275 Ed. Law Rep. 963 (4th Dep't 2012).
As to the federal government in the Sunshine Act, see §§ 88 to 97.

3 Armstrong v. Mayor and City Council of Baltimore, 409 Md. 648, 976 A.2d 349 (2009); Wasikowski v. Nebraska Quality Jobs Bd., 264 Neb. 403, 648 N.W.2d 756 (2002); Kearns-Tribune Corp. v. Salt Lake County Com'n, 2001 UT

55, 28 P.3d 686 (Utah 2001).

4 State ex rel. Newman v. Columbus Tp. Bd., 15 Neb. App. 656, 735 N.W.2d 399 (2007); Smith v. Township of Richmond, 82 A.3d 407 (Pa. 2013).

5 Galbiso v. Orosi Public Utility Dist., 167 Cal. App. 4th 1063, 84 Cal. Rptr. 3d 788 (5th Dist. 2008); McCrea v. Flaherty, 71 Mass. App. Ct. 637, 885 N.E.2d 836 (2008); Schauer v. Grooms, 280 Neb. 426, 786 N.W.2d 909 (2010).

6 In re Foxfield Subdivision, 396 Ill. App. 3d 989, 336 Ill. Dec. 512, 920 N.E.2d 1102 (2d Dist. 2009).

7 Stevens v. City of Hutchinson, 11 Kan. App. 2d 290, 726 P.2d 279 (1986).

8 Wiedemann v. Town of Hilton Head Island, 344 S.C. 233, 542 S.E.2d 752 (Ct. App. 2001).

9 Dockside Discotheque, Inc. v. Board of Adjustment of Town of Southern Pines, 115 N.C. App. 303, 444 S.E.2d 451 (1994).

10 North Pacifica LLC v. California Coastal Com'n, 166 Cal. App. 4th 1416, 83 Cal. Rptr. 3d 636 (2d Dist. 2008).

11 Sarasota Citizens For Responsible Government v. City of Sarasota, 48 So. 3d 755 (Fla. 2010); Okmulgee County Rural Water Dist. No. 2 v. Beggs Public Works Authority, 2009 OK CIV APP 51, 211 P.3d 225 (Div. 3 2009).

12 City of San Antonio v. River City Cabaret, Ltd., 32 S.W.3d 291 (Tex. App. San Antonio 2000).

13 Donahue v. State, 474 N.W.2d 537, 69 Ed. Law Rep. 1158 (Iowa 1991); State ex rel. Am. Civ. Liberties Union of Ohio, Inc. v. Cuyahoga Cty. Bd. of Commers., 128 Ohio St. 3d 256, 2011-Ohio-625, 943 N.E.2d 553 (2011).

14 Frazer v. Dixon Unified School Dist., 18 Cal. App. 4th 781, 22 Cal. Rptr. 2d 641, 85 Ed. Law Rep. 127 (1st Dist. 1993); Animal Legal Defense Fund, Inc. v. Institutional Animal Care and Use Committee of University of Vermont, 159 Vt. 133, 616 A.2d 224, 79 Ed. Law Rep. 130 (1992).

End of Document

2 Am. Jur. 2d Administrative Law § 82

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

1. State Law

§ 82. Definition of “meeting”

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Administrative Law and Procedure 124 to 126

The term “meeting” in public meeting laws generally refers to all official deliberations and formal actions[1] of all governmental boards and commissions.[2] The elements of a “meeting” for the purpose of an open meetings act are: (1) a quorum of a public body’s members are present; (2) a decision is deliberated or rendered; and (3) the decision concerns a matter of public policy.[3]

Definition:

Under the open meetings law, a “meeting” is a gathering of a public body quorum at which it acquires information, discusses the information, or makes decisions regarding that information within its jurisdiction.[4]

Courts have found that a function is a “meeting” only where there are to occur deliberative stages of the decision-making process that lead to the formation and determination of public policy.[5] Some statutes provide that the term “meeting” does not include chance or social gatherings that are not intended to circumvent the sunshine law[6] although luncheons to discuss public policy issues have been found to violate an open meetings law[7] as have discussions held during a break in commission meetings.[8]

Some states require a meeting to be formed of a quorum.[9] It has been found that a public body may violate the sunshine act by clothing itself as a sham advisory committee or subcommittee of less than a quorum.[10]

CUMULATIVE SUPPLEMENT

Cases:

The Open Meetings Act (OMA), also known as the Sunshine Law, precludes a public body from taking official action by way of a secret ballot. Ohio Rev. Code Ann. § 121.22. State ex rel. More Bratenahl v. Village of Bratenahl, 157 Ohio St. 3d 309, 2019-Ohio-3233, 136 N.E.3d 447 (2019).

Within the context of the Open Public Meeting Act (OPMA), the Supreme Court would adopt the following definitions: (1) a "meeting" of a governing body occurs when a majority of its members gathers with the collective intent of transacting the governing body's business, (2) a "committee thereof" with respect to a given governing body is an entity that the governing body created or specifically authorized, and (3) a committee acts "on behalf of" a governing body when the committee exercises actual or de facto decision-making authority on behalf of the governing body. West's RCWA 42.30.030. Citizens Alliance for Property Rights Legal Fund v. San Juan County, 359 P.3d 753 (Wash. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Matter of Hutchinson, 440 N.W.2d 171 (Minn. Ct. App. 1989); Babac v. Pennsylvania Milk Marketing Bd., 531 Pa. 391, 613 A.2d 551 (1992).

2 Hinds County Bd. of Sup'rs v. Common Cause of Mississippi, 551 So. 2d 107 (Miss. 1989).

3 Jocham v. Tuscola County, 239 F. Supp. 2d 714 (E.D. Mich. 2003) (applying Michigan law).

4 Chanos v. Nevada Tax Com'n, 124 Nev. 232, 181 P.3d 675 (2008).

5 Hinds County Bd. of Sup'rs v. Common Cause of Mississippi, 551 So. 2d 107 (Miss. 1989); Harris v. Nordquist, 96 Or. App. 19, 771 P.2d 637, 52 Ed. Law Rep. 1281 (1989); Dallas Morning News Co. v. Board of Trustees of Dallas Independent School Dist., 861 S.W.2d 532, 85 Ed. Law Rep. 1244 (Tex. App. Dallas 1993), writ denied, (Mar. 30, 1994).

6 State ex rel. Badke v. Village Bd. of Village of Greendale, 173 Wis. 2d 553, 494 N.W.2d 408 (1993).

7 Booth Newspapers, Inc. v. Wyoming City Council, 168 Mich. App. 459, 425 N.W.2d 695 (1988).

8 Thuma v. Kroschel, 506 N.W.2d 14 (Minn. Ct. App. 1993).

9 Slagle v. Ross, 125 So. 3d 117, 299 Ed. Law Rep. 305 (Ala. 2012); Safe Air For Everyone v. Idaho State Dept. of Agriculture, 145 Idaho 164, 177 P.3d 378 (2008); Dewey v. Redevelopment Agency of City of Reno, 119 Nev. 87, 64 P.3d 1070 (2003).
As to the definition of "quorum," generally, see § 79.

10 Booth Newspapers, Inc. v. University of Michigan Bd. of Regents, 444 Mich. 211, 507 N.W.2d 422, 86 Ed. Law Rep. 987 (1993).

2 Am. Jur. 2d Administrative Law § 83

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

1. State Law

§ 83. Definition of “meeting”—Electronic meetings

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Administrative Law and Procedure 124 to 126

The availability of electronic media of communications has brought about new interpretations of open meeting laws. A “meeting” within a statutory definition may be conducted by written, telephonic, electronic, wireless, or other virtual means.[1] Thus, the exchange of e-mail messages may constitute a “meeting” within the meaning of an open meetings law even though the mere use or passive receipt of e-mail does not automatically constitute a “meeting.”[2]

Footnotes

1 Claxton Enterprise v. Evans County Bd. of Com’rs, 249 Ga. App. 870, 549 S.E.2d 830 (2001).
A quorum may be found even where some members participate through a telephone conference call on a speaker telephone. Babac v. Pennsylvania Milk Marketing Bd., 531 Pa. 391, 613 A.2d 551 (1992).

2 Wood v. Battle Ground School Dist., 107 Wash. App. 550, 27 P.3d 1208, 155 Ed. Law Rep. 1437 (Div. 2 2001) (the term “meeting” was intended to have a broad definition and includes any meeting at which action is taken regardless of the particular means used to conduct it).

End of Document

2 Am. Jur. 2d Administrative Law § 84

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

1. State Law

§ 84. Exceptions to public meetings requirement; executive sessions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

A.L.R. Library

Pending or prospective litigation exception under state law making proceedings by public bodies open to the public, 35 A.L.R.5th 113

Emergency exception under state law making proceedings by public bodies open to the public, 33 A.L.R.5th 731

The state sunshine laws often provide that meetings for certain purposes need not be public.[1] For instance, meetings concerning personnel matters,[2] such as the hiring, firing, performance, compensation, and discipline of public employees,[3] or matters that may prejudice the reputation or character of any person[4] are often, but not always,[5] exempted by public meetings statutes. Some sunshine laws provide for an emergency exception; for a situation to comprise an "emergency," the situation must be unexpected or unforeseen, and it must necessitate immediate action.[6]

Observation:

While sunshine acts are generally construed liberally in favor of openness in conducting public business,[7] the statutory exceptions authorizing closed sessions of legislative bodies are construed narrowly.[8] The exceptions are not to be used to shield the agency from unwanted or unpleasant public input, interference, or scrutiny.[9]

Meetings to discuss strategy and negotiations with respect to pending claims and litigation to which the public agency is a party are also sometimes exempt by public meetings statutes.[10]A meeting with experts may be exempt from the open meetings law where it is a strategy session with respect to proposed litigation.[11]However, there is authority finding there is no exception to the open meetings law for pending criminal investigations.[12]

Meetings, in exempt cases, are by executive session.[13]However, even when a public meetings law permits an executive session, the agency may still conduct a public meeting.[14]Moreover, in certain cases, a violation of the open meeting law by an illegal executive session may be cured by the readoption of an action at a public meeting.[15]

CUMULATIVE SUPPLEMENT

Cases:

Port's five executive sessions included discussions of factors relevant to lease price for proposed large rail terminal, but were not focused on setting minimum price itself, as required to invoke Open Public Meetings Act's (OPMA) minimum price exception; executive sessions involved discussions of duration of exclusivity agreement, proposed lessee's ability to pay for possible environmental cleanup, and construction timelines and costs. Wash. Rev. Code Ann. § 42.30.110(1)(c). Columbia Riverkeeper v. Port of Vancouver USA, 395 P.3d 1031 (Wash. 2017).

[END OF SUPPLEMENT]

Footnotes

1 District Attorney for Northern Dist. v. School Committee of Wayland, 455 Mass. 561, 918 N.E.2d 796, 251 Ed. Law Rep. 898 (2009); Chanos v. Nevada Tax Com'n, 124 Nev. 232, 181 P.3d 675 (2008).

2 Morrow v. Los Angeles Unified School Dist., 149 Cal. App. 4th 1424, 57 Cal. Rptr. 3d 885, 219 Ed. Law Rep. 158 (2d Dist. 2007).

3 Burnett v. Gloucester County Bd. of Chosen Freeholders, 409 N.J. Super. 219, 976 A.2d 444 (App. Div. 2009).

4 City of Kenai v. Kenai Peninsula Newspapers, Inc., 642 P.2d 1316 (Alaska 1982); Mellin v. City of Allentown, 60 Pa. Commw. 114, 430 A.2d 1048 (1981).

5 City of Flagstaff v. Bleeker, 123 Ariz. 436, 600 P.2d 49 (Ct. App. Div. 1 1979) (posttermination hearing subject to open meeting law).

6 Board of Selectmen of Town of Ridgefield v. Freedom of Information Com'n, 294 Conn. 438, 984 A.2d 748 (2010); Wolf v. Grubbs, 17 Neb. App. 292, 759 N.W.2d 499 (2009).

7 § 81.

8 Page v. MiraCosta Community College Dist., 180 Cal. App. 4th 471, 102 Cal. Rptr. 3d 902, 252 Ed. Law Rep. 278 (4th Dist. 2009).

9 Carter v. Smith, 366 S.W.3d 414, 280 Ed. Law Rep. 1152 (Ky. 2012).

10 Page v. MiraCosta Community College Dist., 180 Cal. App. 4th 471, 102 Cal. Rptr. 3d 902, 252 Ed. Law Rep. 278 (4th Dist. 2009); Carter v. Smith, 366 S.W.3d 414, 280 Ed. Law Rep. 1152 (Ky. 2012).
As to meetings of agencies with their attorneys, see § 85.

11 Mayor and Aldermen of City of Vicksburg v. Vicksburg Printing and Pub. Co., 434 So. 2d 1333 (Miss. 1983).

12 Kilgore v. R.W. Page Corp., 261 Ga. 410, 405 S.E.2d 655 (1991).

13 Shirley v. Chagrin Falls Exempted Village Schools Bd. of Ed., 521 F.2d 1329 (6th Cir. 1975); Berry v. Peoples Broadcasting Corp., 547 N.E.2d 231 (Ind. 1989).
As to notice of executive sessions, see § 86.

14 Berry v. Peoples Broadcasting Corp., 547 N.E.2d 231 (Ind. 1989).

15 McLeod v. Chilton, 132 Ariz. 9, 643 P.2d 712 (Ct. App. Div. 1 1981); Benevolent & Protective Order of Elks, Lodge No. 65 v. City Council of Lawrence, 403 Mass. 563, 531 N.E.2d 1254 (1988).

End of Document

2 Am. Jur. 2d Administrative Law § 85

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

1. State Law

§ 85. Exceptions to public meetings requirement; executive sessions—Meetings between attorney and agency

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

A.L.R. Library

Pending or prospective litigation exception under state law making proceedings by public bodies open to the public, 35 A.L.R.5th 113

Attorney-client exception under state law making proceedings by public bodies open to the public, 34 A.L.R.5th 591

A public meetings statute may allow for private meetings between an agency and its attorney, particularly to discuss litigation strategy, where an open meeting might have an adverse impact on the litigation position.[1] Even in the absence of an express statutory exemption in the open meetings act, some courts have found that private meetings between an agency and its counsel are allowed,[2] particularly in cases where the communication concerns a pending investigation, claim, or action and where the disclosure of matters discussed would seriously impair the ability of the public body to conduct the public's business.[3]

Observation:

The pending litigation exception to the open public meetings act empowers a public body to exclude the public to protect any material covered by the attorney-client privilege. If a communication is covered by the privilege, then the public body legitimately may meet with its attorney in closed session.[4]

Footnotes

1 Doherty v. School Committee of Boston, 386 Mass. 643, 436 N.E.2d 1223, 5 Ed. Law Rep. 222 (1982); Whispering Woods at Bamm Hollow, Inc. v. Middletown Tp. Planning Bd., 220 N.J. Super. 161, 531 A.2d 770 (Law Div. 1987) (discussion of possible settlement within litigation exception).

2 Fiscal Court of Jefferson County v. Courier-Journal and Louisville Times Co., 554 S.W.2d 72 (Ky. 1977); Cooper v. Williamson County Bd. of Educ., 746 S.W.2d 176, 45 Ed. Law Rep. 853 (Tenn. 1987).

3 Minneapolis Star & Tribune Co. v. Housing and Redevelopment Authority In and For City of Minneapolis, 310 Minn. 313, 251 N.W.2d 620 (1976); Oklahoma Ass'n of Municipal Attorneys v. State, 1978 OK 59, 577 P.2d 1310 (Okla. 1978); Herald Pub. Co., Inc. v. Barnwell, 291 S.C. 4, 351 S.E.2d 878 (Ct. App. 1986) (attorney-client exception applies when future litigation is a real possibility).

4 Burnett v. Gloucester County Bd. of Chosen Freeholders, 409 N.J. Super. 219, 976 A.2d 444 (App. Div. 2009).

End of Document

2 Am. Jur. 2d Administrative Law § 86

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

1. State Law

§ 86. Notice

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

The open meetings statutes often require that notice of meetings be given.[1]Notice requirements are generally intended to provide an accurate statement of the time, place, and purpose of a public hearing to those entitled to such notice so that they may attend the hearing and express their views.[2]Where statutes require notice to be given in a certain manner, courts have held that such statutes demand literal compliance,[3]and literal compliance is sufficient even if it does not provide particularly effective notice.[4]Other public meetings statutes, however, do not require notice to the public of governmental meetings.[5]

Observation:

Where notice is required, sometimes, the public meetings statute also requires the notice to contain the agenda of the meeting.[6]The purpose of the agenda requirement is to give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration.[7]

Adequate notice of executive sessions may also be required.[8]The resolutions calling for such executive sessions generally must indicate what is to be discussed.[9]

Footnotes

1 Town of Marble v. Darien, 181 P.3d 1148 (Colo. 2008); Grapski v. City of Alachua, 31 So. 3d 193 (Fla. 1st DCA 2010); City of Postville v. Upper Explorerland Regional Planning Com'n, 834 N.W.2d 1 (Iowa 2013).

2 Weber v. Town of Saukville, 209 Wis. 2d 214, 562 N.W.2d 412 (1997).

3 Smith County v. Thornton, 726 S.W.2d 2 (Tex. 1986).

4 Fielding v. Anderson, 911 S.W.2d 858 (Tex. App. Eastland 1995), writ denied, (Apr. 25, 1996) (notice in inaccessible location).

5 Dozier v. Norris, 241 Ga. 230, 244 S.E.2d 853 (1978).

6 Ansonia Library Bd. of Directors v. Freedom of Information Com'n, 42 Conn. Supp. 84, 600 A.2d 1058 (Super. Ct. 1991); Hilliary v. State, 1981 OK CR 78, 630 P.2d 791 (Okla. Crim. App. 1981).

7 State ex rel. Newman v. Columbus Tp. Bd., 15 Neb. App. 656, 735 N.W.2d 399 (2007).

8 Previdi v. Hirsch, 138 Misc. 2d 436, 524 N.Y.S.2d 643, 44 Ed. Law Rep. 1282 (Sup 1988) (notice was inadequate where the media were not informed, and the sole notice was posted on a bulletin board on the day of the meeting). As to executive sessions, see § 84.

9 Houman v. Mayor and Council of Borough of Pompton Lakes, 155 N.J. Super. 129, 382 A.2d 413 (Law Div. 1977).

End of Document

2 Am. Jur. 2d Administrative Law § 87

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

1. State Law

§ 87. Standing to bring action for possible violation of public meeting law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

Standing to bring an action for the violation of a public meeting law may be possessed by any interested person, including a member of the news media; this includes taxpayers of the municipality involved.[1] The purpose of the action may be to stop, prevent, or reverse a violation or threatened violation of an open meetings law by members of a governmental body.[2] Courts have also found that any person who might be affected by a decision has standing to see that the decision is made in compliance with the open meetings law.[3] Even more broadly, "any person" may have standing to seek enforcement of a sunshine act regardless of whether he or she is an aggrieved party as a result of an official action deliberated or decided upon in a closed meeting.[4]

Caution:

Even though private parties have standing to seek injunctive and mandamus relief, it has been found that only prosecutors have standing to void governmental acts based upon violations of an open meetings act.[5] If the prosecutor fails to bring an action, however, a "relator" may be seen as a private attorney general who vindicates his or her own rights and the rights of the public to open government. A prevailing relator, therefore, may be awarded attorney's fees if the award would advance the purpose of the law.[6]

Courts have also found that resident corporations[7] and unincorporated associations of residents[8] have standing to bring an action under such laws. Members of the news media[9] and publishers also may have standing to bring an action with respect to the violation of an open meetings act since newspapers have a unique role and interest in observing government activity and

informing the public.[10]

CUMULATIVE SUPPLEMENT

Cases:

Willfulness of a violation of the Open Meeting Act, such that action taken is invalid, does not require a showing of bad faith, malice, or wantonness but rather encompasses conscious, purposeful violations of the law or blatant or deliberate disregard of the law by those who know, or should know the requirements of the Act. 25 Okla. Stat. Ann. § 313. Fraternal Order of Police, Bratcher/Miner Memorial Lodge, Lodge No. 122 v. City of Norman, 2021 OK 20, 489 P.3d 20 (Okla. 2021).

[END OF SUPPLEMENT]

Footnotes

1 Finlan v. City of Dallas, 888 F. Supp. 779 (N.D. Tex. 1995) (construing Texas statute).

2 Friends of Canyon Lake, Inc. v. Guadalupe-Blanco River Authority, 96 S.W.3d 519 (Tex. App. Austin 2002).

3 Harris v. Nordquist, 96 Or. App. 19, 771 P.2d 637, 52 Ed. Law Rep. 1281 (1989).

4 State ex rel. Mason v. State Emp. Relations Bd., 133 Ohio App. 3d 213, 727 N.E.2d 181 (10th Dist. Franklin County 1999).

5 City of Topeka v. Watertower Place Development Group, 265 Kan. 148, 959 P.2d 894 (1998).

6 State ex rel. Hodge v. Town of Turtle Lake, 180 Wis. 2d 62, 508 N.W.2d 603, 35 A.L.R.5th 827 (1993).

7 Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Government of Nashville and Davidson County, 842 S.W.2d 611 (Tenn. Ct. App. 1992).

8 Curve Elementary School Parent and Teachers' Organization v. Lauderdale County School Bd., 608 S.W.2d 855 (Tenn. Ct. App. 1980).

9 Hays County v. Hays County Water Planning Partnership, 69 S.W.3d 253 (Tex. App. Austin 2002).

10 Press-Enterprise, Inc. v. Benton Area School Dist., 146 Pa. Commw. 203, 604 A.2d 1221, 73 Ed. Law Rep. 1018 (1992).

End of Document

2 Am. Jur. 2d Administrative Law § 88

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

2. Federal Government in the Sunshine Act

§ 88. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

The federal open meetings law is contained in the Government in the Sunshine Act, also popularly known as the Open Meetings Act. The Act was enacted to assure that the public may obtain to the fullest practicable extent information regarding the decision-making processes of the federal government. The law is designed to provide the public with such information while protecting the rights of individuals and the ability of the government to carry out its responsibilities.[1]

Footnotes

[1] Historical and Statutory Notes to 5 U.S.C.A. § 552b.
6 C.F.R. §§ 1003.1 to 1003.9 implement the provisions of the Government in the Sunshine Act.

2 Am. Jur. 2d Administrative Law § 89

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

2. Federal Government in the Sunshine Act

§ 89. Open meetings; definitions of “agency” and “member”

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Administrative Law and Procedure 124 to 126

A.L.R. Library

What is “agency” within meaning of Federal Sunshine Act (5 U.S.C.A. sec. 552b), 68 A.L.R. Fed. 842

The Government in the Sunshine Act generally provides that, except as otherwise provided, every portion of every meeting of a federal agency must be open to public observation, and members of an agency may not jointly conduct or dispose of agency business other than in accordance with the law.[1] An “agency” includes any executive department, military department, government corporation, government-controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President) or any independent regulatory agency.[2] For purposes of the Act, an agency is headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate and any subdivision thereof authorized to act on behalf of the agency.[3]

A “member” is an individual who belongs to a collegial body heading an agency.[4] A board or panel that does not contain members of an agency is not a subdivision of an agency under the Act, meaning that the Act does not apply to hearings of a licensing board which does not contain any members of the agency.[5]

Footnotes

1 5 U.S.C.A. § 552b(b).

2 5 U.S.C.A. § 552b(a)(1), which incorporates the definition of “agency” found in 5 U.S.C.A. § 552(f)(1).

3 5 U.S.C.A. § 552b(a)(1).

4 5 U.S.C.A. § 552b(a)(3).

5 Hunt v. Nuclear Regulatory Commission, 611 F.2d 332 (10th Cir. 1979).

End of Document

2 Am. Jur. 2d Administrative Law § 90

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

2. Federal Government in the Sunshine Act

§ 90. Definition of “meeting”

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Administrative Law and Procedure 124 to 126

For purposes of the Federal Government in the Sunshine Act, the term “meeting” means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business.[1] The statutory language limiting the Act’s application to deliberations that “determine or result in” the conduct of “official agency business” contemplates discussions that effectively predetermine official actions. Such discussions must be sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency. Thus, the deliberations of a quorum of a subdivision of an agency upon matters not within the subdivision’s formally delegated authority do not constitute “meetings” within the meaning of the Act since such deliberations cannot determine or result in joint conduct or disposition of official agency business. Similarly, a series of joint planning conferences do not constitute meetings “of an agency” within the meaning of the Act where the sessions are not convened by the regulatory agency and are not subject to the agency’s unilateral control.[2]

Observation:

A conversation between a member of an agency and members of the regulated industry do not constitute a “meeting” under the open meetings provisions of the Sunshine Act although such a conversation may constitute an ex parte contact.[3]

Footnotes

1 5 U.S.C.A. § 552b(a)(2).

2 F.C.C. v. ITT World Communications, Inc., 466 U.S. 463, 104 S. Ct. 1936, 80 L. Ed. 2d 480 (1984).

3 Action For Children’s Television v. F.C.C., 564 F.2d 458 (D.C. Cir. 1977).

End of Document

2 Am. Jur. 2d Administrative Law § 91

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

2. Federal Government in the Sunshine Act

§ 91. Exemptions from open meeting requirement

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

A.L.R. Library

Construction and application of exemptions, under 5 U.S.C.A. sec. 552b(c), to open meeting requirement of Sunshine Act, 82 A.L.R. Fed. 465

The Government in the Sunshine Act contains exemptions from the open meeting requirements. The Act provides that, except in a case where the agency finds that the public interest requires otherwise, specified open meeting requirements do not apply where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to:[1]

(1) disclose matters that are specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute, other than the Freedom of Information Act, provided that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that production would interfere with the enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute an unwarranted invasion of personal privacy, disclose the identity of a confidential source (and, under certain circumstances, confidential information disclosed by the source), disclose investigative techniques and procedures, or endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would: (a) lead to significant financial speculation in currencies, securities, or commodities or significantly endanger the stability of any financial institution; or (b) be likely to significantly frustrate implementation of proposed agency action, except where the agency has already disclosed the content or nature of its proposed action or the agency is required by law to make such disclosure on its own initiative prior to taking final agency action; and

(10) specifically concern the agency's issuance of a subpoena; or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration; or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication.

Observation:

Where an agency's decision to close a meeting is challenged, the agency bears the burden of establishing that its meeting is subject to at least one of the 10 statutorily defined grounds for closure.[2]

Footnotes

1 5 U.S.C.A. § 552b(c).

2 Philadelphia Newspapers, Inc. v. Nuclear Regulatory Com'n, 727 F.2d 1195, 82 A.L.R. Fed. 449 (D.C. Cir. 1984).

End of Document

2 Am. Jur. 2d Administrative Law § 92

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

2. Federal Government in the Sunshine Act

§ 92. Procedure for closing meeting

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

Forms

Forms relating to closed meetings, generally, see Federal Procedural Forms, Administrative Procedure [Westlaw® Search Query]

Pursuant to the Government in the Sunshine Act, action to close a meeting will be taken only when a majority of the entire membership of the agency votes to take such action, and the agency must comply with the voting requirements specified in the Act.[1] Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public because private information or information regarding a crime or a criminal investigation is to be discussed, the agency, upon request of any one of its members, must vote by recorded vote whether to close such meeting.[2] Within one day of the vote, the agency must make publicly available a written copy of its vote and a full written explanation of its action closing the meeting together with a list of all persons expected to attend the meeting and their affiliation.[3]

If a majority of an agency's business consists of regulating financial institutions or preparing adjudications, it may provide by regulation for the closing of meetings or portions of meetings in which such topics are discussed. If such regulations are enacted, the voting requirements and the public announcement requirements of the Act do not apply to any portion of a meeting to which the regulations apply provided that the agency, except to the extent that such information is exempt from disclosure under the Act, provides the public with an announcement of the time, place, and subject matter of the meeting and of each portion of the meeting at the earliest practicable time.[4]

Observation:

For every meeting closed pursuant to the Act's statutory exemptions, the General Counsel or chief legal officer of the agency must publicly certify that, in his or her opinion, the meeting may be closed to the public, and he or she must state each relevant exemptive provision.[5]

Footnotes

1 5 U.S.C.A. § 552b(d)(1).

2 5 U.S.C.A. § 552b(d)(2).

3 5 U.S.C.A. § 552b(d)(3).

4 5 U.S.C.A. § 552b(d)(4).

5 5 U.S.C.A. § 552b(f)(1).

End of Document

2 Am. Jur. 2d Administrative Law § 93

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

2. Federal Government in the Sunshine Act

§ 93. Public announcement of meetings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

Forms

Forms relating to open meetings, generally, see Federal Procedural Forms, Administrative Procedure [Westlaw® Search Query]

The Federal Government in the Sunshine Act contains detailed provisions regarding public announcements of government meetings. Such notice must be given whether the meeting is to be opened or closed[1] and must be published in the Federal Register.[2] Provision is also made for any changes in the time or place or subject matter of the meeting or the determination whether to open or close a meeting or a portion thereof to the public.[3]

Footnotes

1 5 U.S.C.A. § 552b(e)(1).

2 5 U.S.C.A. § 552b(e)(3).

3 5 U.S.C.A. § 552b(e)(2).

End of Document

2 Am. Jur. 2d Administrative Law § 94

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

2. Federal Government in the Sunshine Act

§ 94. Court actions: challenging agency regulations or failure to enact them

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

A.L.R. Library

Availability of judicial review of agency compliance with Sunshine Act (5 U.S.C.A. sec. 552b(g) and (h)), 84 A.L.R. Fed. 251

Each agency subject to the requirements of the Federal Government in the Sunshine Act must promulgate regulations to implement the requirements of the Act. Any person may bring a proceeding in the U.S. District Court for the District of Columbia to require an agency to promulgate such regulations if the agency has not promulgated the regulations within the time period specified. Subject to any limitations of time provided by law, any person may bring a proceeding in the U.S. Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this provision that are not in accord with the requirements of the Act and to require the promulgation of regulations that are in accord with such provisions.[1]

Footnotes

[1] 5 U.S.C.A. § 552b(g).

Works.

2 Am. Jur. 2d Administrative Law § 95

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

2. Federal Government in the Sunshine Act

§ 95. Court actions: for injunctive, declaratory, or other relief

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

A.L.R. Library

Availability of judicial review of agency compliance with Sunshine Act (5 U.S.C.A. sec. 552b(g) and (h)), 84 A.L.R. Fed. 251

The district courts of the United States have jurisdiction to enforce the requirements of the Federal Government in the Sunshine Act by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within 60 days after, the meeting out of which the violation of the Act arises. If public announcement of such meeting is not initially provided by the agency in accordance with the Act, an action may be instituted at any time prior to 60 days after any public announcement of such meeting.[1]

Such actions may be brought in the district court of the United States for the district in which the agency meeting is held, or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions, a defendant must serve an answer within 30 days after the service of the complaint. The burden is on the defendant to sustain his or her action. In deciding such cases, the court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate.[2]

Caution:

Nothing in the Act authorizes any federal court having jurisdiction solely on the basis described above[3] to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under the Act) taken or discussed at any agency meeting out of which the violation of the Act arose.[4]

CUMULATIVE SUPPLEMENT

Cases:

Appropriate remedy for Unified Carrier Registration Plan Board's failure to publicly announce information in Federal Register regarding meeting in which it decided to postpone start of annual registration period for motor carriers, brokers, and freight forwarders, in violation of Sunshine Act, was to compel Board to release any draft minutes, transcripts, and recordings of meeting, rather than injunctive relief reversing Board's action; district court lacked authority to invalidate agency action taken at non-conforming meeting, plaintiffs did not claim to have participated in meeting, and serious violation of Act prejudicing plaintiffs and warranting invalidation of Board's action was not demonstrated. 5 U.S.C.A. §§ 552b(e)(1), 552b(e)(3), 552b(h)(1), 552b(h)(2); 49 U.S.C.A. § 14504a. 12 Percent Logistics, Inc. v. Unified Carrier Registration Plan Board, 282 F. Supp. 3d 190 (D.D.C. 2017).

[END OF SUPPLEMENT]

Footnotes

1 5 U.S.C.A. § 552b(h)(1).

2 5 U.S.C.A. § 552b(h)(1).

3 5 U.S.C.A. § 552b(h)(1).

4 5 U.S.C.A. § 552b(h)(2).

2 Am. Jur. 2d Administrative Law § 96

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

2. Federal Government in the Sunshine Act

§ 96. Court actions: for judicial review of agency action

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

A.L.R. Library

Availability of judicial review of agency compliance with Sunshine Act (5 U.S.C.A. sec. 552b(g) and (h)), 84 A.L.R. Fed. 251

Any federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of the Federal Government in the Sunshine Act and afford such relief as it deems appropriate.[1]

Footnotes

[1] 5 U.S.C.A. § 552b(h)(2).
As to judicial review of agency action, generally, see §§ 383 to 559.

End of Document

2 Am. Jur. 2d Administrative Law § 97

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

B. Requirement that Meetings Be Public; Sunshine Acts

2. Federal Government in the Sunshine Act

§ 97. Attorney's fees

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 124 to 126

A party who substantially prevails in an action brought under the Federal Government in the Sunshine Act may be awarded reasonable attorney's fees and other litigation costs reasonably incurred. Costs may be assessed against the plaintiff, however, only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.[1]

Footnotes

[1] 5 U.S.C.A. § 552b(i).

2 Am. Jur. 2d Administrative Law III C Refs.

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

C. Agency Minutes, Records, and Reports

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 127

A.L.R. Library

A.L.R. Index, Administrative Law
West's A.L.R. Digest, Administrative Law and Procedure 127

End of Document

2 Am. Jur. 2d Administrative Law § 98

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

C. Agency Minutes, Records, and Reports

§ 98. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 127

Boards and commissions speak or act officially only through the minutes and records made at duly organized meetings.[1] Statutes may have specific requirements for the keeping of minutes or records.[2] Unless otherwise required by law, the formal record of a public proceeding consists of the minutes of the hearing and the formal findings and order.[3]

Footnotes

1 City of Indianapolis v. Duffitt, 929 N.E.2d 231 (Ind. Ct. App. 2010).

2 Pet v. Department of Health Services, 228 Conn. 651, 638 A.2d 6 (1994); Titus v. Shelby Charter Tp., 226 Mich. App. 611, 574 N.W.2d 391 (1997); Harris v. Nordquist, 96 Or. App. 19, 771 P.2d 637, 52 Ed. Law Rep. 1281 (1989).

3 Dairy Product Services, Inc. v. City of Wellsville, 2000 UT 81, 13 P.3d 581 (Utah 2000).

End of Document

2 Am. Jur. 2d Administrative Law § 99

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

C. Agency Minutes, Records, and Reports

§ 99. Closed meetings under Federal Government in the Sunshine Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 127

If a meeting is closed in accordance with the Federal Government in the Sunshine Act,[1] an agency must maintain a complete transcript or electronic recording which adequately and fully records the proceedings. In the case of a meeting, or a portion thereof, closed to the public because reports of bank examinations, information which affects financial markets, or information regarding impending litigation is to be discussed, the agency must maintain either a transcript, a recording, or a set of minutes that fully and clearly describes all matters discussed and fully and accurately summarizes any actions taken and the reasons for them.[2] The agency must make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes described above except for such items that contain information which is exempt from disclosure.[3]

Footnotes

1 §§ 91, 92.

2 5 U.S.C.A. § 552b(f)(1).

3 5 U.S.C.A. § 552b(f)(2).

End of Document

2 Am. Jur. 2d Administrative Law § 100

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

III. Meetings and Records; Disclosure to Public

C. Agency Minutes, Records, and Reports

§ 100. Inspection of records and papers of administrative agencies

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 127

A historically strong and persuasive public policy requires liberality in the right to examine public records under the common law,[1] under which every person is entitled to inspect public records provided that he or she has the requisite interest in them that outweighs the State's interest in nondisclosure.[2] Apart from a statutory right, a party to a proceeding before an administrative tribunal in which he or she is entitled to a hearing may be entitled to inspect the records and data of the tribunal to secure information or evidence to be used in such hearing, but this right cannot extend to a general examination that would seriously impede the work of the tribunal.[3]

Statutes frequently confer the right to examine the records and papers of administrative agencies, and in such cases, the extent of the right is determined by the statute.[4] Pursuant to federal law, the right of a member of the public to inspect agency records may be regulated by the Freedom of Information Act[5] and the Privacy Act.[6] Nothing in the Government in the Sunshine Act authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by the Act, which is otherwise accessible to such individual under the Privacy Act.[7]

Footnotes

1 Am. Jur. 2d, Records and Recording Laws § 17.

2 Am. Jur. 2d, Records and Recording Laws § 22.

3 U.S. ex rel. St. Louis Southwestern Ry. Co. v. Interstate Commerce Commission, 264 U.S. 64, 44 S. Ct. 294, 68 L. Ed. 565 (1924).

4 Previdi v. Hirsch, 138 Misc. 2d 436, 524 N.Y.S.2d 643, 44 Ed. Law Rep. 1282 (Sup 1988); Harris v. Nordquist, 96 Or. App. 19, 771 P.2d 637, 52 Ed. Law Rep. 1281 (1989).

[5] 5 U.S.C.A. § 552, as discussed in Am. Jur. 2d, Freedom of Information Acts §§ 1 et seq.

[6] 5 U.S.C.A. § 552a, as discussed in Am. Jur. 2d, Freedom of Information Acts §§ 358 to 401.

[7] 5 U.S.C.A. § 552b(m).

End of Document

2 Am. Jur. 2d Administrative Law IV A Refs.

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 11, 341 to 370

A.L.R. Library

A.L.R. Index, Administrative Law
West's A.L.R. Digest, Administrative Law and Procedure 11, 341 to 370

End of Document

2 Am. Jur. 2d Administrative Law § 101

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

A. In General

§ 101. Generally; purposes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 11, 341 to 370

Forms

Forms relating to investigations, generally, see Federal Procedural Forms, Administrative Procedure; Am. Jur. Pleading and Practice Forms, Administrative Law [Westlaw® Search Query]

Administrative agencies have the power, which is not granted to the judiciary,[1] to conduct investigations.[2] For instance, an administrative agency may be empowered by Congress to obtain information bearing on activities which may be properly regulated by federal legislation.[3] The legislative delegation of investigative power has been found constitutional.[4]

The purpose of an administrative investigation is to uncover facts with an eye toward the potential initiation of an agency adjudication or, more generally, for the purpose of facilitating an agency's regulatory goals[5] and compliance with the law.[6] A regulatory agency may investigate possible violations of the law through its administrative process provided that its inquiries are for a proper purpose, the information sought is relevant to that purpose, and statutory procedures are observed.[7] An administrative investigation is not an adversary proceeding and does not result in a judgment that determines guilt or legal rights.[8]

An agency also has the authority to conduct an investigation to determine whether the subject of an investigation is within the agency's jurisdiction.[9] Other purposes for investigation include licensing, reporting to Congress, and disseminating information to the public.[10] An agency may use its investigative powers to monitor compliance with court decrees it has procured.[11] Investigations may also be conducted to determine if rules should be promulgated or existing rules should be modified, but before such a decision is made, there must also be compliance with the rulemaking requirements of the requisite administrative procedure act.[12]

Footnotes

1 U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950).

2 U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950); Brasky v. City of New York Dept. of Investigation, 40 A.D.3d 531, 840 N.Y.S.2d 315 (1st Dep't 2007).

3 Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614, 166 A.L.R. 531 (1946).

4 Kansas City Southern R. Co. v. U.S., 231 U.S. 423, 34 S. Ct. 125, 58 L. Ed. 296 (1913); State ex rel. McEldowney v. Uhl, 111 Idaho 915, 728 P.2d 1324 (1986).

5 U.S. Dept. of Labor v. Kast Metals Corp., 744 F.2d 1145 (5th Cir. 1984).

6 Oriana House, Inc. v. Montgomery, 108 Ohio St. 3d 419, 2006-Ohio-1325, 844 N.E.2d 323 (2006); State, Dept. of Revenue v. Moore, 722 S.W.2d 367 (Tenn. 1986).

7 U.S. v. Gel Spice Co., Inc., 601 F. Supp. 1214 (E.D. N.Y. 1985).

8 Hannah v. Larche, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960).

9 Millan v. Restaurant Enterprises Group, Inc., 14 Cal. App. 4th 477, 18 Cal. Rptr. 2d 198 (4th Dist. 1993), as modified on other grounds on denial of reh'g, (Mar. 24, 1993).
As to persons subject to investigation, see § 108.

10 U.S. Dept. of Labor v. Kast Metals Corp., 744 F.2d 1145 (5th Cir. 1984).

11 U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950).

12 Chicago, B. & Q. R. Co. v. U.S., 242 F. Supp. 414 (N.D. Ill. 1965), judgment aff'd, 382 U.S. 422, 86 S. Ct. 616, 15 L. Ed. 2d 498 (1966).
As to rule-making powers and procedures, generally, see §§ 127 to 240.

2 Am. Jur. 2d Administrative Law § 102

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

A. In General

§ 102. Statutory authorization

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 11, 341 to 347

An agency must have statutory authority to conduct an investigation[1] and must keep within the bounds of this authority.[2] In this regard, the Federal Administrative Procedure Act provides that investigative acts or demands, including process, the requirement of a report, or inspection, may not be issued, made, or enforced except as authorized by law.[3] Therefore, the governing statute must explicitly grant the power to investigate,[4] and the investigation must be made for a legislatively authorized purpose.[5]

Observation:

An administrative investigation that is in excess of statutory authority violates due process.[6]

Footnotes

1 U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950); National Freelancers, Inc. v. State Tax Com'n, Dept. of Taxation and Finance of State of New York, 126 A.D.2d 218, 513 N.Y.S.2d 559 (3d Dep't 1987).

2 Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614, 166 A.L.R. 531 (1946); Everest Re Group, Ltd. v. Department of Financial Services, 10 So. 3d 1120 (Fla. 1st DCA 2009).

3 5 U.S.C.A. § 555(c).

[4] Serr v. Sullivan, 270 F. Supp. 544 (E.D. Pa. 1967), judgment aff'd, 390 F.2d 619 (3d Cir. 1968).

[5] U. S. v. Humble Oil & Refining Co., 518 F.2d 747 (5th Cir. 1975).

[6] People v. McWhorter, 113 Ill. 2d 374, 101 Ill. Dec. 646, 498 N.E.2d 1154 (1986).
As to due process rights in regard to investigations, generally, see § 117.

End of Document

2 Am. Jur. 2d Administrative Law § 103

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

A. In General

§ 103. Exercise and scope of power

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 343 to 349

In the exercise of powers of investigation, an administrative agency must not act arbitrarily,[1] oppressively,[2] or unreasonably.[3] An agency must be allowed the authority to decide where its investigative resources are best applied.[4]

In matters relevant to purposes for which the agency is authorized to conduct an investigation, the agency may investigate merely on suspicion that the law is being violated[5] or even just because it wants assurance that it is not.[6] Sometimes, more than mere suspicion is required[7] and sometimes less.[8]

Footnotes

1 Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614, 166 A.L.R. 531 (1946); U.S. Intern. Trade Com'n v. ASAT, Inc., 411 F.3d 245 (D.C. Cir. 2005); Matter of Investigation into Intra-LATA Equal Access and Presubscription, 532 N.W.2d 583 (Minn. Ct. App. 1995).

2 Walling v. La Belle S.S. Co., 148 F.2d 198 (C.C.A. 6th Cir. 1945); State ex rel. Wolgast v. Schurle, 11 Kan. App. 2d 390, 722 P.2d 585 (1986).

3 U.S. v. Berkowitz, 355 F. Supp. 897 (E.D. Pa. 1973); Unnamed Atty. v. Attorney Grievance Com'n, 313 Md. 357, 545 A.2d 685 (1988).

4 Fleszar v. U.S. Dept. of Labor, 598 F.3d 912 (7th Cir. 2010).

5 U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950); Chao v. Local 743, Intern. Broth. of Teamsters, AFL-CIO, 467 F.3d 1014 (7th Cir. 2006); Carrington v. Arizona Corp. Com'n, 199 Ariz. 303, 18 P.3d 97 (Ct. App. Div. 1 2000), redesignated as opinion, (Feb. 12, 2001).

6 Chao v. Local 743, Intern. Broth. of Teamsters, AFL-CIO, 467 F.3d 1014 (7th Cir. 2006).

[7] Unnamed Atty. v. Attorney Grievance Com'n, 313 Md. 357, 545 A.2d 685 (1988) (requiring some demonstration of a factual basis to support the commission's concern).

[8] U.S. v. Hunton & Williams, 952 F. Supp. 843 (D.D.C. 1997) (the Resolution Trust Corporation may initiate an audit or investigation of the recipient of federal funds even without a particularized suspicion of any wrongdoing).

End of Document

2 Am. Jur. 2d Administrative Law § 104

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

A. In General

§ 104. Relevancy and factual basis

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 341 to 347

The information sought in the course of an investigation must appear reasonably relevant to the investigation.[1] In addition, there must be an authentic factual basis to warrant the investigation,[2] which establishes the relevancy of the item sought.[3]

Footnotes

1 U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950); U.S. v. Gurley, 384 F.3d 316, 2004 FED App. 0320P (6th Cir. 2004); Feathers v. West Virginia Bd. of Medicine, 211 W. Va. 96, 562 S.E.2d 488 (2001).

2 Unnamed Atty. v. Attorney Grievance Com'n, 313 Md. 357, 545 A.2d 685 (1988); Condon v. Inter-Religious Foundation for Community Organization, Inc., 18 Misc. 3d 874, 850 N.Y.S.2d 841 (Sup 2008), aff'd, 51 A.D.3d 465, 856 N.Y.S.2d 620, 232 Ed. Law Rep. 288 (1st Dep't 2008); Brian v. State By and Through Oregon Government Ethics Com'n, 320 Or. 676, 891 P.2d 649 (1995).

3 New York City Dept. of Investigation v. Passannante, 148 A.D.2d 101, 544 N.Y.S.2d 1 (1st Dep't 1989).

End of Document

2 Am. Jur. 2d Administrative Law § 105

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

A. In General

§ 105. Specificity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 341 to 347

In order to be valid, the demand for information in an investigation must not be indefinite[1] or overbroad.[2] The demand must be sufficiently specific to permit reasonable compliance without being unduly burdensome.[3] However, courts have upheld subpoenas calling for "all documents" or "all papers" or "writings of any kind" with respect to a particular subject so long as the information sought is reasonably related to a proper area of investigation.[4]

Footnotes

1 U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950); U.S. v. Gurley, 384 F.3d 316, 2004 FED App. 0320P (6th Cir. 2004); Unnamed Atty. v. Attorney Grievance Com'n, 313 Md. 357, 545 A.2d 685 (1988).

2 Unnamed Atty. v. Attorney Grievance Com'n, 313 Md. 357, 545 A.2d 685 (1988).

3 Citizens' Aide/Ombudsman v. Miller, 543 N.W.2d 899 (Iowa 1996); Greer v. New Jersey Bureau of Securities, 288 N.J. Super. 69, 671 A.2d 1080 (App. Div. 1996); State, Dept. of Revenue v. Moore, 722 S.W.2d 367 (Tenn. 1986).

4 New York City Dept. of Investigation v. Passannante, 148 A.D.2d 101, 544 N.Y.S.2d 1 (1st Dep't 1989).

2 Am. Jur. 2d Administrative Law § 106

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

A. In General

§ 106. Specific investigatory methods

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 341 to 347

Since the Federal Administrative Procedure Act provides that investigative process may not be issued, made, or enforced except as authorized by law,[1] in the case of federal agencies, one must look to the particular regulatory statute, and not to the Federal Administrative Procedure Act, to determine if a particular investigative method is authorized by statute.[2] However, when Congress invests an agency with enforcement and investigatory authority, Congress need not explicitly identify each and every technique that may be used in the course of executing the statutory mission since regulatory or enforcement authority generally carries with it the power to use all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted.[3]

On a state level, an agency's investigation is not required to take any particular form. This is especially true where the legislature has simply told the agency to investigate and has left to it the task of selecting methods and procedures that it should employ in each case.[4]

Footnotes

1 § 102.

2 U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950).

3 Dow Chemical Co. v. U.S., 476 U.S. 227, 106 S. Ct. 1819, 90 L. Ed. 2d 226 (1986); U.S. v. M/V SANCTUARY, 540 F.3d 295 (4th Cir. 2008); Former Employees of Alcatel Telecommunications Cable v. Herman, 25 Ct. Int'l Trade 169, 134 F. Supp. 2d 445 (2001).

4 Industrial Welfare Com. v. Superior Court, 27 Cal. 3d 690, 166 Cal. Rptr. 331, 613 P.2d 579 (1980); Gleason v. W.C. Dean Sr. Trucking, Inc., 228 A.D.2d 678, 646 N.Y.S.2d 20 (2d Dep't 1996).

End of Document

2 Am. Jur. 2d Administrative Law § 107

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

A. In General

§ 107. Specific investigatory methods—Production of accounts, records, or reports

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 341 to 347, 364, 365

An administrative agency is not required to exhaust other sources before seeking to obtain information from a regulated corporation,[1] and official curiosity has been found a sufficient ground for a request for information[2] although it has also been determined that such curiosity, standing alone, is an insufficient ground to seek records.[3] Courts are generally liberal in permitting an administrative agency full exercise of its powers to require the production of books, papers, and documents.[4]

Observation:

An order requiring a company to keep accounts and submit reports cannot be challenged on the ground that it imposes so great a burden on the company as to transgress statutory and constitutional limits where all of the requirements of the commission affirmatively appear to call for the precise kind of accounting system, information, and reports that the legislature has deemed relevant and necessary for the commission in performing its regulatory duties, and the evidence does not show that the expense will lay so heavy a burden upon the company as to extend beyond the bounds of reason.[5]

Footnotes

1 Fleming v. Montgomery Ward & Co., 114 F.2d 384 (C.C.A. 7th Cir. 1940).

2 U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950).

[3] Breakey v. Inspector General of U.S. Dept. of Agriculture, 836 F. Supp. 422 (E.D. Mich. 1993).

[4] Goodyear Tire & Rubber Co. v. N.L.R.B., 122 F.2d 450, 136 A.L.R. 883 (C.C.A. 6th Cir. 1941).
An administrative agency's authority to request records and undertake other investigatory functions is broad. Eddie's Leaf Spring Shop and Towing LLC v. Colorado Public Utilities Com'n of State, 218 P.3d 326 (Colo. 2009).

[5] Federal Power Commission v. East Ohio Gas Co., 338 U.S. 464, 70 S. Ct. 266, 94 L. Ed. 268 (1950).

End of Document

2 Am. Jur. 2d Administrative Law § 108

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

A. In General

§ 108. Persons subject to investigation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 345

A.L.R. Library

Power of administrative agency, in investigation of nonjudicial nature, to issue subpoenas against persons not subject to agency's regulatory jurisdiction, 27 A.L.R.2d 1208

An agency's subpoena power is not necessarily confined to those persons over whom it may exercise regulatory jurisdiction. Even though agency subpoenas directed to individuals implicate constitutionally protected privacy rights,[1] if an agency has regulatory jurisdiction over the subject matter, it may subpoena any person from whom it can obtain information and documents relevant and material to the inquiry.[2]

Footnotes

1 In re McVane, 44 F.3d 1127 (2d Cir. 1995); F.D.I.C. v. Wentz, 55 F.3d 905 (3d Cir. 1995).
As to constitutional rights and concerns regarding investigations, see §§ 110 to 120.

2 Freeman v. Brown Bros. Harriman & Co., 357 F.2d 741 (2d Cir. 1966); Freeman v. Fidelity-Philadelphia Trust Co., 248 F. Supp. 487 (E.D. Pa. 1965).
As to the enforcement of subpoenas in this regard, see §§ 121 to 126.

Works.

2 Am. Jur. 2d Administrative Law § 109

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

A. In General

§ 109. Witnesses and evidence

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 355 to 358

Even a person who is not subject to regulation may be called as a witness[1] in investigatory proceedings.[2] Federal statutes sometimes provide that witnesses may be called from any part of the United States,[3] which has been interpreted to authorize compelling the production of evidence from abroad as well.[4] Even where an agency is entitled to compel production of evidence from anywhere in the United States, however, this power is intended to be exercised reasonably.[5]

Footnotes

1 Ellis v. Interstate Commerce Commission, 237 U.S. 434, 35 S. Ct. 645, 59 L. Ed. 1036 (1915).

2 State ex rel. R. R. & Warehouse Commission v. Mees, 235 Minn. 42, 49 N.W.2d 386, 27 A.L.R.2d 1197 (1951).

3 Jones v. Securities and Exchange Commission, 298 U.S. 1, 56 S. Ct. 654, 80 L. Ed. 1015 (1936); Penfield Co. of Cal. v. Securities and Exchange Commission, 143 F.2d 746, 154 A.L.R. 1027 (C.C.A. 9th Cir. 1944).

4 Federal Maritime Commission v. DeSmedt, 366 F.2d 464 (2d Cir. 1966).

5 Bank of America Nat. Trust & Savings Ass'n v. Douglas, 105 F.2d 100, 123 A.L.R. 1266 (App. D.C. 1939); People v. McWhorter, 113 Ill. 2d 374, 101 Ill. Dec. 646, 498 N.E.2d 1154 (1986); Silverman v. Berkson, 141 N.J. 412, 661 A.2d 1266 (1995) (presenting a balancing test for the reasonableness of a subpoena; thus, when an investigation required an individual to travel 350 miles on a specified business day and to bring certain documents with him, and where there were less disruptive methods of settling the underlying dispute, the subpoena was held to be improper).

2 Am. Jur. 2d Administrative Law IV B Refs.

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

B. Constitutional and Other Rights Affected by Investigations

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1, 5, 355 to 358, 361
West's Key Number Digest, Searches and Seizures 79

A.L.R. Library

A.L.R. Index, Administrative Law
West's A.L.R. Digest, Administrative Law and Procedure 4.1, 5, 355 to 358, 361
West's A.L.R. Digest, Searches and Seizures 79

End of Document

2 Am. Jur. 2d Administrative Law § 110

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

B. Constitutional and Other Rights Affected by Investigations

1. Searches and Seizures

§ 110. Searches and seizures for administrative purposes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1, 5, 355 to 358
West's Key Number Digest, Searches and Seizures 79

A.L.R. Library

Admissibility of evidence obtained by unconstitutional search in proceedings under Occupational Safety and Health Act (29 U.S.C.A. secs. 651 et seq.), 67 A.L.R. Fed. 724

The restrictions on unreasonable searches and seizures pursuant to the Fourth Amendment are not limited to criminal investigations but also apply to administrative inspections.[1] The Fourth Amendment governs administrative inspections of both private dwellings and businesses[2] although it has been recognized that businesses may be reasonably inspected in many more situations than private homes.[3] The Fourth Amendment protection against unreasonable searches and seizures also applies to corporations; however, corporations are not equivalent to individuals in enjoying the right to privacy.[4]

Footnotes

1 Donovan v. Lone Steer, Inc., 464 U.S. 408, 104 S. Ct. 769, 78 L. Ed. 2d 567 (1984); Perez v. Blue Mountain Farms, 961 F. Supp. 2d 1164 (E.D. Wash. 2013).
As to unreasonable searches and seizures, generally, see Am. Jur. 2d, Searches and Seizures §§ 12 to 14.
As to administrative searches and seizures, generally, see Am. Jur. 2d, Searches and Seizures §§ 49 to 52.

2 Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978); State v. Heine, 424 N.J. Super. 48,

35 A.3d 691 (App. Div. 2012), certification denied, 211 N.J. 608, 50 A.3d 40 (2012) and certification granted, 211 N.J. 608, 50 A.3d 40 (2012) and appeal dismissed, 213 N.J. 384, 63 A.3d 225 (2013).

[3] Dow Chemical Co. v. U.S., 476 U.S. 227, 106 S. Ct. 1819, 90 L. Ed. 2d 226 (1986) (taking aerial photographs of an industrial plant from navigable airspace is not a search prohibited by the Fourth Amendment); See v. City of Seattle, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967).

[4] Am. Jur. 2d, Searches and Seizures § 36.

End of Document

2 Am. Jur. 2d Administrative Law § 111

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

B. Constitutional and Other Rights Affected by Investigations

1. Searches and Seizures

§ 111. Probable cause

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1, 5, 355 to 356.1
West's Key Number Digest, Searches and Seizures 79

While the Fourth Amendment provides that no warrant is to issue except upon probable cause, probable cause is not the same in the administrative context as it is in the police investigatory context. Probable cause, as used in the administrative context, only measures the reasonableness of the inspection against proper legislative or administrative standards.[1]

Observation:

An inspection plan must contain specific neutral criteria,[2] and it is still necessary to have a neutral magistrate approve a warrant in order to assure that the inspection is reasonable under the appropriate standards.[3]

Footnotes

1 Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978); Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

2 Torres v. Com. of Puerto Rico, 442 U.S. 465, 99 S. Ct. 2425, 61 L. Ed. 2d 1 (1979).

[3] Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978).

End of Document

2 Am. Jur. 2d Administrative Law § 112

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

B. Constitutional and Other Rights Affected by Investigations

1. Searches and Seizures

§ 112. Exceptions to the warrant requirement

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1, 5, 355 to 356.1
West's Key Number Digest, Searches and Seizures 79

A variety of situations have been held to require no warrant, including:
• emergencies[1]
• closely regulated businesses[2]
• consent searches[3]
• searches of areas in open view or open fields[4]
• searches accompanying administrative investigations or inspections[5]
• searches of the offices of government employees[6]

Fire marshals may enter a still-smoldering building for the purpose of determining the cause of the blaze before any relevant evidence is totally destroyed.[7] Once the immediate emergency has ended, however, by extinguishing the fire, an administrative warrant is required for further entries to carry out the statutorily mandated duty of the fire marshal to investigate the origins of the fire.[8] Likewise, the exception for pervasively regulated industries is an extremely narrow one.[9]

Footnotes

1 North American Cold Storage Co. v. City of Chicago, 211 U.S. 306, 29 S. Ct. 101, 53 L. Ed. 195 (1908) (seizure of unwholesome food); Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905) (compulsory smallpox vaccination); Compagnie Francaise de Navigation a Vapeur v. Board of Health of State of Louisiana, 186 U.S. 380, 22 S. Ct. 811, 46 L. Ed. 1209 (1902) (health quarantine).

2 New York v. Burger, 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987); Patel v. City of Los Angeles, 738 F.3d 1058 (9th Cir. 2013); State v. Declerck, 49 Kan. App. 2d 908, 317 P.3d 794 (2014).

3 Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930

(1967); U.S. v. Brown, 763 F.2d 984 (8th Cir. 1985).

4 Air Pollution Variance Bd. of Colorado v. Western Alfalfa Corp., 416 U.S. 861, 94 S. Ct. 2114, 40 L. Ed. 2d 607 (1974); Northside Realty Associates, Inc. v. U.S., 605 F.2d 1348 (5th Cir. 1979); State v. Wybierala, 305 Minn. 455, 235 N.W.2d 197 (1975).

5 U. S. v. LaSalle Nat. Bank, 437 U.S. 298, 98 S. Ct. 2357, 57 L. Ed. 2d 221 (1978); Wildauer v. Frederick County, 993 F.2d 369 (4th Cir. 1993); State v. Gness, 85 A.3d 382 (N.H. 2014).

6 O'Connor v. Ortega, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987).

7 Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978); State v. Olsen, 282 N.W.2d 528 (Minn. 1979).

8 Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978).

9 Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978) (OSHA inspection potentially applicable to a wide range of ordinary businesses); G. M. Leasing Corp. v. U. S., 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977) (IRS levy).

End of Document

2 Am. Jur. 2d Administrative Law § 113

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

B. Constitutional and Other Rights Affected by Investigations

1. Searches and Seizures

§ 113. Employee drug testing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1, 5, 355 to 356.1
West's Key Number Digest, Searches and Seizures 79

A.L.R. Library

Validity, under Federal Constitution, of regulations, rules, or statutes requiring random or mass drug testing of public employees or persons whose employment is regulated by state, local, or Federal Government, 86 A.L.R. Fed. 420

Urine or blood testing compelled or authorized by regulations promulgated by federal agencies is a search within the meaning of the Fourth Amendment, even if carried out by private parties, where the persons carrying out the testing act as an instrument or agent of the government.[1] While the Fourth Amendment protects individuals from unreasonable searches conducted by the government, even when the government acts as an employer, where a Fourth Amendment intrusion serves "special governmental needs," beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.[2]

Absent reasonable suspicion of on-duty drug use or drug-impaired work performance, the courts have held unconstitutional the warrantless mandatory urinalysis drug testing of employees of the Department of Agriculture who do not hold safety- or security-sensitive jobs,[3] Army civilian laboratory workers, or those in a biological-specimen chain of custody.[4]

Footnotes

[1] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).
As to drug and alcohol tests as subject to the Fourth Amendment prohibition against unreasonable searches and seizures, generally, see Am. Jur. 2d, Searches and Seizures §§ 100 to 104.

[2] National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989).

[3] National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990).

[4] National Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989).

End of Document

2 Am. Jur. 2d Administrative Law § 114

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

B. Constitutional and Other Rights Affected by Investigations

1. Searches and Seizures

§ 114. Subpoenas for records

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1, 357, 358
West's Key Number Digest, Searches and Seizures 79

While the Fourth Amendment does not prevent the issuance of process to require the production of books and papers, an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment when the scope of the order is too broad.[1] However, probable cause for the issuance of an administrative summons is not the same as probable cause in the criminal law area; that is, an agency need not have probable cause to believe that a specific violation of a statute has occurred before it can commence an investigation and subpoena papers to determine if there has been a violation.[2]

A person has no expectation of privacy in the business records of a third party and thus has no interest protected by the Fourth Amendment in such records.[3] Accordingly, it has been consistently found that a person has no Fourth Amendment basis for challenging subpoenas directed at business records covering his or her own transactions in the possession of a third party and also has no right to notice of such subpoenas.[4]

Courts are willing to enforce an administrative subpoena, even if it is quite broad, so long as it does not demand the production of clearly irrelevant documents.[5] All that is required is that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.[6]

Observation:

No warrant is required as a predicate to an administrative subpoena which does not involve efforts of government personnel to make nonconsensual entries into areas not open to the public although the subject of a subpoena must be allowed to question the reasonableness of the subpoena, in an action in district court, before suffering any penalties for refusing to comply with it.[7]

Footnotes

1 Am. Jur. 2d, Searches and Seizures § 76.

2 U.S. v. Powell, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112, 9 Fed. R. Serv. 2d 81A.33, Case 1 (1964).

3 U. S. v. Miller, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976); People v. Pearson, 169 Cal. App. 3d 319, 215 Cal. Rptr. 147 (5th Dist. 1985).

4 U.S. v. Stuart, 587 F.2d 929 (8th Cir. 1978).

5 U.S. v. Morton Salt Co., 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950).
As to the requirement of relevancy in investigations, generally, see § 104.

6 Donovan v. Lone Steer, Inc., 464 U.S. 408, 104 S. Ct. 769, 78 L. Ed. 2d 567 (1984); Office of Citizens' Aide/Ombudsman v. Edwards, 825 N.W.2d 8 (Iowa 2012); State ex rel. Workforce Safety, and Insurance v. Altru Health Systems, 2007 ND 38, 729 N.W.2d 113 (N.D. 2007).

7 Donovan v. Lone Steer, Inc., 464 U.S. 408, 104 S. Ct. 769, 78 L. Ed. 2d 567 (1984).

End of Document

2 Am. Jur. 2d Administrative Law § 115

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

B. Constitutional and Other Rights Affected by Investigations

2. Other Constitutional Concerns

§ 115. Self-incrimination

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1, 5, 355 to 356.1

The privilege against self-incrimination found in the Fifth Amendment may be claimed in any proceeding, including administrative and investigatory proceedings.[1] However, the privilege against self-incrimination offers no protection against administrative sanctions that are not criminal or penal in nature[2] or when, as a mere incident of an administrative search, criminal penalties may result.[3] In addition, a person subject to regulation by an administrative agency cannot claim a Fifth Amendment privilege in records that the law requires him or her to keep.[4]

Caution:

A subject of an administrative subpoena can generally not invoke a blanket Fifth Amendment privilege. Instead, if the agency requests that the subject produce documents, the subject must identify which documents contain information that may tend to incriminate the subject.[5]

Footnotes

1 Allen v. Illinois, 478 U.S. 364, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986); State ex rel. Dept. of Pesticide Regulation v. Pet Food Exp. Ltd., 165 Cal. App. 4th 841, 81 Cal. Rptr. 3d 486 (3d Dist. 2008).
As to the privilege against self-incrimination, generally, see Am. Jur. 2d, Criminal Law §§ 1035 to 1060; Am. Jur. 2d,

Witnesses §§ 78 to 128.

[2] Kimm v. Rosenberg, 363 U.S. 405, 80 S. Ct. 1139, 4 L. Ed. 2d 1299 (1960); Church v. Powell, 40 N.C. App. 254, 252 S.E.2d 229 (1979) (driver's license revocation hearing).

[3] Board of County Com'rs of Johnson County v. Grant, 264 Kan. 58, 954 P.2d 695 (1998).

[4] Shapiro v. U.S., 335 U.S. 1, 68 S. Ct. 1375, 92 L. Ed. 1787 (1948); In re Shiplov, 945 So. 2d 52 (La. Ct. App. 4th Cir. 2006), on reh'g, (Dec. 6, 2006) and writ denied, 949 So. 2d 444 (La. 2007).
As to the keeping and disclosure of records, see § 107.

[5] I. C. C. v. Gould, 629 F.2d 847 (3d Cir. 1980).

End of Document

2 Am. Jur. 2d Administrative Law § 116

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

B. Constitutional and Other Rights Affected by Investigations

2. Other Constitutional Concerns

§ 116. Self-incrimination—Effect of grant of immunity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1, 5, 355 to 356.1

A legislature is empowered to deprive a witness of the constitutional privilege against self-incrimination by according such witness complete immunity from prosecution for the offense to which the testimony relates.[1] The general federal immunity statute provides that whenever a witness refuses to comply with an order to testify or provide other information on the basis of the privilege against self-incrimination in a proceeding before or ancillary to an agency, the witness may not refuse to comply with the order on the basis of the privilege. However, no testimony or other information compelled under the order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.[2]

Footnotes

1 Am. Jur. 2d, Witnesses § 140.

2 18 U.S.C.A. § 6002.

End of Document

2 Am. Jur. 2d Administrative Law § 117

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

B. Constitutional and Other Rights Affected by Investigations

2. Other Constitutional Concerns

§ 117. Due process; right to confrontation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1, 5, 355 to 356.1

An administrative investigation is not an adversary proceeding and does not result in a judgment to determine guilt or legal rights.[1]Accordingly, when only investigative powers of an agency are utilized, due process considerations do not attach.[2]Neither the Due Process Clauses of the Fifth and 14th Amendments nor the Confrontation Clause of the Sixth Amendment is offended when a federal administrative agency, without notifying a person under investigation, uses its subpoena power to gather evidence adverse to the person.[3]

As long as no legal rights are adversely determined during the investigation, the demands of due process are satisfied if procedural rights are granted in the subsequent proceedings.[4]However, this rule only applies where the initial proceeding is purely investigatory, and due process rights must be afforded if a proceeding is essentially criminal, and the agency makes a finding that a specific individual is guilty.[5]

Footnotes

1 § 101.

2 Francis v. Accardo, 602 So. 2d 1066 (La. Ct. App. 1st Cir. 1992).
As to due process of law, generally, see Am. Jur. 2d, Constitutional Law §§ 942 to 1024.

3 S.E.C. v. Jerry T. O'Brien, Inc., 467 U.S. 735, 104 S. Ct. 2720, 81 L. Ed. 2d 615 (1984).

4 Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 312 U.S. 126, 312 U.S. 657, 61 S. Ct. 524, 85 L. Ed. 624 (1941); Beverly Enterprises, Inc. v. Herman, 130 F. Supp. 2d 1 (D.D.C. 2000).

5 Jenkins v. McKeithen, 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969).

End of Document

2 Am. Jur. 2d Administrative Law § 118

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

B. Constitutional and Other Rights Affected by Investigations

2. Other Constitutional Concerns

§ 118. Right to counsel

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1, 5, 361

A.L.R. Library

Comment Note.—Right to assistance by counsel in administrative proceedings, 33 A.L.R.3d 229

Since administrative investigative proceedings are not adjudicatory in nature,[1] a party has no constitutional right to be accompanied by counsel during such proceedings.[2] However, the general rule is subject to a possible exception where investigatory administrative proceedings may result in criminal prosecutions,[3] and statutes may grant the right to assistance of counsel.[4]

Footnotes

1 § 101.

2 Anonymous Nos. 6 and 7 v. Baker, 360 U.S. 287, 79 S. Ct. 1157, 3 L. Ed. 2d 1234 (1959); Matter of Comprehensive Investigation of School Dist. of Newark, 276 N.J. Super. 354, 647 A.2d 1383, 94 Ed. Law Rep. 369 (App. Div. 1994). As to the right to counsel in criminal proceedings, see Am. Jur. 2d, Criminal Law §§ 1097 to 1153.

3 Mathis v. U.S., 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968).

4 § 119.

End of Document

2 Am. Jur. 2d Administrative Law § 119

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

B. Constitutional and Other Rights Affected by Investigations

2. Other Constitutional Concerns

§ 119. Right to counsel—Statutory right; Federal Administrative Procedure Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1, 5, 361

A.L.R. Library

Comment Note.—Right to assistance by counsel in administrative proceedings, 33 A.L.R.3d 229

Even though the right to counsel is not a constitutional right in administrative investigations,[1] statutes may grant the right to assistance of counsel. Persons may have the right to be accompanied and assisted by counsel in informal administrative proceedings under state statutes.[2] In addition, the Federal Administrative Procedure Act grants a person compelled to appear in person before an agency or a representative of the agency the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by another qualified representative.[3] Anyone compelled to appear before an investigator, including a person other than the party being investigated,[4] is entitled to be represented by counsel although it has been questioned whether a person who voluntarily appears before an investigator, and is not compelled to appear, has a right to counsel under the Federal Administrative Procedure Act.[5]

Footnotes

1 § 118.

2 Thompson v. Department of Professional Regulation, Bd. of Medical Examiners, 488 So. 2d 103 (Fla. 1st DCA 1986) (right to counsel at an informal hearing).

[3] 5 U.S.C.A. § 555(b).

[4] Backer v. C.I.R., 275 F.2d 141 (5th Cir. 1960).

[5] Smith v. U.S., 250 F. Supp. 803 (D.N.J. 1966).

End of Document

2 Am. Jur. 2d Administrative Law § 120

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

B. Constitutional and Other Rights Affected by Investigations

2. Other Constitutional Concerns

§ 120. Privileges of witnesses

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 356.1 to 358

Forms

Forms relating to privilege: see Federal Procedural Forms, Contempt [Westlaw® Search Query]

Courts have sometimes found that certain witness privileges may apply in the context of administrative investigations. For instance, the attorney-client privilege applies to administrative investigations.[1]Thus, when an agency has the power to compel testimony, its power must be tempered by the attorney-client privilege unless there is an unambiguous statutory directive to the contrary.[2]The principle of attorney-client privilege prevents an agency from subpoenaing papers from an attorney if they would be privileged in the hands of the client; however, nonprivileged documents are not immunized when they are turned over to an attorney.[3]

Observation:

Nevertheless, when administrative agencies conduct nonadjudicative, fact-finding investigations, rights such as appraisal or specific notice, confrontation, and cross-examination of witnesses on behalf of other witnesses before the agency generally do not apply.[4]

Footnotes

1 U.S. v. Hunton & Williams, 952 F. Supp. 843 (D.D.C. 1997) (privilege exists but is not violated by requiring attorneys to reveal the names of clients); Southern Cal. Gas Co. v. Public Utilities Com., 50 Cal. 3d 31, 265 Cal. Rptr. 801, 784 P.2d 1373 (1990).
As to the privileges of witnesses in the judicial context, generally, see Am. Jur. 2d, Witnesses §§ 273 to 537.

2 Southern Cal. Gas Co. v. Public Utilities Com., 50 Cal. 3d 31, 265 Cal. Rptr. 801, 784 P.2d 1373 (1990).

3 Fisher v. U.S., 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976).

4 Hannah v. Larche, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960); Rhode Island Republican Party v. Daluz, 961 A.2d 287 (R.I. 2008).

End of Document

2 Am. Jur. 2d Administrative Law IV C Refs.

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

C. Enforcement of Administrative Order or Subpoena

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 357 to 360.1

A.L.R. Library

A.L.R. Index, Administrative Law
West's A.L.R. Digest, Administrative Law and Procedure 357 to 360.1

End of Document

2 Am. Jur. 2d Administrative Law § 121

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

C. Enforcement of Administrative Order or Subpoena

§ 121. Generally; necessity of court proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 357 to 360.1

Forms

Forms relating to contempt in connection with administrative proceedings or actions, generally, see Federal Procedural Forms, Contempt [Westlaw® Search Query]

Administrative officials themselves do not have the power to enforce subpoenas.[1] An administrative officer has no power to hold a party in contempt or otherwise punish a party for contesting the validity of a subpoena before there is a judicial order of enforcement.[2] Most regulatory statutes confer appropriate jurisdiction and provide for an application by the administrative agency[3] to a specified court for an order enforcing the administrative order or subpoena.[4]

In enforcing such subpoenas, however, the court's discretion is limited. The ultimate inquiry is whether the enforcement of the administrative subpoena would constitute an abuse of the court's process.[5] As long as the investigation is within the agency's authority, the subpoena is not too indefinite, and the information sought is reasonably relevant, the district court must enforce an administrative subpoena.[6] For purposes of an administrative subpoena, the notion of relevancy is a broad one, and so long as the material requested touches a matter under investigation, then the administrative subpoena will survive a challenge that the material is not relevant.[7]

Footnotes

1 Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614, 166 A.L.R. 531 (1946); State, Dept. of Revenue v. Moore, 722 S.W.2d 367 (Tenn. 1986).

[2] Reisman v. Caplin, 375 U.S. 440, 84 S. Ct. 508, 11 L. Ed. 2d 459 (1964).

[3] Civil Aeronautics Bd. v. Hermann, 353 U.S. 322, 77 S. Ct. 804, 1 L. Ed. 2d 852 (1957); Goodyear Tire & Rubber Co. v. N.L.R.B., 122 F.2d 450, 136 A.L.R. 883 (C.C.A. 6th Cir. 1941).

[4] N.L.R.B. v. Duval Jewelry Co. of Miami, 357 U.S. 1, 78 S. Ct. 1024, 2 L. Ed. 2d 1097 (1958); U.S. v. Golden Valley Elec. Ass'n, 689 F.3d 1108 (9th Cir. 2012); Harris v. Stutzman, 42 Ohio St. 3d 13, 536 N.E.2d 1154 (1989).

[5] University of Medicine and Dentistry of New Jersey v. Corrigan, 347 F.3d 57 (3d Cir. 2003); U.S. v. Markwood, 48 F.3d 969, 31 Fed. R. Serv. 3d 756, 1995 FED App. 0097P (6th Cir. 1995); State Bd. of Registration for Healing Arts v. Vandivort, 23 S.W.3d 725 (Mo. Ct. App. W.D. 2000).

[6] E.E.O.C. v. United Air Lines, Inc., 287 F.3d 643 (7th Cir. 2002).

[7] N.L.R.B. v. Fortune Bay Resort Casino, 688 F. Supp. 2d 858 (D. Minn. 2010).

End of Document

2 Am. Jur. 2d Administrative Law § 122

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

C. Enforcement of Administrative Order or Subpoena

§ 122. Independent actions; necessity of exhausting administrative remedies

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 357 to 360.1

Federal courts have heard independent actions to enjoin the holding of an investigative hearing,[1] to enjoin a warrantless search,[2] or to vacate and quash administrative summonses.[3] Such independent actions may be proper if the agency has clearly violated a right secured by statute or regulation, and the issue presented is strictly legal and cannot be later judicially reviewed.[4]

If a party challenges the scope of the investigative demand, the party must first present its objection to the agency before raising the objection in court.[5] A party must thereby exhaust administrative remedies.[6] Once the party being investigated makes a record before the agency, the party's remedy is to present a defense in the proceeding to enforce the subpoena.[7]

Observation:

Although a challenge to a subpoena must be raised before an agency, there is no requirement that the agency grant a formal hearing on the challenge.[8]

Footnotes

[1] Hannah v. Larche, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960).

[2] Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978).

[3] Application of Levine, 149 F. Supp. 642 (S.D. N.Y. 1956), order aff'd, 243 F.2d 175 (2d Cir. 1956).

[4] F.T.C. v. Miller, 549 F.2d 452 (7th Cir. 1977).

[5] Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961).

[6] In re Establishment Inspection of Kohler Co., 935 F.2d 810 (7th Cir. 1991); E.E.O.C. v. City of Milwaukee, 919 F. Supp. 1247 (E.D. Wis. 1996).
The Model Acts require the exhaustion of administrative remedies. Revised Model State Administrative Procedure Act § 506 (2010); Model State Administrative Procedure Act § 5-107 (1981).

[7] Reisman v. Caplin, 375 U.S. 440, 84 S. Ct. 508, 11 L. Ed. 2d 459 (1964).

[8] F.T.C. v. Hallmark, Inc., 265 F.2d 433 (7th Cir. 1959).

End of Document

2 Am. Jur. 2d Administrative Law § 123

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

C. Enforcement of Administrative Order or Subpoena

§ 123. Enforcement procedure

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 357 to 360.1

A.L.R. Library

Procedural requirements for judicial enforcement of subpoenas issued by Federal Trade Commission under sec. 9 of Federal Trade Commission Act (15 USC sec. 49), 7 A.L.R. Fed. 347

The Federal Rules of Civil Procedure apply to proceedings to compel testimony or the production of documents through a subpoena issued by an United States officer or agency under a federal statute except as otherwise provided by statute, by local rule, or by court order in the proceedings.[1]Accordingly, if the particular regulatory statute contains no provision specifying the procedure to be followed in an enforcement proceeding, the procedures specified in the Federal Rules of Civil Procedure are to be followed.[2]

The Federal Rules also provide that a request for a court order must be made by motion.[3]A formal complaint is not required.[4]

Under the Revised Model State Administrative Procedure Act, unless otherwise provided by law or agency rule, an administrative subpoena, on application to the court by a party or the agency, will be enforced in the manner provided by law for the service and enforcement of a subpoena in a civil action.[5]Under the Model State Administrative Procedure Act, in addition to other remedies provided by law, an agency may seek enforcement of its order by filing a petition for civil enforcement in the trial court of general jurisdiction.[6]Moreover, a person who would qualify under the Act as having standing to obtain judicial review of an agency's failure to enforce its order may file a petition for civil enforcement of that order under specified circumstances.[7]

Footnotes

1 Fed. R. Civ. P. 81(a)(5).

2 U.S. v. Powell, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112, 9 Fed. R. Serv. 2d 81A.33, Case 1 (1964).

3 Fed. R. Civ. P. 7(b)(1).

4 U.S. v. Newman, 441 F.2d 165 (5th Cir. 1971); U.S. v. Stoltz, 525 F. Supp. 617 (D.D.C. 1981).

5 Revised Model State Administrative Procedure Act § 410(b) (2010).

6 Model State Administrative Procedure Act § 5-201(a) (1981).

7 Model State Administrative Procedure Act § 5-202(a) (1981).

End of Document

2 Am. Jur. 2d Administrative Law § 124

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

C. Enforcement of Administrative Order or Subpoena

§ 124. Enforceability of subpoenas

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 357 to 360.1

Generally, courts will not interfere with the decision of an agency to issue subpoenas in conducting an investigation,[1] and the courts' role in a proceeding to enforce an administrative subpoena is thus extremely limited.[2] Under the Federal Administrative Procedure Act, on contest, the court must sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with the law.[3]

Since it is generally up to an administrator to define the scope of the administrator's inquiry, a court must enforce an administrative subpoena unless:
(1) the evidence sought is clearly incompetent or irrelevant;[4]
(2) the demand for information is too indefinite;[5]

(3) the purpose of the investigation was not authorized by statute;[6] or
(4) proper administrative steps were not followed in issuing the subpoena.[7]

CUMULATIVE SUPPLEMENT

Cases:

Once the government makes preliminary showing necessary for judicial enforcement of an administrative subpoena, the burden shifts to the subpoena recipient to disprove one of the criteria or to demonstrate that judicial enforcement should be denied on the ground that it would be an abuse of the court's process. Securities and Exchange Commission v. Marin, 982 F.3d 1341 (11th Cir. 2020).

The court's role in a proceeding to enforce an administrative subpoena is a strictly limited one, since administrative agencies wield broad power to gather information through the issuance of subpoenas. United States v. Institute for College Access & Success, 27 F. Supp. 3d 106, 311 Ed. Law Rep. 869 (D.D.C. 2014).

In context of administrative subpoenas, burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. United States v. Capitol Supply, Inc., 27 F. Supp. 3d 91 (D.D.C. 2014).

Courts generally enforce an administrative subpoena if the following elements are met: (1) it reasonably relates to an investigation within the agency's authority, (2) the specific inquiry is relevant to that purpose and is not too indefinite, (3) the proper administrative procedures have been followed, and (4) the subpoena does not demand information for an illegitimate purpose. E.E.O.C. v. Trinity Health Corp., 107 F. Supp. 3d 934 (N.D. Ind. 2015).

The process of reviewing an administrative subpoena for judicial enforcement is not one for a determination of the underlying claim on its merits; to establish its authority to investigate, administrative agency need only present an arguable basis for jurisdiction, and as long as jurisdiction is plausible and not plainly lacking, the subpoena should be enforced, unless the party being investigated demonstrates that the subpoena is unduly burdensome. WyoLaw, LLC v. Office of Attorney General, Consumer Protection Unit, 2021 WY 61, 486 P.3d 964 (Wyo. 2021).

[END OF SUPPLEMENT]

Footnotes

1 Abrams v. Kearney, 133 Misc. 2d 845, 508 N.Y.S.2d 850 (Sup 1986).

2 N.L.R.B. v. American Medical Response, Inc., 438 F.3d 188 (2d Cir. 2006).

3 5 U.S.C.A. § 555(d).

4 U.S. v. Powell, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112, 9 Fed. R. Serv. 2d 81A.33, Case 1 (1964); U.S. v. Whispering Oaks Residential Care Facility, LLC, 673 F.3d 813 (8th Cir. 2012).

5 U.S. v. Powell, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112, 9 Fed. R. Serv. 2d 81A.33, Case 1 (1964); Washington Home Remodelers, Inc. v. State, Office of Attorney General, Consumer Protection Division, 426 Md. 613, 45 A.3d 208 (2012).

6 U.S. v. Powell, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112, 9 Fed. R. Serv. 2d 81A.33, Case 1 (1964); N.L.R.B. v. American Medical Response, Inc., 438 F.3d 188 (2d Cir. 2006).

7 U.S. v. Powell, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112, 9 Fed. R. Serv. 2d 81A.33, Case 1 (1964); State ex rel. McGraw v. King, 229 W. Va. 365, 729 S.E.2d 200 (2012).

End of Document

2 Am. Jur. 2d Administrative Law § 125

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

C. Enforcement of Administrative Order or Subpoena

§ 125. Enforcement order

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 357 to 360.1

Pursuant to the federal statute, if a court determines that an administrative subpoena should be enforced, it must issue an order requiring the appearance of the witness, or the production of the evidence or data requested, within a reasonable time, under penalty of punishment for contempt in case of the contumacious failure to comply.[1] If a court finds that an investigative order of an administrative agency is only sustainable in part, it may order compliance with only part of the demand.[2] In addition, a court may modify a subpoena if it appears that the subpoena as written is too broad or oppressive[3] and may also order production under conditions that assure that the respondent's business is not unduly disrupted.[4]

Footnotes

1 5 U.S.C.A. § 555(d).

2 St. Regis Paper Co. v. U.S., 368 U.S. 208, 82 S. Ct. 289, 7 L. Ed. 2d 240 (1961); National Labor Relations Board v. Anchor Rome Mills, 197 F.2d 447 (5th Cir. 1952).

3 F C C v. Cohn, 154 F. Supp. 899 (S.D. N.Y. 1957).

4 Civil Aeronautics Bd. v. Hermann, 353 U.S. 322, 77 S. Ct. 804, 1 L. Ed. 2d 852 (1957).

End of Document

2 Am. Jur. 2d Administrative Law § 126

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

IV. Investigations

C. Enforcement of Administrative Order or Subpoena

§ 126. Appeal of enforcement order

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 357 to 360.1

A proceeding to enforce an administrative subpoena is an independent proceeding, and an order by a district court enforcing such a subpoena is a final order appealable as of right.[1] Finality is not defeated by the fact that the district court retains jurisdiction to grant further relief.[2] However, an order by a magistrate judge in a subpoena enforcement proceeding is generally not final until it is reviewed by a district judge.[3]

An appeal from a district court order enforcing an administrative subpoena is rendered moot upon the subject's compliance with the subpoena. No live controversy is created by the fact that the party remains subject to the subpoena since future attempts at enforcement may not occur and, if they do occur, present their own opportunity for review.[4]

Observation:

The Model State Administrative Procedure Act states that decisions on petitions for civil enforcement are reviewable by the appellate court as in other civil cases.[5]

CUMULATIVE SUPPLEMENT

Cases:

A court reviewing the enforceability of an administrative subpoena may consider only whether the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant; if agency's subpoena satisfies these requirements, court must enforce it. United States v. Institute for College Access & Success, 27 F. Supp. 3d 106, 311 Ed. Law Rep. 869 (D.D.C. 2014).

[END OF SUPPLEMENT]

Footnotes

1 La Mura v. U.S., 765 F.2d 974 (11th Cir. 1985); F.T.C. v. Texaco, Inc., 555 F.2d 862 (D.C. Cir. 1977).
A district court order enforcing an administrative subpoena is final and ripe for appellate review. E.E.O.C. v. Federal Exp. Corp., 558 F.3d 842 (9th Cir. 2009).

2 F.T.C. v. Texaco, Inc., 555 F.2d 862 (D.C. Cir. 1977).

3 U.S. v. Jones, 581 F.2d 816 (10th Cir. 1978).

4 Office of Thrift Supervision Dept. of Treasury v. Dobbs, 931 F.2d 956 (D.C. Cir. 1991).

5 Model State Administrative Procedure Act § 5-205 (1981).
As to judicial review under the Revised Model State Administrative Act, see Revised Model State Administrative Procedure Act §§ 501 to 508 (2010).

2 Am. Jur. 2d Administrative Law V A Refs.

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1, 9, 12, 341, 343.1, 381 to 389, 392.1, 441, 442

A.L.R. Library

A.L.R. Index, Administrative Law
West's A.L.R. Digest, Administrative Law and Procedure 4.1, 9, 12, 341, 343.1, 381 to 389, 392.1, 441, 442

End of Document

2 Am. Jur. 2d Administrative Law § 127

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

A. In General

1. Generally

§ 127. General nature and basis of authority

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 9, 12, 381 to 389

A legislature may grant[1] or delegate[2] the power to make rules and regulations to an administrative agency. The origin of the rulemaking capacity is in a delegation from the legislature.[3] The basic purpose of establishing agencies to consider and promulgate rules is to delegate the primary authority of implementing policy in a specialized area to governmental bodies with the staff, resources, and expertise to understand and solve those specialized problems.[4] However, while administrative agencies have no inherent legislative power, they have all the powers expressly delegated to them by the legislature and are authorized to fill in the interstices in the legislation by promulgating rules and regulations consistent with their enabling legislation.[5] In other words, while an agency does not have the power to promulgate rules that amend or change legislative enactments, it may fill in the gaps in legislation where necessary to effectuate a general statutory scheme.[6]

The promulgation of administrative rules and regulations lies at the very heart of the administrative process, permitting expert and flexible control in areas where the diversity of circumstances and situations to be encountered forbids the enactment of legislation anticipating every possible problem which may arise and providing for its solution.[7]

CUMULATIVE SUPPLEMENT

Cases:

Whether an agency's statement is subject to the Administrative Procedures Act's (APA) rule-making requirements requires the interior determination of whether the statement is actually a rule. S.D. Codified Laws § 1-26-4. Rhines v. South Dakota Department of Corrections, 2019 SD 59, 935 N.W.2d 541 (S.D. 2019).

[END OF SUPPLEMENT]

Footnotes

1 City of Albuquerque v. New Mexico Public Regulation Com'n, 2003-NMSC-028, 134 N.M. 472, 79 P.3d 297 (2003).

2 Griffith v. Frontier West Virginia, Inc., 228 W. Va. 277, 719 S.E.2d 747 (2011).

3 Chrysler Corp. v. Brown, 441 U.S. 281, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979).
An administrative agency is empowered to adopt rules when a statute grants rule-making authority and when there is a specific law to be implemented. Subirats v. Fidelity Nat. Property, 106 So. 3d 997 (Fla. 3d DCA 2013).

4 In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 67 A.3d 621 (App. Div. 2013), certification denied, 216 N.J. 8, 75 A.3d 1162 (2013).

5 Kigin v. State Workers' Compensation Bd., 109 A.D.3d 299, 970 N.Y.S.2d 111 (3d Dep't 2013), leave to appeal granted, 22 N.Y.3d 854, 977 N.Y.S.2d 183, 999 N.E.2d 548 (2013).

6 Washington Federation of State Employees v. State Dept. of General Admin., 152 Wash. App. 368, 216 P.3d 1061 (Div. 2 2009).

7 In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 67 A.3d 621 (App. Div. 2013), certification denied, 216 N.J. 8, 75 A.3d 1162 (2013).

End of Document

2 Am. Jur. 2d Administrative Law § 128

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

A. In General

1. Generally

§ 128. Express or implied authority

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 385 to 388

A.L.R. Library

Construction and Application of Public Safety Officers' Benefits Act (PSOBA), 42 U.S.C.A ss3796 to 3796d-7, 23 A.L.R. Fed. 2d 129

While the need for regulation cannot alone create the authority to regulate,[1] statutory authority to promulgate rules may be either express or implied.[2] When a statute expressly authorizes an agency to regulate an industry, it implies the authority to promulgate rules and regulations necessary to accomplish that purpose.[3] Thus, an administrative agency's powers to promulgate regulations are shaped by its organic statute taken as a whole and need not necessarily be traced to specific words.[4]

Federal courts hold that when Congress has explicitly left a gap for an agency to fill, it expressly delegates authority to the agency to elucidate a specific provision of the statute by regulation.[5] The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress[6] provided it does so in a manner that is consistent with the policies reflected in the statutory program.[7] When an agency fills such a "gap" reasonably, and in accordance with other applicable requirements, the courts accept the result as legally binding.[8]

Footnotes

1 ExxonMobil Gas Marketing Co. v. F.E.R.C., 297 F.3d 1071 (D.C. Cir. 2002).

2 Pruett v. Harris County Bail Bond Bd., 249 S.W.3d 447 (Tex. 2008); Washington Federation of State Employees v. State Dept. of General Admin., 152 Wash. App. 368, 216 P.3d 1061 (Div. 2 2009).

3 Pruett v. Harris County Bail Bond Bd., 249 S.W.3d 447 (Tex. 2008).

4 Ciampi v. Commissioner of Correction, 452 Mass. 162, 892 N.E.2d 270 (2008).
An enabling statute need not spell out every detail of an administrative agency's rule to expressly authorize it. Milwaukee Police Ass'n v. Bd. of Fire & Police Com'rs of City of Milwaukee, 787 F. Supp. 2d 888 (E.D. Wis. 2011), appeal dismissed, 708 F.3d 921 (7th Cir. 2013) (applying Wisconsin law).

5 U.S. v. Mead Corp., 533 U.S. 218, 121 S. Ct. 2164, 150 L. Ed. 2d 292, 3 A.L.R. Fed. 2d 651 (2001); Palomar Medical Center v. Sebelius, 693 F.3d 1151 (9th Cir. 2012); Reckitt Benckiser, Inc. v. Jackson, 762 F. Supp. 2d 34 (D.D.C. 2011); Electrical Workers Ins. Fund v. Sebelius, 906 F. Supp. 2d 707 (E.D. Mich. 2012); New Gaming Systems, Inc. v. National Indian Gaming Com'n, 896 F. Supp. 2d 1093 (W.D. Okla. 2012).

6 Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 127 S. Ct. 2339, 168 L. Ed. 2d 54 (2007); Philip Morris USA Inc. v. Vilsack, 896 F. Supp. 2d 512 (E.D. Va. 2012), aff'd, 736 F.3d 284 (4th Cir. 2013); Towne v. United States, 113 Fed. Cl. 87 (2013).

7 Contreras v. U.S., 215 F.3d 1267 (Fed. Cir. 2000).

8 Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 127 S. Ct. 2339, 168 L. Ed. 2d 54 (2007).

End of Document

2 Am. Jur. 2d Administrative Law § 129

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

A. In General

1. Generally

§ 129. Limits on authority

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 385.1 to 387

An agency's regulatory power derives only from an authorizing or empowering statute.[1]Thus, the rule-making authority delegated to administrative agencies is limited by the statute conferring the power.[2]An administrative agency has no power to make law,[3]cannot promulgate rules or regulations that contravene the will of the legislature[4]and can only promulgate rules to further the implementation of the law as it exists[5]because an agency may not promulgate even reasonable regulations that claim a force of law without delegated authority.[6]An agency's authority to promulgate rules is limited to enacting rules which carry out and further the purposes of the legislation[7]and do not enlarge, alter, limit, or restrict the provisions of the act being administered.[8]

In the absence of valid statutory authority, an administrative agency may not, under the guise of a regulation, substitute its judgment for that of the legislature.[9]Moreover, a basic limitation on an agency's rulemaking authority is that an administrative agency may not legislate by enacting rules which are in excess of legislative policy.[10]Nor may an agency create,[11]remove, or limit substantive rights granted in the enabling act.[12]In other words, administrative rules may not add to, detract from,[13]or modify the statute which they are intended to implement.[14]In this respect, administrative agencies must exercise their rule-making authority within the parameters of their statutory grant.[15]In deciding whether a particular administrative agency has exceeded its rule-making powers, the determinative factor is whether the rule's provisions are in harmony with the general objectives of the act involved.[16]

CUMULATIVE SUPPLEMENT

Cases:

Power of an administrative officer or board to administer a statute and prescribe rules and regulations to that end is not the

power to make law but the power to adopt regulations to carry into effect the will of the legislative body as expressed by the statute; a regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. Citibank, N.A. v. South Dakota Dept. of Revenue, 2015 SD 67, 868 N.W.2d 381 (S.D. 2015).

[END OF SUPPLEMENT]

Footnotes

1 § 127.

2 Bowen v. Georgetown University Hosp., 488 U.S. 204, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988).

3 Arellano v. Department of Human Services, 402 Ill. App. 3d 665, 348 Ill. Dec. 23, 943 N.E.2d 631 (2d Dist. 2010).

4 Kew Gardens Dev. Corp. v. Wambua, 103 A.D.3d 576, 961 N.Y.S.2d 48 (1st Dep't 2013).
As to the validity of rules that exceed the scope of the legislative delegation, generally, see § 215.

5 Seittelman v. Sabol, 91 N.Y.2d 618, 674 N.Y.S.2d 253, 697 N.E.2d 154 (1998).
An administrative agency's power to promulgate legislative regulations is limited to authority delegated by Congress. American Federation of Labor v. Chertoff, 552 F. Supp. 2d 999 (N.D. Cal. 2007).

6 National Auto. Dealers Ass'n v. F.T.C., 864 F. Supp. 2d 65 (D.D.C. 2012), appeal dismissed, 2013 WL 1164417 (D.C. Cir. 2013).

7 Lales v. Wholesale Motors Co., 121 Fair Empl. Prac. Cas. (BNA) 1225, 2014 WL 560829 (Haw. 2014).

8 Lales v. Wholesale Motors Co., 121 Fair Empl. Prac. Cas. (BNA) 1225, 2014 WL 560829 (Haw. 2014); Appalachian Racing, LLC v. Family Trust Foundation of Kentucky, Inc., 423 S.W.3d 726 (Ky. 2014); Garrison v. Department of Revenue, 345 Or. 544, 200 P.3d 126 (2008).

9 City and County of San Francisco v. Ballard, 136 Cal. App. 4th 381, 39 Cal. Rptr. 3d 1 (1st Dist. 2006).

10 Perrysburg Twp. v. Rossford Arena Amphitheater Auth., 175 Ohio App. 3d 549, 2008-Ohio-363, 888 N.E.2d 440 (6th Dist. Wood County 2008).

11 People ex rel. Kilquist v. Brown, 203 Ill. App. 3d 957, 148 Ill. Dec. 928, 561 N.E.2d 234 (5th Dist. 1990).

12 Knox County ex rel. Kessel v. Knox County Personnel Bd., 753 S.W.2d 357 (Tenn. Ct. App. 1988).

13 Formula Development Corp. v. Town of Chester, 156 N.H. 177, 934 A.2d 504 (2007); State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm., 117 Ohio St. 3d 441, 2008-Ohio-1261, 884 N.E.2d 589 (2008).

14 Formula Development Corp. v. Town of Chester, 156 N.H. 177, 934 A.2d 504 (2007).

15 Sharpe v. Arizona Health Care Cost Containment System, 220 Ariz. 488, 207 P.3d 741 (Ct. App. Div. 1 2009).

16 Pruett v. Harris County Bail Bond Bd., 249 S.W.3d 447 (Tex. 2008).

2 Am. Jur. 2d Administrative Law § 130

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

A. In General

1. Generally

§ 130. Legislative nature

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 381, 382.1

While there is contrary authority,[1] rulemaking is considered to be a legislative[2] or quasi-legislative function[3] because it is largely concerned with questions of policy.[4]

Footnotes

1 Durrett v. Bryan, 14 Kan. App. 2d 723, 799 P.2d 110 (1990).

2 Chase 3000, Inc. v. Public Service Com'n, 273 Neb. 133, 728 N.W.2d 560 (2007).

3 Chrysler Corp. v. Brown, 441 U.S. 281, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979).

4 Venter v. Board of Educ., 185 Md. App. 648, 972 A.2d 328, 245 Ed. Law Rep. 306 (2009).

End of Document

2 Am. Jur. 2d Administrative Law § 131

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

A. In General

1. Generally

§ 131. Agency discretion

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 385 to 388

An agency has the inherent authority and is given wide latitude and discretion to adopt regulations[1] that are reasonably necessary to perform its statutory duties.[2] Accordingly, administrative agencies may not act arbitrarily and capriciously in the enactment of rules and regulations in the exercise of their delegated powers.[3] A court will not substitute its judgment for that of the agency[4] as to the content of a legislative rule[5] absent fraud, bad faith, or abuse of power[6] unless the statutes mandate the adoption of the requested rule.[7]

Administrative agencies have undoubted power to use predictive tools in rulemaking.[8] Moreover, the "one-step-at-a-time" doctrine authorizes agencies to promulgate regulations in a piecemeal fashion. The one-step-at-a-time doctrine rests on the notion that since agencies have great discretion to treat a problem partially, the court of appeals should not strike down a regulation if it is a first step toward a complete solution.[9]

Observation:

The Regulatory Flexibility Act[10] may have an impact upon an agency's discretion in promulgating regulations.

A regulatory agency is charged with the responsibility of adapting its regulations to changing conditions when enforcing a statute under its authority.[11] Specifically, an agency may base a standard or mandate on future technology when there exists a rational connection between the regulatory target and the presumed innovation.[12]

CUMULATIVE SUPPLEMENT

Cases:

An agency's preference for symmetry cannot trump an asymmetrical statute. Michigan v. E.P.A., 135 S. Ct. 2699 (2015).

[END OF SUPPLEMENT]

Footnotes

1 Judicial Inquiry and Review Com'n of Virginia v. Elliott, 272 Va. 97, 630 S.E.2d 485 (2006).

2 Julie Q. v. Department of Children and Family Services, 2011 IL App (2d) 100643, 357 Ill. Dec. 448, 963 N.E.2d 401 (App. Ct. 2d Dist. 2011), appeal allowed, 360 Ill. Dec. 3, 968 N.E.2d 82 (Ill. 2012) and judgment aff'd, 2013 IL 113783, 374 Ill. Dec. 480, 995 N.E.2d 977 (Ill. 2013).

3 Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 57 S. Ct. 364, 81 L. Ed. 510 (1937); Florentine v. Town of Darien, 142 Conn. 415, 115 A.2d 328 (1955).

4 American Network, Inc. v. Washington Utilities and Transp. Com'n, 113 Wash. 2d 59, 776 P.2d 950 (1989).
A reviewing court is not free to set aside regulations because it would have interpreted the statute in a different manner. Batterton v. Francis, 432 U.S. 416, 97 S. Ct. 2399, 53 L. Ed. 2d 448 (1977).

5 Dilts v. Director of Revenue, 208 S.W.3d 299 (Mo. Ct. App. W.D. 2006).

6 Bayada Nurses, Inc. v. Commonwealth, Dept. of Labor and Industry, 958 A.2d 1050 (Pa. Commw. Ct. 2008), order aff'd, 607 Pa. 527, 8 A.3d 866 (2010).

7 Bayonet Point Hosp., Inc. v. Department of Health and Rehabilitative Services, 490 So. 2d 1318 (Fla. 1st DCA 1986).

8 American Farm Bureau Federation v. U.S. E.P.A., 77 Env't. Rep. Cas. (BNA) 1855, 2013 WL 5177530 (M.D. Pa. 2013).

9 Center for Biological Diversity v. E.P.A., 722 F.3d 401 (D.C. Cir. 2013).

10 5 U.S.C.A. §§ 601 to 612.
As to the compliance with the Act in the federal rule-making process, see § 169.

11 In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 67 A.3d 621 (App. Div. 2013), certification denied, 216 N.J. 8, 75 A.3d 1162 (2013).

12 American Petroleum Institute v. E.P.A., 706 F.3d 474 (D.C. Cir. 2013).

End of Document

2 Am. Jur. 2d Administrative Law § 132

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

A. In General

2. Rule, Rulemaking Defined

§ 132. Federal Administrative Procedure Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 381, 382.1, 385.1, 386

The Federal Administrative Procedure Act (APA) defines "rulemaking" as an agency process for formulating, amending, or repealing a rule.[1] A "rule" is defined in the APA as the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.[2]

Footnotes

1 5 U.S.C.A. § 551(5).

2 5 U.S.C.A. § 551(4).

2 Am. Jur. 2d Administrative Law § 133

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

A. In General

2. Rule, Rulemaking Defined

§ 133. State law and Model State Administrative Procedure Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 4.1, 381, 382.1, 385.1, 386

A state's administrative procedures act governs the delegation of rulemaking authority to executive agencies by the state legislature.[1]State administrative agencies may be bound by the rule-making provisions of the state's administrative procedures act.[2]Whether an agency's action is rulemaking, despite bearing some other label, is determined under the state administrative procedure act.[3]

Any agency announcement of policy or interpretation of law that has future effect and acts on unnamed and unspecified facts is a "rule" for purposes of state administrative law.[4]

To determine whether an agency has attempted to establish a binding norm so that the agency's pronouncement is a regulation, the court considers: (1) the plain language of the enactment; (2) the manner in which the agency implements it; and (3) whether it restricts the agency's discretion.[5]

The 2010 version of the Model State Administrative Procedure Act defines "rule" as the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy or the organization, procedure, or practice requirements of an agency and has the force of law.[6]Also, under the 2010 version, "rulemaking" means the process for the adoption of a new rule or the amendment or repeal of an existing rule.[7]

Under the 1981 version of the Model State Administrative Procedure Act, a rule is the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes: (1) law or policy; or (2) the organization, procedure, or practice requirements of an agency.[8]The term "rule" includes the amendment, repeal, or suspension of an existing rule.[9]The 1981 version defines rulemaking as the process for formulation and adoption of a rule.[10]

Footnotes

[1] Lockett v. Evans, 2014 OK 34, 2014 WL 1632235 (Okla. 2014).
Protocols following mandatory guidelines are deemed regulations which may not be used by a state agency until they are formally adopted, following compliance with procedural requirements under the Administrative Procedure Act. People v. Taylor, 174 Cal. App. 4th 920, 94 Cal. Rptr. 3d 756 (4th Dist. 2009), as modified on denial of reh'g, (June 29, 2009).

[2] Bradford Associates v. Rhode Island Div. of Purchases, 772 A.2d 485 (R.I. 2001).

[3] McGee Guest Home, Inc. v. Department of Social and Health Services of State of Wash., 142 Wash. 2d 316, 12 P.3d 144 (2000).

[4] Young v. Children's Div., State Dept. of Social Services, 284 S.W.3d 553 (Mo. 2009).

[5] Northwestern Youth Services, Inc. v. Com., Dept. of Public Welfare, 1 A.3d 988 (Pa. Commw. Ct. 2010), order aff'd, 66 A.3d 301 (Pa. 2013).

[6] Model State Administrative Procedure Act (2010) § 102(30).

[7] Model State Administrative Procedure Act (2010) § 102(31).

[8] Model State Administrative Procedure Act (1981) § 1-102(10).

[9] Model State Administrative Procedure Act (1981) § 1-102(10).

[10] Model State Administrative Procedure Act (1981) § 1-102(11).

End of Document

2 Am. Jur. 2d Administrative Law § 134

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

A. In General

3. Rulemaking Distinguished from Other Agency Action

§ 134. Adjudication

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 381, 382.1, 441, 442

Treatises and Practice Aids

As to rulemaking defined and distinguished, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

Generally, an administrative agency acting formally may do so through rulemaking, which is quasi-legislative,[1] or through adjudication, which is quasi-judicial.[2]

The Federal Administrative Procedure Act (APA) distinguishes adjudication from rulemaking by stating that adjudication is an agency process for the formulation of an order,[3] and an order is a final disposition in a matter other than rulemaking.[4] Two principal characteristics distinguish "rulemaking" from "adjudication," under the APA: (1) adjudications resolve disputes among specific individuals in specific cases, and (2) because adjudications involve concrete disputes, they have an immediate effect on specific individuals; in contrast, rulemaking is prospective and has a definitive effect on individuals only after the rule subsequently is applied.[5] Thus, rulemaking looks to the future,[6] since rules have legal consequences only for the future,[7] while adjudication judges preexisting events under existing law.[8] The APA accepts this theory and provides that a rule is an agency statement of future effect.[9] When determining whether an agency action is an adjudication or a rulemaking subject to the notice and comment requirements under the Administrative Procedure Act, the court first considers the agency's characterization of its own action and, second, examines the ultimate product of the agency action.[10]

Adjudication is party-specific and is concerned with the determination of past and present rights and liabilities; in contrast, rulemaking is not party-specific but, rather, tends to focus on policy considerations and results in orders that are, by definition, orders of future effect.[11] Another possible distinction between rulemaking and adjudication is that rulemaking may

affect an entire class rather than particular members of a group.[12]However, the Federal APA provides that a rule may be of general or particular applicability.[13]Indeed, rules may affect individual rights.[14]Conversely, the fact that an agency's decision may have collateral effects upon others similarly situated to parties in the case does not transform an adjudicatory action into a rule-making proceeding.[15]

CUMULATIVE SUPPLEMENT

Cases:

Interpretations that arise in the course of case-specific adjudication are not "regulations" under the Administrative Procedure Act (APA). Cal. Gov't Code § 11340 et seq. Center for Biological Diversity v. Department of Fish and Wildlife, 234 Cal. App. 4th 214, 183 Cal. Rptr. 3d 736 (3d Dist. 2015).

[END OF SUPPLEMENT]

Footnotes

1 As to quasi-legislative character of rulemaking, see § 130.

2 Northwest Covenant Medical Center v. Fishman, 167 N.J. 123, 770 A.2d 233 (2001).
Administrative adjudication is a quasi-judicial function. Morgan v. U.S., 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936).
As to adjudication, generally, see §§ 258 to 271.

3 5 U.S.C.A. § 551(7).

4 5 U.S.C.A. § 551(6).

5 City of Arlington, Tex. v. F.C.C., 668 F.3d 229 (5th Cir. 2012), certiorari granted in part, 133 S. Ct. 421, 184 L. Ed. 2d 252 (2012) and certiorari granted in part, 133 S. Ct. 524, 184 L. Ed. 2d 252 (2012) and aff'd, 133 S. Ct. 1863 (2013).

6 Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S. Ct. 67, 53 L. Ed. 150 (1908); C.H. v. Payne, 683 F. Supp. 2d 865 (S.D. Ind. 2010).

7 Franks v. Salazar, 816 F. Supp. 2d 49 (D.D.C. 2011).
Rulemaking is the process by which an administrative agency lays down new prescriptions to govern the future conduct of those subject to its authority. Venter v. Board of Educ., 185 Md. App. 648, 972 A.2d 328, 245 Ed. Law Rep. 306 (2009).

8 Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S. Ct. 67, 53 L. Ed. 150 (1908).

9 5 U.S.C.A. § 551(4).

10 City of Arlington, Tex. v. F.C.C., 668 F.3d 229 (5th Cir. 2012), certiorari granted in part, 133 S. Ct. 421, 184 L. Ed. 2d 252 (2012) and certiorari granted in part, 133 S. Ct. 524, 184 L. Ed. 2d 252 (2012) and aff'd, 133 S. Ct. 1863 (2013).

11 San Juan Cable LLC v. Puerto Rico Telephone Co., Inc., 612 F.3d 25 (1st Cir. 2010).

12 Woodland Private Study Group v. State, Dept. of Environmental Protection, 109 N.J. 62, 533 A.2d 387 (1987).

13 5 U.S.C.A. § 551(4).

14 Short Haul Survival Committee v. U.S., 572 F.2d 240 (9th Cir. 1978).

15 AviComm, Inc. v. Colorado Public Utilities Com'n, 955 P.2d 1023 (Colo. 1998).

End of Document

2 Am. Jur. 2d Administrative Law § 135

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

A. In General

3. Rulemaking Distinguished from Other Agency Action

§ 135. Adjudication—Agency discretion to act through rulemaking or adjudication

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 381, 382.1, 441, 442

An agency may establish rules of general application in either a statutory rule-making procedure or an individual adjudication.[1]Adjudicative rulemaking by an agency may be appropriate when the agency is construing a new rule or an issue requires ad hoc resolution that cannot be captured within the bounds of a general rule.[2]Indeed, an agency may use adjudication to announce new principles even if the principles involve a change from past policies.[3]

On the other hand, it is sometimes said that the preferred method of policymaking is by the promulgation of rules[4]rather than in the course of deciding contested cases[5]to avoid undercutting the jurisdiction's administrative procedure act.[6]Thus, while the Federal Administrative Procedure Act does not forbid agencies from using adjudicative proceedings to develop new interpretations of statutes, regulations, or orders, it does require agencies to avoid the inherently arbitrary nature of unpublished ad hoc determinations.[7]

According to some courts, an agency's determination of a disputed question during adjudication amounts to the declaration of a new rule, for purposes of the principle that agencies normally should promulgate new rules through the rulemaking procedures of the state's administrative procedure act, if it: (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that was not previously expressed in any official and explicit agency determination, adjudication or rule, or constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.[8]

Generally, however, administrative agencies have some discretion to exercise their authority through either adjudication or rulemaking[9]or both.[10]Even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rule-making authority to determine issues that do not require case-by-case determination.[11]If a statutory scheme requires

individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.[12]

Footnotes

1 Washington Hosp. Center v. District of Columbia Dept. of Employment Services, 743 A.2d 1208 (D.C. 1999).

2 Rodriguez v. Service Lloyds Ins. Co., 997 S.W.2d 248 (Tex. 1999).

3 Washington Hosp. Center v. District of Columbia Dept. of Employment Services, 743 A.2d 1208 (D.C. 1999).

4 Campo Jersey, Inc. v. Director, Div. of Taxation, 390 N.J. Super. 366, 915 A.2d 600 (App. Div. 2007), also published at, 23 N.J. Tax 370, 2007 WL 1429416 (Super. Ct. App. Div. 2007).

5 Forelaws on Bd. v. Energy Facility Siting Council, 306 Or. 205, 760 P.2d 212 (1988).

6 Rodriguez v. Service Lloyds Ins. Co., 997 S.W.2d 248 (Tex. 1999).

7 Mid Continent Nail Corp. v. U.S., 725 F.3d 1295 (Fed. Cir. 2013).

8 U.S. v. Reeves, 891 F. Supp. 2d 690 (D.N.J. 2012) (applying New Jersey law); In re Provision of Basic Generation Service for Period Beginning June 1 2008, 205 N.J. 339, 15 A.3d 829 (2011).

9 Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947); City of Arlington, Tex. v. F.C.C., 668 F.3d 229 (5th Cir. 2012), certiorari granted in part, 133 S. Ct. 421, 184 L. Ed. 2d 252 (2012) and certiorari granted in part, 133 S. Ct. 524, 184 L. Ed. 2d 252 (2012) and aff'd, 133 S. Ct. 1863 (2013); F.T.C. v. Wyndham Worldwide Corp., 2014 WL 1349019 (D.N.J. 2014); Mesbahi v. Maryland State Bd. of Physicians, 201 Md. App. 315, 29 A.3d 679 (2011); Doe v. Sex Offender Registry Bd., 79 Mass. App. Ct. 683, 948 N.E.2d 1268 (2011).
An agency has wide discretion in deciding to forgo rulemaking. Squaxin Island Tribe v. Washington State Dept. of Ecology, 177 Wash. App. 734, 312 P.3d 766 (Div. 2 2013).

10 Greenbriar Hills Country Club v. Director of Revenue, 47 S.W.3d 346 (Mo. 2001).

11 Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Companies, 498 U.S. 211, 111 S. Ct. 615, 112 L. Ed. 2d 636 (1991).

12 Lopez v. Davis, 531 U.S. 230, 121 S. Ct. 714, 148 L. Ed. 2d 635 (2001).

2 Am. Jur. 2d Administrative Law § 136

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

A. In General

3. Rulemaking Distinguished from Other Agency Action

§ 136. Investigation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 341, 343.1, 381, 382.1

Treatises and Practice Aids

As to rulemaking defined and distinguished, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

Fact finding is generally done in the investigative rather than the rule-making process.[1] An investigation, therefore, may be a prelude to rulemaking,[2] but rule-making requirements must be met once it is decided that a rule must be enacted or amended.[3]

Footnotes

1 American Exp. Co. v. U. S., 472 F.2d 1050 (C.C.P.A. 1973).
As to investigations, generally, see §§ 101 to 109.

2 § 101.

3 Chicago, B. & Q. R. Co. v. U.S., 242 F. Supp. 414 (N.D. Ill. 1965), judgment aff'd, 382 U.S. 422, 86 S. Ct. 616, 15 L. Ed. 2d 498 (1966).

End of Document

2 Am. Jur. 2d Administrative Law § 137

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

A. In General

4. Review Committee

§ 137. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 381, 392.1

Under the 2010 version of the Model State Administrative Procedure Act, a standing committee of the legislature is created and designated as the rules review committee.[1]An agency must file a copy of an adopted rule with the rules review committee, but an agency is not required to file an emergency rule.[2]Further, the 2010 version of the Model Act authorizes the rules review committee to examine each rule in effect and newly adopted rule to determine whether it is a valid exercise of delegated legislative authority, whether the statutory authority for the rule has expired or been repealed, the necessity for the rule, that the rule is a reasonable implementation of the law, and that the agency complied with the regulatory analysis requirements and the analysis properly reflects the effect of the rule.[3]The committee may request from an agency information necessary to exercise its powers.[4]The rules review committee is authorized by the 2010 Model Act to approve, disapprove, or disapprove and propose an amendment to a rule within 30 days after receiving a copy of it from an agency.[5]

Under the 1981 version of the Model State Administrative Procedure Act, agencies have a duty to review all their rules as often as the Model Act requires to determine whether new rules should be adopted.[6]The 1981 version of the Model Act also allows for the creation of an administrative rules review committee of the legislature.[7]The committee may, among other things, selectively review possible, proposed, or adopted rules[8]and recommend to an agency that it adopt a rule.[9]

Footnotes

1 Model State Administrative Procedure Act (2010) § 701.

2 Model State Administrative Procedure Act (2010) § 702(a).

3 Model State Administrative Procedure Act (2010) § 702(b).

4 Model State Administrative Procedure Act (2010) § 702(c).

5 Model State Administrative Procedure Act (2010) § 703.

6 Model State Administrative Procedure Act (1981) § 3-201.

7 Model State Administrative Procedure Act (1981) § 3-203.

8 Model State Administrative Procedure Act (1981) § 3-204(a).

9 Model State Administrative Procedure Act (1981) § 3-204(e).

End of Document

2 Am. Jur. 2d Administrative Law V B Refs.

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

B. Types of Rules and Agency Statements

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 381 to 384

A.L.R. Library

A.L.R. Index, Administrative Law
West's A.L.R. Digest, Administrative Law and Procedure 381 to 384

End of Document

2 Am. Jur. 2d Administrative Law § 138

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

B. Types of Rules and Agency Statements

1. In General

§ 138. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 382.1, 383

A.L.R. Library

What constitutes "interpretative rule" of agency so as to exempt such action from notice requirements of Administrative Procedure Act (5 U.S.C.A. sec. 553(b)(3)(A)), 126 A.L.R. Fed. 347

The Federal Administrative Procedure Act (APA)[1] recognizes the existence of legislative rules (sometimes referred to as substantive rules),[2] interpretive rules,[3] procedural rules,[4] and general statements of policy.[5] While the APA does not define these terms, courts have developed definitions.[6]

The Model State Administrative Procedure Act does not use these terms although state courts[7] and a state's administrative procedure act[8] may do so.

A state's administrative procedure act does not require every agency decision to be in the form of a rule.[9] Thus, a state agency can carry out its statutorily appointed day-to-day tasks without every action being considered an exercise in rulemaking,[10] and not every piece of paper emanating from an agency is a regulation.[11] However, an agency may not adopt a guideline or policy directive in lieu of a rule.[12]

Footnotes

1 5 U.S.C.A. § 553.

2 As to legislative rules, generally, see § 140.

3 As to interpretive rules, generally, see § 142.

4 As to procedural rules, generally, see § 144.

5 As to general statements of policy, generally, see § 145.

6 Chrysler Corp. v. Brown, 441 U.S. 281, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979).

7 Engineering Management Services, Inc. v. Maryland State Highway Admin., 375 Md. 211, 825 A.2d 966 (2003). There are two categories of administrative rules, quasi-legislative and interpretative. In re Cabrera, 55 Cal. 4th 683, 148 Cal. Rptr. 3d 500, 287 P.3d 72 (2012).

8 Coordinating Council for Independent Living, Inc. v. Palmer, 209 W. Va. 274, 546 S.E.2d 454 (2001).

9 Oklahoma Public Employees Ass'n v. Oklahoma Dept. of Central Services, 2002 OK 71, 55 P.3d 1072 (Okla. 2002).

10 Arkansas Pharmacist's Ass'n, Inc. v. Arkansas State and Public School Life and Health Ins. Bd., 352 Ark. 1, 98 S.W.3d 27 (2003).

11 Chiron Corp. and PerSeptive Biosystems, Inc. v. National Transp. Safety Bd., 198 F.3d 935 (D.C. Cir. 1999).

12 Jordan v. Department of Corrections, 165 Mich. App. 20, 418 N.W.2d 914 (1987).

End of Document

2 Am. Jur. 2d Administrative Law § 139

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

B. Types of Rules and Agency Statements

1. In General

§ 139. Determination of character of statement or directive

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 382.1, 383

The inquiry as to whether a statement is a rule, and subject to the rule-making requirements,[1] focus on whether the policy being implemented has the effect of being a rule.[2] An agency's intent to create a regulation is ascertained by examination of the provision's language, its context, and any available extrinsic evidence.[3] The characterization[4] or label an agency gives its rules is not dispositive or conclusive[5] although the label carries some weight.[6]

Footnotes

1 As to the federal and state rule-making requirements, see §§ 142 to 182 and §§ 183 to 206, respectively.

2 Constantino v. Michigan Dept. of State Police, 707 F. Supp. 2d 724 (W.D. Mich. 2010), order amended on other grounds, 2010 WL 4115385 (W.D. Mich. 2010).

3 Kearney Partners Fund, LLC ex rel. Lincoln Partners Fund, LLC v. U.S., 946 F. Supp. 2d 1302 (M.D. Fla. 2013); Yankton Sioux Tribe v. Kempthorne, 442 F. Supp. 2d 774, 212 Ed. Law Rep. 304 (D.S.D. 2006).

4 U.S. v. Alameda Gateway Ltd., 213 F.3d 1161 (9th Cir. 2000); Eastwood Nursing and Rehabilitation Center v. Dept. of Public Welfare, 910 A.2d 134 (Pa. Commw. Ct. 2006).

5 Time Warner Cable Inc. v. F.C.C., 729 F.3d 137 (2d Cir. 2013); Constantino v. Michigan Dept. of State Police, 707 F. Supp. 2d 724 (W.D. Mich. 2010), order amended on other grounds, 2010 WL 4115385 (W.D. Mich. 2010); Sams v. Department of Environmental Protection, 308 Conn. 359, 63 A.3d 953 (2013).
An agency's own label as to whether a rule is interpretive, while relevant, is not dispositive. Ace Property & Cas. Ins. Co. v. Federal Crop Ins. Corp., 517 F. Supp. 2d 391 (D.D.C. 2007).
As to the weight given a federal agency's characterization of a rule as exempt from the Federal Administrative

Procedure Act, see § 176.

6 Truckers United for Safety v. Federal Highway Admin., 139 F.3d 934 (D.C. Cir. 1998).

End of Document

2 Am. Jur. 2d Administrative Law § 140

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

B. Types of Rules and Agency Statements

2. Legislative Rules

§ 140. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 382 to 384

A.L.R. Library

What constitutes "interpretative rule" of agency so as to exempt such action from notice requirements of Administrative Procedure Act (5 U.S.C.A. sec. 553(b)(3)(A)), 126 A.L.R. Fed. 347

Treatises and Practice Aids

As to types of rules, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

"Legislative rules," also known as substantive rules,[1] are those issued pursuant to statutory authority or legislative delegation[2] that—
— implement a statute.[3]
— effect a change in existing law or policy.[4]
— grant rights or impose obligations.[5]
— create new law, rights, or duties,[6] in what amounts to a legislative act.[7]
— impose general, extrastatutory obligations[8] or new duties upon a regulated party.[9]
— affect individual rights and obligations.[10]
— have a "substantial impact" on those to whom they apply.[11]

— implement a statute.[12]
— create substantive law,[13]usually implementary to existing law.[14]
However, it has been held that the impact of a rule has no bearing on whether it is legislative, interpretative, or procedural for the purposes of the Federal Administrative Procedure Act and that an otherwise-procedural rule does not become a substantive one simply because it imposes a burden on regulated parties.[15]

Observation:

If a rule is based on an agency's power to exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a "legislative rule."[16]

CUMULATIVE SUPPLEMENT

Cases:

A "substantive rule," as requires notice and comment period pursuant to Administrative Procedure Act (APA), is one issued by an agency pursuant to statutory authority, which implements the statute and has the force and effect of law. 5 U.S.C. § 553(b). Scenic America, Inc. v. United States Department of Transportation, 49 F. Supp. 3d 53 (D.D.C. 2014).

[END OF SUPPLEMENT]

Footnotes

1 American Tort Reform Ass'n v. Occupational Safety & Health Admin., 738 F.3d 387 (D.C. Cir. 2013); Building Materials Corp. of America v. Board of Educ. of Baltimore County, 428 Md. 572, 53 A.3d 347, 285 Ed. Law Rep. 455 (2012).

2 Batterton v. Francis, 432 U.S. 416, 97 S. Ct. 2399, 53 L. Ed. 2d 448 (1977); Building Materials Corp. of America v. Board of Educ. of Baltimore County, 428 Md. 572, 53 A.3d 347, 285 Ed. Law Rep. 455 (2012).
As to the delegation of rule-making power by the legislature, see § 127.

3 U.S. v. Stevenson, 676 F.3d 557 (6th Cir. 2012), cert. denied, 133 S. Ct. 168, 184 L. Ed. 2d 236 (2012).

4 Miller v. California Speedway Corp., 536 F.3d 1020 (9th Cir. 2008); American Tort Reform Ass'n v. Occupational Safety & Health Admin., 738 F.3d 387 (D.C. Cir. 2013); Kiley v. Federal Bureau of Prisons, 333 F. Supp. 2d 406 (D. Md. 2004).

5 American Tort Reform Ass'n v. Occupational Safety & Health Admin., 738 F.3d 387 (D.C. Cir. 2013); Kiley v. Federal Bureau of Prisons, 333 F. Supp. 2d 406 (D. Md. 2004).

6 Cnty. of Clark v. LB Props., Inc., 315 P.3d 294, 129 Nev. Adv. Op. No. 96 (Nev. 2013); Building Materials Corp. of America v. Board of Educ. of Baltimore County, 428 Md. 572, 53 A.3d 347, 285 Ed. Law Rep. 455 (2012).
An agency creates a "legislative rule," for purposes of the Administrative Procedure Act, when it creates a new legal norm based on the agency's own authority to engage in supplementary lawmaking. Iowa League of Cities v. E.P.A.,

711 F.3d 844 (8th Cir. 2013).

7 New York State Elec. & Gas Corp. v. Saranac Power Partners, L.P., 267 F.3d 128 (2d Cir. 2001).

8 U.S. v. Gonzales & Gonzales Bonds and Ins. Agency, Inc., 728 F. Supp. 2d 1077 (N.D. Cal. 2010).

9 Chao v. Rothermel, 327 F.3d 223 (3d Cir. 2003).

10 Nguyen v. B.I. Inc., 435 F. Supp. 2d 1109 (D. Or. 2006); State v. Copes, 175 Md. App. 351, 927 A.2d 426 (2007).
For administrative rule to have the force and effect of law, it must be legislative in nature, affecting individual rights and obligations. Freedom Foundation v. Washington State Dept. of Transp., Div. of Washington State Ferries, 168 Wash. App. 278, 276 P.3d 341 (Div. 2 2012).

11 U.S. Dept. of Labor v. Kast Metals Corp., 744 F.2d 1145 (5th Cir. 1984).
A regulation must be a rule of sufficient generality to impinge substantially on others who will deal with the agency at a future time. Pierce v. Lantz, 113 Conn. App. 98, 965 A.2d 576 (2009).
A substantive or legislative rule produces significant effects on private interests. American Tort Reform Ass'n v. Occupational Safety & Health Admin., 738 F.3d 387 (D.C. Cir. 2013); Kiley v. Federal Bureau of Prisons, 333 F. Supp. 2d 406 (D. Md. 2004).

12 U.S. v. Stevenson, 676 F.3d 557 (6th Cir. 2012), cert. denied, 133 S. Ct. 168, 184 L. Ed. 2d 236 (2012).

13 Minnesota Transitions Charter School v. Commissioner of Minnesota Dept. of Educ., 844 N.W.2d 223, 302 Ed. Law Rep. 1198 (Minn. Ct. App. 2014).

14 Board of Trustees of Knox County Hosp. v. Shalala, 135 F.3d 493, 48 Fed. R. Evid. Serv. 1034 (7th Cir. 1998).

15 James V. Hurson Associates, Inc. v. Glickman, 229 F.3d 277, 47 Fed. R. Serv. 3d 1238 (D.C. Cir. 2000).

16 Star Enterprise v. U.S. E.P.A., 235 F.3d 139 (3d Cir. 2000), as amended, (Feb. 20, 2001).

End of Document

2 Am. Jur. 2d Administrative Law § 141

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

B. Types of Rules and Agency Statements

2. Legislative Rules

§ 141. Force and effect; proper promulgation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 382 to 384

Legislative or substantive rules have the force and effect of law and are binding on all persons and the courts.[1] Indeed, it has been held that the primary criterion in determining whether an agency action constitutes a legislative rule is whether the action binds private parties or the agency itself with the force of law[2] or whether the rule has legal effect[3] on private persons, and not merely the internal management or organization of a state agency.[4]

Legislative rules must be promulgated in accordance with proper procedures under a jurisdiction's administrative procedure act,[5] including the notice-and-comment requirements under the Federal Administrative Procedure Act.[6] Indeed, an administrative rule has the force of law only if the agency promulgated it with delegated authority.[7] Thus, when a court assessing the validity of quasi-legislative administrative rules is satisfied that the rule in question lay within the lawmaking authority delegated by the legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end.[8]

The inclusion in a bill which authorizes the promulgation of legislative rules pertaining to multiple agencies within one executive department does not violate the one object rule of a state constitution.[9]

CUMULATIVE SUPPLEMENT

Cases:

Rules issued through the Administrative Procedure Act's (APA) notice-and-comment process are often referred to as legislative rules because they have the force and effect of law. 5 U.S.C.A. § 553. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

Nursing homes were not likely to prevail on issue of whether Center for Medicare and Medicaid Services (CMS) acted arbitrarily and capriciously in enacting rule, which would effectively bar nursing homes receiving federal funds from entering into new pre-dispute arbitration agreements with their residents, weighing against preliminary injunction prohibiting enforcement of rule in nursing homes' action under Administrative Procedure Act (APA) seeking declaration that rule was unlawful, since fact that rule was change from CMS' prior stated position on issue was insufficient to demonstrate that CMS acted arbitrarily or capriciously. 5 U.S.C.A. § 551 et seq.; 42 C.F.R. § 483.70(n)(1). American Health Care Association v. Burwell, 217 F. Supp. 3d 921 (N.D. Miss. 2016).

Beneficiaries of state Medicaid program providing home-based services to low-income individuals with physical disabilities demonstrated likelihood of success on the merits of their claim that, by failing to provide proper notice, Department of Human Services (DHS) did not substantially comply with Administrative Procedure Act (APA) in promulgating new rule implementing reassessment system for determining attendant-care hours, as required to issue temporary restraining order (TRO) enjoining DHS from reducing beneficiaries' hours under new system; beneficiaries showed that, although DHS's proposed rule was submitted to the public, there was no mention of the new reassessment system in DHS's notice of rule making. Ark. Code Ann. § 25-15-204; Ark. R. Civ. P. 65. Arkansas Department of Human Services v. Ledgerwood, 2017 Ark. 308, 530 S.W.3d 336 (2017).

Although the Supreme Court does not defer to an administrative agency's interpretation of a rule when that interpretation is not promulgated, agencies may argue in favor of the interpretation as a litigation position, and the Supreme Court may adopt the interpretation when the Court's de novo consideration leads it to conclude that the interpretation is correct. Matter of Minnesota Living Assistance, Inc., 934 N.W.2d 300 (Minn. 2019).

[END OF SUPPLEMENT]

Footnotes

1 § 223.

2 General Elec. Co. v. E.P.A., 290 F.3d 377 (D.C. Cir. 2002).

3 Truckers United for Safety v. Federal Highway Admin., 139 F.3d 934 (D.C. Cir. 1998).

4 Texas Dept. of Transp. v. Sunset Transp., Inc., 357 S.W.3d 691 (Tex. App. Austin 2011), reh'g overruled, (Jan. 13, 2012).

5 SBC Inc. v. Federal Communications Com'n, 414 F.3d 486 (3d Cir. 2005); State of Alaska, Alaska Bd. of Fisheries v. Grunert, 139 P.3d 1226 (Alaska 2006) (emergency regulations).

6 Time Warner Cable Inc. v. F.C.C., 729 F.3d 137 (2d Cir. 2013); Sorenson Communications, Inc. v. F.C.C., 567 F.3d 1215 (10th Cir. 2009); American Tort Reform Ass'n v. Occupational Safety & Health Admin., 738 F.3d 387 (D.C. Cir. 2013); Alabama v. Centers for Medicare & Medicaid Services, 780 F. Supp. 2d 1219 (M.D. Ala. 2011), aff'd, 674 F.3d 1241 (11th Cir. 2012).
As to the procedure for the promulgation of rules, generally, see §§ 147 to 206.

7 Pierce County v. State, 144 Wash. App. 783, 185 P.3d 594 (Div. 2 2008), as amended on denial of reconsideration, (July 15, 2008).

8 In re Cabrera, 55 Cal. 4th 683, 148 Cal. Rptr. 3d 500, 287 P.3d 72 (2012).

9 Swiger v. UGI/AmeriGas, Inc., 216 W. Va. 756, 613 S.E.2d 904 (2005).

End of Document

2 Am. Jur. 2d Administrative Law § 142

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

B. Types of Rules and Agency Statements

3. Interpretative Rules

§ 142. Interpretive rules; agency definitions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 381, 382.1, 383

A.L.R. Library

What constitutes "interpretative rule" of agency so as to exempt such action from notice requirements of Administrative Procedure Act (5 U.S.C.A. sec. 553(b)(3)(A)), 126 A.L.R. Fed. 347

Treatises and Practice Aids

As to types of rules, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

Judicial decisions frequently contrast legislative rules and interpretative rules.[1] Unlike a legislative rule,[2] an interpretative rule—

— is not an attempt to make new law or modify existing law,[3] but rather instructs as to what an agency[4] or administrative officer[5] thinks a statute or regulation means.

— does not create rights,[6] but merely clarifies[7] or explains[8] an existing statute or regulation.
— gives guidance to its staff and affected parties as to how the agency intends to administer a statute or regulation.[9]
— advises the public of the agency's construction of the rules it administers.[10]

— only reminds the affected parties of existing duties.[11]
— only interprets the statute to guide the administrative agency in the performance of its duties.[12]
— describes the type of factors which an agency will consider in future administrative proceedings without, however, binding the agency to a particular result.[13]

Agency manuals, guidelines, and memoranda may be interpretive rules[14]though a manual may have the force and effect of law if promulgated in accordance with the Federal Administrative Procedure Act.[15]A "program statement" is an internal administrative agency guideline which is akin to an interpretive rule.[16]

CUMULATIVE SUPPLEMENT

Cases:

The critical feature of interpretive rules, which are not subject to the Administrative Procedure Act's (APA) notice-and-comment requirement, is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers. 5 U.S.C.A. § 553(b)(A). Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

Interpretive rules, which are not subject to the Administrative Procedure Act's (APA) notice-and-comment requirement, do not have the force and effect of law and are not accorded that weight in the adjudicatory process. 5 U.S.C.A. § 553(b)(A). Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

If the language of an agency's document is such that private parties can rely on it as a safe harbor by which to shape their actions, it can be binding as a practical matter, as factor in determining whether document is "interpretive rule" under Administrative Procedure Act (APA). 5 U.S.C.A. § 553. Securities Industry and Financial Markets Association v. United States Commodity Futures Trading Commission, 67 F. Supp. 3d 373 (D.D.C. 2014).

The distinction between legislative rules, which are subject to rigorous notice-and-comment rulemaking procedures and interpretive rules, which are not, turns primarily on whether the rule has binding legal effect, and a court makes that assessment by considering the agency's characterization of the guidance and whether the agency has applied the guidance as binding on the parties. 5 U.S.C.A. § 553. United States v. US Stem Cell Clinic, LLC, 403 F. Supp. 3d 1279 (S.D. Fla. 2019).

The touchstone for distinguishing an interpretive rule from one subject to notice and comment under the Administrative Procedure Act (APA) is whether the rule clarifies an existing statute or regulation, on the one hand, or creates new law, rights, or duties in what amounts to a legislative act, on the other; if the rule is an interpretation of a statute rather than an extra-statutory imposition of rights, duties or obligations, it remains interpretive even if the rule embodies the agency's changed interpretation of the statute. 5 U.S.C.A. § 553. Natural Resources Defense Council, Inc. v. U.S. Department of the Interior, 397 F. Supp. 3d 430 (S.D. N.Y. 2019).

An interpretive rule serves the advisory function of explaining the meaning of a word or phrase in a statute or other rule and describes the type of factors that an agency will consider in future administrative proceedings without, however, binding the agency to a particular result. Colo. Rev. Stat. Ann. § 24-4-103(1). Doe 1 v. Colorado Department of Public Health and Environment, 2019 CO 92, 451 P.3d 851 (Colo. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Cooper Technologies Co. v. Dudas, 536 F.3d 1330 (Fed. Cir. 2008); Moorestown Tp. Bd. of Educ. v. S.D., 811 F. Supp. 2d 1057, 276 Ed. Law Rep. 196 (D.N.J. 2011); Building Materials Corp. of America v. Board of Educ. of

Baltimore County, 428 Md. 572, 53 A.3d 347, 285 Ed. Law Rep. 455 (2012); State v. Harenda Enterprises, Inc., 2008 WI 16, 307 Wis. 2d 604, 746 N.W.2d 25 (2008).

2 As to legislative rules, generally, see § 140.

3 National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs, 260 F.3d 1365 (Fed. Cir. 2001).
If an administrative agency rule is inconsistent with or amends an existing legislative rule, then it cannot be interpretive since it would impose new rights or obligations by changing an existing law. Mora-Meraz v. Thomas, 601 F.3d 933 (9th Cir. 2010).

4 Building Materials Corp. of America v. Board of Educ. of Baltimore County, 428 Md. 572, 53 A.3d 347, 285 Ed. Law Rep. 455 (2012).
An "interpretive rule" represents the agency's reading of statutes and rules. Guerra v. Shinseki, 642 F.3d 1046 (Fed. Cir. 2011), cert. denied, 132 S. Ct. 1795, 182 L. Ed. 2d 617 (2012).

5 Davidson v. Glickman, 169 F.3d 996 (5th Cir. 1999).

6 U.S. v. Lott, 2014 WL 1622796 (2d Cir. 2014).

7 U.S. v. Lott, 2014 WL 1622796 (2d Cir. 2014); Dismas Charities, Inc. v. U.S. Dept. of Justice, 401 F.3d 666, 2005 FED App. 0128P (6th Cir. 2005); Cooper Technologies Co. v. Dudas, 536 F.3d 1330 (Fed. Cir. 2008).

8 Miller v. California Speedway Corp., 536 F.3d 1020 (9th Cir. 2008); Northwestern Youth Services, Inc. v. Com., Dept. of Public Welfare, 66 A.3d 301 (Pa. 2013); State v. Harenda Enterprises, Inc., 2008 WI 16, 307 Wis. 2d 604, 746 N.W.2d 25 (2008).

9 Moorestown Tp. Bd. of Educ. v. S.D., 811 F. Supp. 2d 1057, 276 Ed. Law Rep. 196 (D.N.J. 2011).

10 Miller v. California Speedway Corp., 536 F.3d 1020 (9th Cir. 2008); Sorenson Communications, Inc. v. F.C.C., 567 F.3d 1215 (10th Cir. 2009); Firearms Import/Export Roundtable Trade Group v. Jones, 854 F. Supp. 2d 1 (D.D.C. 2012), aff'd, 498 Fed. Appx. 50 (D.C. Cir. 2013).

11 Building Materials Corp. of America v. Board of Educ. of Baltimore County, 428 Md. 572, 53 A.3d 347, 285 Ed. Law Rep. 455 (2012).

12 Department of Public Safety and Correctional Services v. Beard, 142 Md. App. 283, 790 A.2d 57 (2002).

13 Joseph v. Mieka Corp., 2012 COA 84, 282 P.3d 509 (Colo. App. 2012).

14 Mile High Therapy Centers, Inc. v. Bowen, 735 F. Supp. 984 (D. Colo. 1988).

15 Roath v. U.S., 843 F. Supp. 2d 944 (E.D. Wis. 2011), on reconsideration, 2012 WL 4718123 (E.D. Wis. 2012).

16 Tablada v. Thomas, 533 F.3d 800 (9th Cir. 2008).

End of Document

2 Am. Jur. 2d Administrative Law § 143

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

B. Types of Rules and Agency Statements

3. Interpretative Rules

§ 143. Authority to issue; exemption from notice and comment; lack of legal effect

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 381, 382.1, 383

A.L.R. Library

What constitutes "interpretative rule" of agency so as to exempt such action from notice requirements of Administrative Procedure Act (5 U.S.C.A. sec. 553(b)(3)(A)), 126 A.L.R. Fed. 347

Treatises and Practice Aids

As to types of rules, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

An agency charged with the duty to enforce or administer a statute has inherent authority to issue interpretive rules[1] informing the public of the procedures and standards it intends to apply in exercising its discretion.[2] Agency rules which are merely interpretive are exempt from statutory notice-and-comment requirements of the Federal Administrative Procedure Act[3] and the administrative procedure acts of some states.[4] Interpretative regulations generally lack the force and effect of law.[5] However, as a practical matter, an interpretive rule affects the regulatory practices of an agency or the expectations of a regulated entity as to what a law or regulation means and how it will be enforced; when it has a substantial impact on the rights of individuals, its promulgation may constitute final agency action for purposes of judicial review under the Federal Administrative Procedure Act.[6]

When an agency announces a new statutory interpretation, and thus engages in interpretive rulemaking, it may do so through adjudication without complying with the notice and comment provisions of a state administrative procedure act and, in many cases, may give retroactive effect to the interpretation in the case in which the new interpretation is announced because the agency is not really effecting a change in the law.[7]

CUMULATIVE SUPPLEMENT

Cases:

Language in an agency policy that merely reminds parties of existing duties is interpretive and thus not subject to rulemaking requirements of state Administrative Procedure Act (APA). Colo. Rev. Stat. Ann. § 24-4-103(1). Doe 1 v. Colorado Department of Public Health and Environment, 2019 CO 92, 451 P.3d 851 (Colo. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Association of Washington Business v. State, Dept. of Revenue, 121 Wash. App. 766, 90 P.3d 1128 (Div. 2 2004), aff'd as modified, 155 Wash. 2d 430, 120 P.3d 46 (2005).

2 Durable Mfg. Co. v. U.S. Dept. of Labor, 584 F. Supp. 2d 1092 (N.D. Ill. 2008), judgment aff'd, 578 F.3d 497 (7th Cir. 2009).

3 § 174.

4 § 204.

5 Erringer v. Thompson, 371 F.3d 625 (9th Cir. 2004); Segarra v. Federal Reserve of New York, 2014 WL 1660040 (S.D. N.Y. 2014).

6 Defenders of Wildlife v. Tuggle, 607 F. Supp. 2d 1095 (D. Ariz. 2009).

7 Andrews v. District of Columbia Police and Firefighters Retirement and Relief Bd., 991 A.2d 763 (D.C. 2010).

End of Document

2 Am. Jur. 2d Administrative Law § 144

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

B. Types of Rules and Agency Statements

4. Procedural Rules; Policy Statements

§ 144. Procedural rules

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 381, 382.1, 383

A.L.R. Library

What constitutes "interpretative rule" of agency so as to exempt such action from notice requirements of Administrative Procedure Act (5 U.S.C.A. sec. 553(b)(3)(A)), 126 A.L.R. Fed. 347

Treatises and Practice Aids

As to types of rules, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

Procedural rules generally deal with an agency's methods of operation and are not intended to change the agency's basic regulatory standards.[1]Absent constitutional constraints or extremely compelling circumstances, administrative agencies should be free to fashion their own rules of procedure[2]though those regulations must be reasonably related to the purposes of the enabling legislation.[3]Indeed, some states allow agencies to make rules for the conduct of their own procedures even without explicit statutory authorization.[4]

"Procedural rules" are those that do not themselves alter the rights or interests of the parties[5]though they may alter the manner in which the parties present themselves or their viewpoints to the agency.[6]Rules that prescribe a timetable for asserting substantive rights are procedural.[7]

However, it is also recognized that procedural rules may affect substantive rights[8]to some degree,[9]and where a procedural rule, such as a new rule of evidence,[10]has a substantial impact on a party's rights, the distinction between procedural and substantive rules breaks down.[11]An agency rule that modifies substantive rights can only be nominally procedural.[12]However, the substantial impact test has been rejected,[13]and it has been held that a procedural rule does not become substantive merely because it has a substantive impact as by denying parties the opportunity to appeal if they fail to comply with certain procedures.[14]

Observation:

Over time, in applying the exception to the Federal Administrative Procedure Act for notice-and-comment provisions for procedural rules,[15]at least one federal circuit court has gradually shifted focus from asking whether a given procedure has a "substantial impact" on parties to inquiring more broadly whether the agency action "encodes a substantive value judgment."[16]

CUMULATIVE SUPPLEMENT

Cases:

Beyond the Administrative Procedure Act's (APA) minimum requirements, courts lack authority to impose upon an agency their own notion of which procedures are best or most likely to further some vague, undefined public good, since to do so would violate the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure. 5 U.S.C.A. § 551 et seq. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

Agencies are free, in the exercise of their discretion, to grant procedural rights in addition to the Administrative Procedure Act's (APA) procedures for rulemaking, but reviewing courts are generally not free to impose such rights if the agencies have not chosen to grant them. 5 U.S.C.A. § 553. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

Beyond the Administrative Procedure Act's (APA) minimum requirements, courts lack authority to impose upon an agency their own notion of which procedures are best or most likely to further some vague, undefined public good, since to do so would violate the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure. 5 U.S.C.A. § 551 et seq. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

Agencies are free, in the exercise of their discretion, to grant procedural rights in addition to the Administrative Procedure Act's (APA) procedures for rulemaking, but reviewing courts are generally not free to impose such rights if the agencies have not chosen to grant them. 5 U.S.C.A. § 553. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

Critical feature of a procedural rule not subject to notice-and-comment rulemaking under Administrative Procedure Act (APA) is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency; such rules ensure that agencies retain latitude in organizing their internal operations. 5 U.S.C.A. § 553(b)(3)(A). Rocky Mountain Health Maintenance Organization, Inc. v. Azar, 384 F. Supp. 3d 80 (D.D.C. 2019).

[END OF SUPPLEMENT]

Footnotes

[1] Aiken v. Obledo, 442 F. Supp. 628 (E.D. Cal. 1977).

[2] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978).

[3] Liadov v. Mukasey, 518 F.3d 1003 (8th Cir. 2008).

[4] Weyerhaeuser Co. v. Miller, 306 Or. 1, 760 P.2d 1317 (1988).

[5] Time Warner Cable Inc. v. F.C.C., 729 F.3d 137 (2d Cir. 2013); Electronic Privacy Information Center v. U.S. Dept. of Homeland Sec., 653 F.3d 1 (D.C. Cir. 2011); National Mining Ass'n v. Jackson, 816 F. Supp. 2d 37 (D.D.C. 2011).

[6] Time Warner Cable Inc. v. F.C.C., 729 F.3d 137 (2d Cir. 2013); Electronic Privacy Information Center v. U.S. Dept. of Homeland Sec., 653 F.3d 1 (D.C. Cir. 2011).

[7] National Whistleblower Center v. Nuclear Regulatory Com'n, 208 F.3d 256 (D.C. Cir. 2000).
Time limitations imposed upon administrative agencies by their own regulations are not mandatory. Giambrone v. Grannis, 88 A.D.3d 1272, 930 N.Y.S.2d 735 (4th Dep't 2011).

[8] E.E.O.C. v. National Cash Register Co., 405 F. Supp. 562 (N.D. Ga. 1975).

[9] Time Warner Cable Inc. v. F.C.C., 729 F.3d 137 (2d Cir. 2013).

[10] Pharmaceutical Mfrs. Ass'n v. Finch, 307 F. Supp. 858 (D. Del. 1970) (rejected by, Animal Legal Defense Fund v. Quigg, 710 F. Supp. 728 (N.D. Cal. 1989)).

[11] Sannon v. U.S., 460 F. Supp. 458 (S.D. Fla. 1978).
As to legislative or substantive rules, see § 140.

[12] U.S. Dept. of Labor v. Kast Metals Corp., 744 F.2d 1145 (5th Cir. 1984).

[13] Animal Legal Defense Fund v. Quigg, 710 F. Supp. 728 (N.D. Cal. 1989).

[14] U.S. v. Gonzales & Gonzales Bonds and Ins. Agency, Inc., 728 F. Supp. 2d 1077 (N.D. Cal. 2010).

[15] As to the exception to the notice-and-comment provisions for procedural rules under federal law, see § 175.

[16] National Sec. Counselors v. C.I.A., 931 F. Supp. 2d 77 (D.D.C. 2013).

End of Document

2 Am. Jur. 2d Administrative Law § 145

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

B. Types of Rules and Agency Statements

4. Procedural Rules; Policy Statements

§ 145. Policy statements; federal law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 381, 382.1, 383

Treatises and Practice Aids

As to types of rules, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

Agency policy statements are often important guides to the exercise of discretion.[1]However, they have been described as lacking the firmness of a prescribed standard[2]and are generally considered not to be substantive rules[3]or subject to rule-making requirements.[4]If an agency's "rule" leaves the agency free to exercise discretion, it is likely a policy statement.[5]Indeed, the key inquiry in determining whether an agency has issued a rule or a policy statement is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case.[6]Further, a policy statement, promulgated without notice and comment, does not become a regulation simply because an agency chooses to publish it in the Code of Federal Regulations.[7]

The distinction between a "substantive rule" and a "policy statement," for purposes of determining the propriety of judicial review of agency positions, turns largely on whether the agency position is one of present binding effect,[8]that is, whether it constrains the agency's discretion.[9]In other words, an agency's general statement of policy differs from a substantive rule in that a policy statement is neither a rule nor a precedent but merely announces to the public the policy which the agency hopes to implement in future rulemakings or adjudication.[10]

However, where a policy statement purports to create substantive requirements, it can be a legislative rule regardless of the agency's characterization.[11]Thus, an agency policy statement may be invalid if it is intended to impose obligations or to limit the rights of members of the public but not be published in the Federal Register as a regulation in accordance with the

Administrative Procedure Act.[12]

Footnotes

1 Davis Walker Corp. v. Blumenthal, 460 F. Supp. 283 (D.D.C. 1978).

2 Sprint Corp. v. F.C.C., 315 F.3d 369 (D.C. Cir. 2003).

3 Pelissero v. Thompson, 170 F.3d 442 (4th Cir. 1999); Panhandle Eastern Pipe Line Co. v. F.E.R.C., 198 F.3d 266 (D.C. Cir. 1999).

4 New Hope Power Co. v. U.S. Army Corps of Engineers, 746 F. Supp. 2d 1272 (S.D. Fla. 2010).
As to the exemption from rule-making procedures for federal policy statements, generally, see § 175.

5 U.S. v. Vertac Chemical Corp., 453 F.3d 1031 (8th Cir. 2006); Broadgate Inc. v. U.S. Citizenship & Immigration Services, 730 F. Supp. 2d 240 (D.D.C. 2010).

6 New Hope Power Co. v. U.S. Army Corps of Engineers, 746 F. Supp. 2d 1272 (S.D. Fla. 2010).

7 ANR Pipeline Co. v. F.E.R.C., 205 F.3d 403 (D.C. Cir. 2000).

8 Interstate Natural Gas Ass'n of America v. F.E.R.C., 285 F.3d 18 (D.C. Cir. 2002).
An agency's policy guidelines amount to a general statement of policy, rather than a binding rule, even though the guidelines are voluntarily followed by automakers and have become a de facto industry standard where the guidelines do not have legal consequences since the agency never codified the practices in binding regulations. Center for Auto Safety v. National Highway Traffic Safety Admin., 452 F.3d 798 (D.C. Cir. 2006).

9 Interstate Natural Gas Ass'n of America v. F.E.R.C., 285 F.3d 18 (D.C. Cir. 2002).

10 Panhandle Eastern Pipe Line Co. v. F.E.R.C., 198 F.3d 266 (D.C. Cir. 1999).

11 South Dakota v. Ubbelohde, 330 F.3d 1014, 56 Fed. R. Serv. 3d 271 (8th Cir. 2003).

12 Farrell v. Department Of Interior, 314 F.3d 584 (Fed. Cir. 2002).
As to the validity of rules, generally, see §§ 214 to 222.

End of Document

2 Am. Jur. 2d Administrative Law § 146

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

B. Types of Rules and Agency Statements

4. Procedural Rules; Policy Statements

§ 146. Policy statements; federal law—Under state law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 381, 382.1, 383

A pronouncement that leaves a state agency with discretion to deviate from its terms can be held to be a statement of policy, not a regulation.[1] A statement of policy expresses what the agency hopes to implement in future rulemakings or adjudications, but has no immediate effect, while, by contrast, a regulation establishes a standard of conduct which has the force of law.[2] Policy statements may not have to be promulgated as rules under state law.[3] However, rules which govern administrative regulations may apply to an administrative agency policy which has the effect of a regulation.[4]

Footnotes

1 Transportation Services, Inc. v. Underground Storage Tank Indemnification Bd., 67 A.3d 142 (Pa. Commw. Ct. 2013).

2 Borough of Bedford v. Com., Dept. of Environmental Protection, 972 A.2d 53 (Pa. Commw. Ct. 2009).

3 State ex rel. Com'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

4 Agnew v. State Bd. of Equalization, 21 Cal. 4th 310, 87 Cal. Rptr. 2d 423, 981 P.2d 52 (1999).

End of Document

2 Am. Jur. 2d Administrative Law V C Refs.

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392 to 409, 418

A.L.R. Library

A.L.R. Index, Administrative Law
West's A.L.R. Digest, Administrative Law and Procedure 392 to 409, 418

End of Document

2 Am. Jur. 2d Administrative Law § 147

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

a. In General; Informal Rulemaking

(1) In General

§ 147. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392.1

A.L.R. Library

Federal requirements for public participation in adoption, submission, and approval of state implementation plans and revisions pursuant to sec. 110 of Clean Air Act (42 U.S.C.A. sec. 7410), 151 A.L.R. Fed. 445

Treatises and Practice Aids

As to notice-and-comment procedure, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw® Search Query]

The Federal Administrative Procedure Act (APA)[1] requires that rules promulgated by administrative agencies undergo certain procedures.[2] Generally, the legislative fact-finding technique known as notice-and-comment rulemaking must be followed[3] in promulgating substantive or legislative rules[4] or when the agency's pronouncement appears on its face to be binding, or is applied by the agency in a way that indicates it is binding,[5] subject to certain exceptions,[6] unless formal rulemaking is required,[7] or negotiated rulemaking occurs.[8] More specifically, the promulgation of substantive rules requires:

— notice of the proposed rule[9]
— a hearing or receipt and consideration of public comments[10]
— adoption of a rule after consideration of the relevant matter presented[11]
— publication of the new rule[12]

CUMULATIVE SUPPLEMENT

Cases:

The Administrative Procedure Act's (APA) requirement that an agency offer public notice and a comment period before adopting new regulations does not apply to public benefit programs like Medicare. 5 U.S.C.A. § 553(a)(2); 42 U.S.C.A. § 1395 et seq. Azar v. Allina Health Services, 139 S. Ct. 1804 (2019).

An administrative agency adopting permanent rules must comply with numerous procedural steps to provide public notice and receive public input; however, when adopting temporary rules, an agency has fewer procedural steps to follow, and those steps do not need to include pre-adoption notice and comment. Or. Rev. Stat. § 183.335(5). Friends of the Columbia Gorge v. Energy Facility Siting Council, 366 Or. 78, 456 P.3d 635 (2020).

[END OF SUPPLEMENT]

Footnotes

1 5 U.S.C.A. § 553.

2 Center for Biological Diversity v. Brennan, 571 F. Supp. 2d 1105 (N.D. Cal. 2007).
Regulations subject to the APA cannot be afforded the force and effect of law if not promulgated pursuant to the statutory procedural minimum found in the APA. Alaska Oil and Gas Ass'n v. Salazar, 916 F. Supp. 2d 974 (D. Alaska 2013).

3 L.A. Closeout, Inc. v. Department of Homeland Sec., 513 F.3d 940 (9th Cir. 2008) (legislative rules); Segarra v. Federal Reserve of New York, 2014 WL 1660040 (S.D. N.Y. 2014).
As to procedures for comment under the Federal APA, see §§ 154, 155.

4 American Tort Reform Ass'n v. Occupational Safety & Health Admin., 738 F.3d 387 (D.C. Cir. 2013); Bimini Superfast Operations LLC v. Winkowski, 2014 WL 92897 (D.D.C. 2014); Segarra v. Federal Reserve of New York, 2014 WL 1660040 (S.D. N.Y. 2014).

5 A & E Coal Co. v. Adams, 694 F.3d 798 (6th Cir. 2012).

6 §§ 170 to 182.

7 As to formal rulemaking, see § 160.

8 As to negotiated rulemaking, see §§ 161, 162.

9 Agape Church, Inc. v. F.C.C., 738 F.3d 397 (D.C. Cir. 2013); National Mining Ass'n v. Jackson, 816 F. Supp. 2d 37 (D.D.C. 2011).
As to notice in informal federal rulemaking, generally, see §§ 149 to 153.

10 U.S. v. DeLeon, 330 F.3d 1033 (8th Cir. 2003).
As to receipt of comment and hearing in informal federal rulemaking, generally, see §§ 154 to 159.

[11] Safari Aviation Inc. v. Garvey, 300 F.3d 1144 (9th Cir. 2002).
As to adoption of a federal rule, generally, see §§ 163 to 165.

[12] U.S. v. DeLeon, 330 F.3d 1033 (8th Cir. 2003).
As to publication of a federal rule, generally, see §§ 166 to 168.

End of Document

2 Am. Jur. 2d Administrative Law § 148

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

a. In General; Informal Rulemaking

(1) In General

§ 148. Purpose of notice-and-comment proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392.1

Treatises and Practice Aids

As to notice-and-comment procedure, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw® Search Query]

Notice improves the quality of agency rulemaking by insuring that the agency regulations will be tested by exposure to diverse public comment.[1] The notice-and-comment procedure assures that the public and the persons being regulated are given an opportunity to participate,[2] provide information, and suggest alternatives.[3] It thus gives interested parties an opportunity to participate in the rulemaking through the submission of comments,[4] data, views, or arguments.[5] Notice also ensures fairness to affected parties and provides a well-developed record that enhances the quality of judicial review.[6]

Footnotes

1 Steinhorst Associates v. Preston, 572 F. Supp. 2d 112 (D.D.C. 2008); New Hope Power Co. v. U.S. Army Corps of Engineers, 746 F. Supp. 2d 1272 (S.D. Fla. 2010).
Rule-making process requires an agency to fairly apprise interested parties of all significant subjects and issues

involved so that they can participate in the process. AARP v. E.E.O.C., 390 F. Supp. 2d 437 (E.D. Pa. 2005), aff'd on other grounds, 489 F.3d 558 (3d Cir. 2007).

[2] Louisiana Forestry Ass'n Inc. v. Secretary U.S. Dept. of Labor, 745 F.3d 653 (3d Cir. 2014); U.S. v. Utesch, 596 F.3d 302 (6th Cir. 2010); Erringer v. Thompson, 371 F.3d 625 (9th Cir. 2004); Northern Mariana Islands v. U.S., 686 F. Supp. 2d 7 (D.D.C. 2009).

[3] Safari Aviation Inc. v. Garvey, 300 F.3d 1144 (9th Cir. 2002).

[4] Owner-Operator Independent Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Admin., 494 F.3d 188 (D.C. Cir. 2007).

[5] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978).

[6] Steinhorst Associates v. Preston, 572 F. Supp. 2d 112 (D.D.C. 2008); New Hope Power Co. v. U.S. Army Corps of Engineers, 746 F. Supp. 2d 1272 (S.D. Fla. 2010).

End of Document

2 Am. Jur. 2d Administrative Law § 149

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

a. In General; Informal Rulemaking

(2) Notice

§ 149. Publication of notice

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392.1 to 395

Treatises and Practice Aids

As to notice-and-comment procedure, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw® Search Query]

Forms

Forms relating to objections, generally, see Federal Procedural Forms, Administrative Procedure [Westlaw® Search Query]

The Federal Administrative Procedure Act (APA) provides that general notice of proposed rulemaking must be published in the Federal Register[1] unless persons subject to the rule are named and are either personally served or otherwise have actual notice of the rule-making proceeding in accordance with the law.[2] The notice provisions of the Federal APA provide at least as much protection as the due-process provisions of the Fifth Amendment.[3]

Footnotes

1 5 U.S.C.A. § 553(b).

2 5 U.S.C.A. § 553(b).

3 Forester v. Consumer Product Safety Commission of U. S., 559 F.2d 774 (D.C. Cir. 1977).

End of Document

2 Am. Jur. 2d Administrative Law § 150

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

a. In General; Informal Rulemaking

(2) Notice

§ 150. Compliance with publication requirements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392.1 to 395

A.L.R. Library

Federal requirements for public participation in adoption, submission, and approval of state implementation plans and revisions pursuant to sec. 110 of Clean Air Act (42 U.S.C.A. sec. 7410), 151 A.L.R. Fed. 445

Failure to publish a notice of proposed rulemaking as required by the Federal Administrative Procedure Act (APA) results in the invalidation of the ensuing rule,[1] at least if the proceeding does not come within one of the exceptions to the notice-and-comment rule-making provisions of the APA.[2] Such failure to publish notice is an indication that the statement by the agency was not meant to be a binding regulation but simply a statement of policy.[3] However, a regulated entity may also waive an objection that notice of a proposed regulation was not published where the entity participates in the proceeding without making a timely objection to the agency.[4]

Practice Tip:

To state a claim that a federal agency violated the APA by failing to publish a policy in the Federal Register, the plaintiff must demonstrate that he or she did not have actual notice of the content of that policy[5] and that he or she has been adversely affected by the unpublished policy.[6]

Footnotes

1 Shell Oil Co. v. Federal Energy Administration, 527 F.2d 1243 (Temp. Emer. Ct. App. 1975).
Failure to comply with the Administrative Procedure Act requirement to provide for a period of public notice and comment before promulgating a rule renders an agency regulation invalid. McAloney v. Gutierrez, 557 F. Supp. 2d 694 (N.D. W. Va. 2008).

2 As to exceptions to the federal rule-making procedure, see §§ 170 to 182.

3 Beshir v. Holder, 2014 WL 284886 (D.D.C. 2014).

4 Southern Ry. Co. v. U. S., 412 F. Supp. 1122 (D.D.C. 1976).

5 Texas Alliance for Home Care Services v. Sebelius, 811 F. Supp. 2d 76 (D.D.C. 2011), aff'd, 681 F.3d 402 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 1312, 185 L. Ed. 2d 178 (2013); Sherwood v. Tennessee Valley Authority, 925 F. Supp. 2d 906 (E.D. Tenn. 2013).

6 Sherwood v. Tennessee Valley Authority, 925 F. Supp. 2d 906 (E.D. Tenn. 2013).

End of Document

2 Am. Jur. 2d Administrative Law § 151

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

a. In General; Informal Rulemaking

(2) Notice

§ 151. Contents of notice

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392.1 to 395

A.L.R. Library

Federal requirements for public participation in adoption, submission, and approval of state implementation plans and revisions pursuant to sec. 110 of Clean Air Act (42 U.S.C.A. sec. 7410), 151 A.L.R. Fed. 445

Treatises and Practice Aids

As to notice-and-comment procedure, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw® Search Query]

The Federal Administrative Procedure Act requires that a notice of proposed rulemaking include:

— a statement of the time, place, and nature of public rule-making proceedings

— reference to the legal authority under which the rule is proposed

— either the terms or substance of the proposed rule or a description of the subject and issues involved[1]

Integral to notice requirements is the agency's duty to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.[2]When a proposed rule is based on scientific data, the agency should identify the data and the methodology used to obtain it.[3]

Footnotes

1 5 U.S.C.A. § 553(b).

2 California Communities Against Toxics v. U.S. E.P.A., 688 F.3d 989 (9th Cir. 2012); Owner-Operator Independent Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Admin., 494 F.3d 188 (D.C. Cir. 2007).

3 Lloyd Noland Hosp. and Clinic v. Heckler, 762 F.2d 1561 (11th Cir. 1985).

2 Am. Jur. 2d Administrative Law § 152

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

a. In General; Informal Rulemaking

(2) Notice

§ 152. Adequacy of notice

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392.1 to 395

Treatises and Practice Aids

As to notice-and-comment procedure, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw® Search Query]

The Federal Administrative Procedure Act (APA) authorizes either notice which specifies the "terms or substance" of the contemplated rule or notice which merely describes the "subjects and issues involved."[1]Because Congress has not specified the level of specificity expected of the agency in providing notice of rulemaking, the agency is entitled to broad deference in picking a suitable level; similarly, if the underlying statutory language does not require a particular methodology, the court cannot demand that the agency implement such a test.[2]The notice need not identify every precise proposal which the agency may ultimately adopt.[3]However, an agency must describe the range of alternatives being considered with reasonable specificity, otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking.[4]

Generally, notice is adequate if it apprises interested parties of the issues to be addressed in the rule-making proceeding with sufficient clarity and specificity to allow them to participate in the rulemaking in a meaningful and informed manner.[5]

If notice is inadequate, the regulation must fall on procedural grounds, and the substantive validity of the change accordingly

need not be analyzed.[6]

When an agency adopts final rules that differ from the proposed rules, and changes are so major that the original notice does not adequately frame the subjects for discussion, the agency may be required to give notice a second time.[7]Moreover, although the clearly expressed intent of regulators can overcome the plain meaning of a regulation, the notice provisions of the APA require that some indication of the regulatory intent that overcomes the plain language must be referenced in the published notices that accompanied the rulemaking process; otherwise, interested parties would not have the meaningful opportunity to comment on proposed regulations that the APA contemplates because they would have had no way of knowing what was actually proposed.[8]

CUMULATIVE SUPPLEMENT

Cases:

Notice is sufficient under the Administrative Procedure Act (APA) if it affords interested parties a reasonable opportunity to participate in the rulemaking process, and if the parties have not been deprived of the opportunity to present relevant information by lack of notice that the issue was there. 5 U.S.C.A. § 553(b). Pharmaceutical Research and Manufacturers of America v. Federal Trade Commission, 44 F. Supp. 3d 95 (D.D.C. 2014).

[END OF SUPPLEMENT]

Footnotes

1 5 U.S.C.A. § 553(b)(3).

2 Texas Alliance for Home Care Services v. Sebelius, 811 F. Supp. 2d 76 (D.D.C. 2011), aff'd, 681 F.3d 402 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 1312, 185 L. Ed. 2d 178 (2013).

3 American Medical Ass'n v. U.S., 887 F.2d 760 (7th Cir. 1989); Hi-Tech Pharmaceuticals, Inc. v. Crawford, 505 F. Supp. 2d 1341 (N.D. Ga. 2007), aff'd, 544 F.3d 1187 (11th Cir. 2008); Nutraceutical Corp. v. Von Eschenbach, 477 F. Supp. 2d 1161 (D. Utah 2007).

4 Time Warner Cable Inc. v. F.C.C., 729 F.3d 137 (2d Cir. 2013); Prometheus Radio Project v. F.C.C., 652 F.3d 431 (3d Cir. 2011), cert. denied, 133 S. Ct. 63, 183 L. Ed. 2d 710 (2012) and cert. denied, 133 S. Ct. 64, 183 L. Ed. 2d 710 (2012) and cert. denied, 133 S. Ct. 73, 183 L. Ed. 2d 710 (2012).

5 American Medical Ass'n v. U.S., 887 F.2d 760 (7th Cir. 1989).

6 Public Citizen, Inc. v. Mineta, 427 F. Supp. 2d 7 (D.D.C. 2006), judgment amended on other grounds, 444 F. Supp. 2d 12 (D.D.C. 2006), judgment aff'd, 533 F.3d 810 (D.C. Cir. 2008).

7 Connecticut Light and Power Co. v. Nuclear Regulatory Commission, 673 F.2d 525 (D.C. Cir. 1982).

8 Safe Air For Everyone v. U.S. E.P.A., 488 F.3d 1088 (9th Cir. 2007).

2 Am. Jur. 2d Administrative Law § 153

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

a. In General; Informal Rulemaking

(2) Notice

§ 153. Rule differing from published notice

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392.1 to 395, 404.1

A.L.R. Library

What constitutes adequate notice of proposed federal agency rule against objection that rule adopted differed in substance from that published as proposed in notice, 96 A.L.R. Fed. 411

Treatises and Practice Aids

As to notice-and-comment procedure, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw® Search Query]

A final rule is not necessarily invalid for lack of adequate notice simply by reason of the fact that the rule finally adopted differs from the original proposal.[1]An agency is not required to publish in advance every precise proposal which it may ultimately adopt as a rule.[2]Indeed, the rationale of the Administrative Procedure Act's notice and comment requirements rests on the expectation that the final rules will be somewhat different and improved from the rules originally proposed by the agency.[3]An agency can make even substantial changes from the proposed version.[4]If an agency could not change a rule after

receiving comments, it would be placed in the absurd position of either being unable to learn from the comments or being forced to commence new comment periods ad infinitum.[5]

When the final rule adopted differs substantially from the rule proposed in the notice, the courts may evaluate the adequacy of the initial notice under one or both of the following tests: (1) whether the final rule is a logical outgrowth of the proposal[6]or the notice and comments, or rule-making, process following the publication of the proposed rule;[7]and (2) whether the notice of the proposed rulemaking fairly apprised interested parties so that they had an opportunity to comment.[8]If a final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal. Additionally, an agency cannot bootstrap notice from a comment made to the proposed rule.[9]

Footnotes

1 American Medical Ass'n v. U.S., 887 F.2d 760 (7th Cir. 1989); Neighborhood Assistance Corp. of America v. Consumer Financial Protection Bureau, 907 F. Supp. 2d 112 (D.D.C. 2012).

2 § 152.

3 National Restaurant Ass'n v. Solis, 870 F. Supp. 2d 42 (D.D.C. 2012), appeal dismissed, 2012 WL 3244056 (D.C. Cir. 2012).

4 Natural Resources Defense Council, Inc. v. Thomas, 838 F.2d 1224 (D.C. Cir. 1988).

5 American Medical Ass'n v. U.S., 887 F.2d 760 (7th Cir. 1989).

6 NVE, Inc. v. Department of Health and Human Services, 436 F.3d 182 (3d Cir. 2006); Miami-Dade County v. U.S. E.P.A., 529 F.3d 1049 (11th Cir. 2008); Select Specialty Hospital-Akron, LLC v. Sebelius, 820 F. Supp. 2d 13 (D.D.C. 2011).
A final rule enacted by an agency is a logical outgrowth of the proposed rule only if interested parties should have anticipated that the change was possible and thus reasonably should have filed their comments on the subject during the notice-and-comment period. Council Tree Communications, Inc. v. F.C.C., 619 F.3d 235 (3d Cir. 2010); Daimler Trucks North America LLC v. E.P.A., 737 F.3d 95 (D.C. Cir. 2013).

7 ConocoPhillips Co. v. U.S. E.P.A., 612 F.3d 822 (5th Cir. 2010); Agape Church, Inc. v. F.C.C., 738 F.3d 397 (D.C. Cir. 2013); Moore v. Kempthorne, 464 F. Supp. 2d 519 (E.D. Va. 2006).
A court will deem an agency's final rule to be a logical outgrowth of a proposed rule if a new round of notice and comment would not provide commentators with their first occasion to offer new and different criticisms which the agency might find convincing. Daimler Trucks North America LLC v. E.P.A., 737 F.3d 95 (D.C. Cir. 2013).

8 American Medical Ass'n v. U.S., 887 F.2d 760 (7th Cir. 1989).
Rule-making process requires an agency to fairly apprise interested parties of all significant subjects and issues involved. NVE, Inc. v. Department of Health and Human Services, 436 F.3d 182 (3d Cir. 2006); Hi-Tech Pharmaceuticals, Inc. v. Crawford, 505 F. Supp. 2d 1341 (N.D. Ga. 2007), aff'd, 544 F.3d 1187 (11th Cir. 2008).

9 Public Citizen, Inc. v. Mineta, 427 F. Supp. 2d 7 (D.D.C. 2006), judgment amended on other grounds, 444 F. Supp. 2d 12 (D.D.C. 2006), judgment aff'd, 533 F.3d 810 (D.C. Cir. 2008).

2 Am. Jur. 2d Administrative Law § 154

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

a. In General; Informal Rulemaking

(3) Comment and Hearing

§ 154. Opportunity for comment; hearing not required

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 394 to 402

Treatises and Practice Aids

As to notice-and-comment procedure, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw® Search Query]

Forms

Forms relating to rulemaking, generally, see Am. Jur. Pleading and Practice Forms, Administrative Law; Federal Procedural Forms, Administrative Procedure [Westlaw® Search Query]

In the case of informal rulemaking under the Federal Administrative Procedure Act, an agency must give interested persons an opportunity to participate in the rule-making process through submission of written data, views, or arguments with or without the opportunity for an oral presentation.[1]A hearing is not required.[2]The public's opportunity for comment prior to the adoption of or modification to regulations must be a meaningful opportunity,[3]which means that the agency must remain sufficiently open-minded.[4]The Administrative Procedure Act thus requires that comments submitted by members of the

public be considered, not simply received, by the agency.[5]All an agency need do is grant interested persons the opportunity to submit comments.[6]Further, the public need not have an opportunity to comment on every bit of information influencing an agency's decision.[7]

Observation:

An agency is entitled to use the comment period on a proposed rule to consider alternative interpretations before settling on the view it considers most sound.[8]

Footnotes

1 5 U.S.C.A. § 553(c).

2 § 159.

3 Prometheus Radio Project v. F.C.C., 652 F.3d 431 (3d Cir. 2011), cert. denied, 133 S. Ct. 63, 183 L. Ed. 2d 710 (2012) and cert. denied, 133 S. Ct. 64, 183 L. Ed. 2d 710 (2012) and cert. denied, 133 S. Ct. 73, 183 L. Ed. 2d 710 (2012); Rural Cellular Ass'n v. F.C.C., 588 F.3d 1095 (D.C. Cir. 2009).

4 Rural Cellular Ass'n v. F.C.C., 588 F.3d 1095 (D.C. Cir. 2009).

5 Northern Mariana Islands v. U.S., 686 F. Supp. 2d 7 (D.D.C. 2009).

6 Chip Steak Co. v. Hardin, 332 F. Supp. 1084 (N.D. Cal. 1971), judgment aff'd, 467 F.2d 481 (9th Cir. 1972).

7 Kern County Farm Bureau v. Allen, 450 F.3d 1072 (9th Cir. 2006).

8 McNamee v. Department of the Treasury, 488 F.3d 100 (2d Cir. 2007).

End of Document

2 Am. Jur. 2d Administrative Law § 155

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

a. In General; Informal Rulemaking

(3) Comment and Hearing

§ 155. Response to comment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 400, 402

Forms

Forms relating to responses, generally, see Federal Procedural Forms, Administrative Procedure [Westlaw® Search Query]

The notice-and-comment provision of the Federal Administrative Procedure Act has not been interpreted to require an agency to respond to every comment[1] or item of fact or opinion[2] or to analyze every issue or alternative raised by the comments, no matter how insubstantial.[3] On the other hand, the opportunity to comment on proposed rules is meaningless unless the agency responds to significant points raised by the public.[4]

Comments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern.[5] The comment cannot merely state that a particular mistake was made but must show why the mistake was of possible significance in the results.[6] Thus, an agency need respond only to those comments which—
— if true or adopted, would require a change in the proposed rule.[7]
— raise significant problems.[8]
— can be thought to challenge a fundamental premise.[9]
— are relevant or significant.[10]

CUMULATIVE SUPPLEMENT

Cases:

Under the Administrative Procedure Act's (APA) notice-and-comment requirement, an agency must consider and respond to significant comments received during the period for public comment. 5 U.S.C.A. § 553. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

An agency need not discuss every item of fact or opinion included in public comments. 5 U.S.C.A. § 551 et seq. Environmental Defense Fund v. Environmental Protection Agency, 922 F.3d 446 (D.C. Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

[1] Vermont Public Service Bd. v. F.C.C., 661 F.3d 54 (D.C. Cir. 2011); Alaska v. Lubchenco, 825 F. Supp. 2d 209 (D.D.C. 2011); Ohio Valley Environmental Coalition v. Hurst, 604 F. Supp. 2d 860 (S.D. W. Va. 2009).
As to the need to respond to comments in the basis and purpose statement accompanying the promulgated rule, see § 164.

[2] Louisiana Federal Land Bank Ass'n, FLCA v. Farm Credit Admin., 336 F.3d 1075 (D.C. Cir. 2003).

[3] American Min. Congress v. U.S. E.P.A., 907 F.2d 1179 (D.C. Cir. 1990).

[4] St. James Hosp. v. Heckler, 760 F.2d 1460 (7th Cir. 1985).

[5] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978); Interstate Natural Gas Ass'n of America v. F.E.R.C., 494 F.3d 1092 (D.C. Cir. 2007).

[6] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978).

[7] Nehemiah Corp. of America v. Jackson, 546 F. Supp. 2d 830 (E.D. Cal. 2008); Sherley v. Sebelius, 776 F. Supp. 2d 1 (D.D.C. 2011), aff'd, 689 F.3d 776 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 847, 184 L. Ed. 2d 655 (2013).

[8] Nehemiah Corp. of America v. Jackson, 546 F. Supp. 2d 830 (E.D. Cal. 2008); Alaska v. Lubchenco, 825 F. Supp. 2d 209 (D.D.C. 2011).

[9] MCI WorldCom, Inc. v. F.C.C., 209 F.3d 760 (D.C. Cir. 2000).

[10] Lilliputian Systems, Inc. v. Pipeline and Hazardous Materials Safety Admin., 741 F.3d 1309 (D.C. Cir. 2014); Nehemiah Corp. of America v. Jackson, 546 F. Supp. 2d 830 (E.D. Cal. 2008).

2 Am. Jur. 2d Administrative Law § 156

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

a. In General; Informal Rulemaking

(3) Comment and Hearing

§ 156. Length of comment period

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 394, 395

Treatises and Practice Aids

As to notice-and-comment procedure, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw® Search Query]

The Federal Administrative Procedure Act[1] does not prevent an agency from stating in its notice of rulemaking that comments must be received by a specified date.[2] Generally, a notice and comment period is required for agency rulemaking.[3] Indeed, some cutoff is necessary,[4] and an abbreviated comment period, such as 10 days, may be proper if necessitated by deadlines for agency action.[5] An agency may compensate for an abbreviated comment period by stating that comments received after the effective date of the rule will be considered and by repromulgating the rule after those comments are received.[6]

If the notice and comment period are inadequate, the regulation must fall on procedural grounds.[7]

Footnotes

1 5 U.S.C.A. § 553(c).

[2] Fund for Animals v. Frizzell, 402 F. Supp. 35 (D.D.C. 1975), judgment aff'd, 530 F.2d 982 (D.C. Cir. 1975).

[3] MacLean v. Department of Homeland Sec., 543 F.3d 1145 (9th Cir. 2008).

[4] American Ass'n of Meat Processors v. Bergland, 460 F. Supp. 279 (D.D.C. 1978).
United States Department of Agriculture's 30-day notice and comment period for rule satisfied the requirement that interested parties have opportunity to participate in rulemaking. Fleming Companies, Inc. v. U.S. Dept. of Agriculture, 322 F. Supp. 2d 744 (E.D. Tex. 2004), aff'd, 164 Fed. Appx. 528 (5th Cir. 2006).

[5] Fund for Animals v. Frizzell, 402 F. Supp. 35 (D.D.C. 1975), judgment aff'd, 530 F.2d 982 (D.C. Cir. 1975).

[6] Pent-R-Books, Inc. v. U.S. Postal Service, 328 F. Supp. 297, 15 A.L.R. Fed. 464 (E.D. N.Y. 1971).

[7] Public Citizen, Inc. v. Mineta, 427 F. Supp. 2d 7 (D.D.C. 2006), judgment amended on other grounds, 444 F. Supp. 2d 12 (D.D.C. 2006), judgment aff'd, 533 F.3d 810 (D.C. Cir. 2008).
Failure to comply with APA requirement to provide for a period of public notice and comment before promulgating a rule renders an agency regulation invalid. McAloney v. Gutierrez, 557 F. Supp. 2d 694 (N.D. W. Va. 2008).

End of Document

2 Am. Jur. 2d Administrative Law § 157

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

a. In General; Informal Rulemaking

(3) Comment and Hearing

§ 157. Ex parte contacts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 397, 398

Treatises and Practice Aids

As to notice-and-comment procedure, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw® Search Query]

Ex parte contacts can result in the invalidation of a proposed rule if private parties are competing for available privileges.[1] Such contacts may also invalidate a proposed rule if the existence of ex parte contacts so interferes with the public proceedings that it is questionable whether the rule is based on comments in the public record, thereby raising serious questions of fairness and imperiling judicial review.[2]

Under other authority, while ex parte contacts are not always permissible, they do not per se vitiate agency informal rulemaking unless it appears from the administrative record that they may have materially influenced the action ultimately taken. The problem of ex parte contacts in rulemaking is one of degree so that a reviewing court should note whether the proceeding was of a type susceptible to poisonous ex parte influence and whether serious questions of fairness arose.[3] Moreover, an agency is not required to disclose all informal contacts related to the issue addressed in notice and comment rulemaking so long as the contacts do not frustrate judicial review or raise serious questions of fairness.[4]

Footnotes

1 Sangamon Val. Television Corp. v. U.S., 269 F.2d 221 (D.C. Cir. 1959).

2 Home Box Office, Inc. v. F.C.C., 567 F.2d 9 (D.C. Cir. 1977).
This holding may apply only in the informal rule-making context. Air Transport Ass'n of America v. F.A.A., 169 F.3d 1 (D.C. Cir. 1999).

3 Action For Children's Television v. F.C.C., 564 F.2d 458 (D.C. Cir. 1977).

4 American Ass'n of Retired Persons v. E.E.O.C., 489 F.3d 558 (3d Cir. 2007).

End of Document

2 Am. Jur. 2d Administrative Law § 158

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

a. In General; Informal Rulemaking

(3) Comment and Hearing

§ 158. Reliance on agency knowledge and expertise

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 397, 398, 402

Treatises and Practice Aids

As to notice-and-comment procedure, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw® Search Query]

An agency, in rulemaking, can look beyond the particular hearing record since it otherwise would be unable to draw upon its expertise.[1]Thus, a person designated to make a decision in a rule-making proceeding may confer with staff experts,[2]may act on the basis of data contained in the agency's files or on information informally gained, and may rely on agency expertise, views, or opinions.[3]Further, a presiding officer may ask the assistance of staff experts in interpreting technical data in the record.[4]

An agency cannot rest a rule on data that, in critical degree, is known only to the agency.[5]When an agency must select some necessarily somewhat arbitrary figure in establishing bright-line rules, the court will defer to its expertise if it provides substantial evidence to support its choice and responds to substantial criticism of that figure.[6]

CUMULATIVE SUPPLEMENT

Cases:

To the extent the exact harms from an agency's proposed rule are unknown or difficult to predict, that does not justify disregarding the effect entirely. City and County of San Francisco v. U.S. Citizenship and Immigration Services, 408 F. Supp. 3d 1057 (N.D. Cal. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Pacific Coast European Conference v. U.S., 350 F.2d 197 (9th Cir. 1965).

2 Hercules, Inc. v. Environmental Protection Agency, 598 F.2d 91 (D.C. Cir. 1978).

3 Flying Tiger Line, Inc. v. Boyd, 244 F. Supp. 889 (D. D.C. 1965).

4 Hercules, Inc. v. Environmental Protection Agency, 598 F.2d 91 (D.C. Cir. 1978).

5 American Radio Relay League, Inc. v. F.C.C., 524 F.3d 227 (D.C. Cir. 2008); Nehemiah Corp. of America v. Jackson, 546 F. Supp. 2d 830 (E.D. Cal. 2008).

6 Association of Private Colleges and Universities v. Duncan, 870 F. Supp. 2d 133, 286 Ed. Law Rep. 313 (D.D.C. 2012).

End of Document

2 Am. Jur. 2d Administrative Law § 159

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

a. In General; Informal Rulemaking

(3) Comment and Hearing

§ 159. Necessity of hearing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 394, 395, 400

Under the Administrative Procedure Act (APA),[1] a federal agency need not provide an evidentiary hearing or oral presentation as part of the comment requirement.[2] The Constitution does not require that interested parties be granted a legislative,[3] evidentiary,[4] or any type of hearing in rulemaking[5] since when a rule applies to more than a few people, it is impractical that everyone should have a direct voice in its adoption.[6] Generally speaking, all that is required is that anyone interested be given the opportunity to comment on all facts and all ideas that the agency considers.[7]

In general, an agency possesses the discretion whether to permit oral presentations and reply submissions and can determine their scope, character, and time sequence.[8] Such discretion resides only in the agency, and a court has no power to order that an agency adopt procedures not required by the Federal APA, the Constitution, and other relevant statutes.[9]

Footnotes

1 5 U.S.C.A. § 553(c).

2 Bell Tel. Co. of Pennsylvania v. F.C.C., 503 F.2d 1250 (3d Cir. 1974).
As to 5 U.S.C.A. § 553(c), providing for comment through the submission of data, views, or arguments with or without the opportunity for an oral presentation, see § 154.

3 Powelton Civic Home Owners Ass'n v. Department of Housing and Urban Development, 284 F. Supp. 809 (E.D. Pa. 1968).

[4] Sima Products Corp. v. McLucas, 460 F. Supp. 128 (N.D. Ill. 1978), judgment aff'd, 612 F.2d 309 (7th Cir. 1980).

[5] Alaska S. S. Co. v. Federal Maritime Commission, 356 F.2d 59 (9th Cir. 1966).

[6] Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (1915).

[7] American Ass'n of Meat Processors v. Bergland, 460 F. Supp. 279 (D.D.C. 1978).

[8] American Public Gas Ass'n v. Federal Power Commission, 567 F.2d 1016 (D.C. Cir. 1977).

[9] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978).

End of Document

2 Am. Jur. 2d Administrative Law § 160

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

b. Formal Rulemaking

§ 160. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392.1, 396 to 402

Treatises and Practice Aids

As to formal rulemaking after hearing, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

The Federal Administrative Procedure Act (APA) provides that when rules are required by statute to be made on the record after an opportunity for an agency hearing, notice-and-comment provisions[1] do not apply, and the provisions relating to formal, adjudicatory-type hearings before administrative law judges[2] apply instead.[3] Under the APA, formal procedures are required only when a regulatory statute provides that there must be a hearing and the hearing must be on the record.[4] While the exact words that the rule must be made on the record after an opportunity for a hearing need not be contained in a regulatory act,[5] there must be a close conjunction of the concepts, and the terms "hearing" and "on the record" are extremely relevant.[6] However, a court may make no presumption that a statutory "hearing" requirement does or does not compel the agency to undertake a formal "hearing on the record," thereby leaving it to the agency, as an initial matter, to resolve the ambiguity.[7] There is a strong presumption that the procedural guarantees of the notice-and-comment provisions of the APA[8] are sufficient unless Congress specifically indicates to the contrary.[9]

CUMULATIVE SUPPLEMENT

Cases:

Rules issued through the Administrative Procedure Act's (APA) notice-and-comment process are often referred to as legislative rules because they have the force and effect of law. 5 U.S.C.A. § 553. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

[END OF SUPPLEMENT]

Footnotes

1 §§ 147 to 159.

2 5 U.S.C.A. §§ 556, 557.

3 5 U.S.C.A. § 553(c).
As to procedure under 5 U.S.C.A. §§ 556, 557, see §§ 258 to 382.

4 U. S. v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 92 S. Ct. 1941, 32 L. Ed. 2d 453 (1972).

5 U. S. v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 92 S. Ct. 1941, 32 L. Ed. 2d 453 (1972).

6 Marathon Oil Co. v. E.P.A., 564 F.2d 1253 (9th Cir. 1977).

7 Chemical Waste Management, Inc. v. U.S. E.P.A., 873 F.2d 1477 (D.C. Cir. 1989).

8 As to notice-and-comment under the APA, see §§ 147 to 159.

9 National Classification Committee v. U.S., 765 F.2d 1146 (D.C. Cir. 1985).

2 Am. Jur. 2d Administrative Law § 161

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

c. Negotiated Rulemaking

§ 161. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392.1

Treatises and Practice Aids

As to negotiated rulemaking, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

The Federal Negotiated Rulemaking Act[1] defines "negotiated rulemaking" as rulemaking through the use of a negotiated rulemaking committee.[2] A "negotiated rulemaking committee" is an advisory committee established by an agency to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule.[3] The notice-and-comment procedures for rulemaking[4] do not apply to negotiated rulemaking.[5]

Footnotes

1 5 U.S.C.A. §§ 561 to 570.

2 5 U.S.C.A. § 562(6).

3 5 U.S.C.A. § 562(7).

[4] As to notice-and-comment rule-making procedures under 5 U.S.C.A. § 553 of the Federal Administrative Procedure Act, generally, see §§ 147 to 159.

[5] 5 U.S.C.A. § 566(e).

End of Document

2 Am. Jur. 2d Administrative Law § 162

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

1. Types of Rulemaking

c. Negotiated Rulemaking

§ 162. Judicial review

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392.1

Treatises and Practice Aids

As to negotiated rulemaking, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

An agency action relating to establishing, assisting, or terminating a negotiated rule-making committee is not subject to judicial review.[1] However, the Negotiated Rulemaking Act does not bar judicial review of a rule if such judicial review is otherwise provided for by law.[2]

Footnotes

1 5 U.S.C.A. § 570.

2 5 U.S.C.A. § 570.

Works.

2 Am. Jur. 2d Administrative Law § 163

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

2. Adoption of Rule

§ 163. Generally; statement of basis and purpose

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 403 to 405.5

A.L.R. Library

Sufficiency of agency's compliance with requirement of Administrative Procedure Act (5 U.S.C.A. sec. 553(c)) that agency shall incorporate in rules adopted concise general statement of their basis and purpose, 46 A.L.R. Fed. 780

Treatises and Practice Aids

As to statement of basis and purpose, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

The Federal Administrative Procedure Act (APA) requires the agency to incorporate in its rules a concise general statement of their basis and purpose.[1] A federal statute may also require an agency to make a written report of proceedings or statements of action including regulation.[2]

An agency is not in compliance with the APA if the statement is inadequate in content.[3] An explanation of the basis and purpose of the rule that is so inadequate that the reviewing court cannot evaluate it is a fundamental flaw that normally requires vacatur of the rule.[4] However, it has also been said that no statement of basis and purpose is required if the basis and purpose of a rule are obvious from a reading of the rule.[5]

Further, a court reviewing an agency rule may not supply a reasonable basis for the agency's action that the agency itself has not given.[6]However, the reviewing court will uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned.[7]A rule may be invalidated under the APA if an agency fails to explain the rule adequately.[8]

The language of the APA contemplates that the basis and purpose statement will accompany the publication of the rule and not follow the rule long after it has been published.[9]

CUMULATIVE SUPPLEMENT

Statutes:

49 U.S.C.A. § 706 was renumbered as 49 U.S.C.A. § 1306, effective December 18, 2015.

Cases:

"Appropriate" within meaning of a statute allowing an agency to adopt appropriate regulations is the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors; although this term leaves agencies with flexibility, an agency may not entirely fail to consider an important aspect of the problem when deciding whether regulation is appropriate. Michigan v. E.P.A., 135 S. Ct. 2699 (2015).

[END OF SUPPLEMENT]

Footnotes

1 5 U.S.C.A. § 553(c).

2 49 U.S.C.A. § 706(a), (b) (relating to the Surface Transportation Board).

3 § 165.

4 Heartland Regional Medical Center v. Sebelius, 566 F.3d 193 (D.C. Cir. 2009); Defenders of Wildlife v. Jackson, 791 F. Supp. 2d 96 (D.D.C. 2011).

5 Disabled American Veterans v. Gober, 234 F.3d 682 (Fed. Cir. 2000).

6 Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

7 Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

8 § 165.

9 Action on Smoking and Health v. C.A.B., 713 F.2d 795 (D.C. Cir. 1983).

Works.

2 Am. Jur. 2d Administrative Law § 164

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

2. Adoption of Rule

§ 164. Contents and sufficiency of statement

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 405

A.L.R. Library

Sufficiency of agency's compliance with requirement of Administrative Procedure Act (5 U.S.C.A. sec. 553(c)) that agency shall incorporate in rules adopted concise general statement of their basis and purpose, 46 A.L.R. Fed. 780

Treatises and Practice Aids

As to statement of basis and purpose, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

The Federal Administrative Procedure Act does not require an exhaustive explanation of an agency's reasoning for adopting a rule,[1] nor is the requirement of a concise general statement of basis and purpose meant to be particularly onerous.[2] The required statement of basis and purpose need not justify the rules selected in every detail so long as it explains the general basis for the rules chosen.[3] Nor need an agency refer to all the specific issues raised in comments[4] or address every fact, opinion, or comment received on the proposed rule.[5]

What is required is a concise general statement of the regulation's basis and purpose[6] which indicates the major issues of policy that were raised and explains why the agency responded in the manner that it did.[7] The agency must examine the

relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.[8]The detail required in an administrative agency's statement of the basis and purpose of the rules it is adopting depends on the subject of the regulation and the nature of the comments received on the proposed rule.[9]The statement must be sufficient to allow meaningful judicial review.[10]That is, the statement should convince the court that the rule is based on the relevant factors[11]and is not arbitrary or capricious.[12]Specifically, the statement should—

— enable the courts to be aware of the legal and factual framework underlying the agency's actions.[13]

— demonstrate what major issues of policy were resolved.[14]

— explain a decision to depart from a settled course of behavior.[15]

— respond in a reasoned manner to the comments received.[16]

Observation:

An agency choosing to alter its regulatory course must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored.[17]

CUMULATIVE SUPPLEMENT

Cases:

One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016).

An agency may justify its policy choice by explaining why that policy is more consistent with statutory language than alternative policies. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016).

[END OF SUPPLEMENT]

Footnotes

1 HLI Lordship Industries, Inc. v. Committee for Purchase from the Blind and Other Severely Handicapped, 791 F.2d 1136 (4th Cir. 1986).

2 Penobscot Indian Nation v. U.S. Dept. of Housing and Urban Development, 539 F. Supp. 2d 40 (D.D.C. 2008).

3 Universal Health Services of McAllen, Inc. Subsidiary of Universal Health Services, Inc. v. Sullivan, 770 F. Supp. 704 (D.D.C. 1991), judgment aff'd, 978 F.2d 745 (D.C. Cir. 1992).

4 Alvarado Community Hosp. v. Shalala, 155 F.3d 1115 (9th Cir. 1998), opinion amended on other grounds, 166 F.3d 950 (9th Cir. 1999).

5 Reytblatt v. U.S. Nuclear Regulatory Com'n, 105 F.3d 715 (D.C. Cir. 1997).
As to holdings that an agency need not respond to every comment, generally, see § 155.

6 Penobscot Indian Nation v. U.S. Dept. of Housing and Urban Development, 539 F. Supp. 2d 40 (D.D.C. 2008);

Fleming Companies, Inc. v. U.S. Dept. of Agriculture, 322 F. Supp. 2d 744 (E.D. Tex. 2004), aff'd, 164 Fed. Appx. 528 (5th Cir. 2006).

7 Alvarado Community Hosp. v. Shalala, 155 F.3d 1115 (9th Cir. 1998), opinion amended on other grounds, 166 F.3d 950 (9th Cir. 1999).

8 Penobscot Indian Nation v. U.S. Dept. of Housing and Urban Development, 539 F. Supp. 2d 40 (D.D.C. 2008).

9 Ohio Valley Environmental Coalition v. Hurst, 604 F. Supp. 2d 860 (S.D. W. Va. 2009).

10 Ohio Valley Environmental Coalition v. Hurst, 604 F. Supp. 2d 860 (S.D. W. Va. 2009).
As to the scope of judicial review of rulemaking, generally, see §§ 468 to 472.

11 Natural Resources Defense Council, Inc. v. Securities and Exchange Commission, 389 F. Supp. 689 (D.D.C. 1974).

12 National Welfare Rights Organization v. Mathews, 533 F.2d 637 (D.C. Cir. 1976).

13 Disabled American Veterans v. Gober, 234 F.3d 682 (Fed. Cir. 2000).

14 Citizens to Save Spencer County v. U.S. Environmental Protection Agency, 600 F.2d 844 (D.C. Cir. 1979).

15 Penobscot Indian Nation v. U.S. Dept. of Housing and Urban Development, 539 F. Supp. 2d 40 (D.D.C. 2008).

16 Ohio Valley Environmental Coalition v. Hurst, 604 F. Supp. 2d 860 (S.D. W. Va. 2009).

17 Central and South West Services, Inc. v. U.S. E.P.A., 220 F.3d 683 (5th Cir. 2000).

End of Document

2 Am. Jur. 2d Administrative Law § 165

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

2. Adoption of Rule

§ 165. Inadequate statements; judicial review

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 405

While it has been recognized that detailed findings of fact are not always required in a statement supporting a rule,[1] a reviewing court may invalidate the rule if an agency fails to explain it adequately.[2] A court may require a higher degree of factual support for a rule in its statement of basis and purpose if the governing statute requires that the rule be supported by substantial evidence[3] or if the agency must justify a particular dollar limitation.[4] The statement of a rule's basis and purpose is inadequate if it does not respond to significant public comments.[5] Moreover, a statement of basis is inadequate where it completely fails to address criticisms of the data relied upon by the agency in formulating its new rules and fails to address alternatives suggested by commenters.[6] Nevertheless, absent a clear and specific congressional requirement for detailed factual findings, a court should not import a formal fact-finding requirement into informal rulemaking.[7]

Footnotes

1 § 164.

2 Alvarado Community Hosp. v. Shalala, 155 F.3d 1115 (9th Cir. 1998), opinion amended on other grounds, 166 F.3d 950 (9th Cir. 1999).

3 Union Oil Co. of California v. Federal Power Commission, 542 F.2d 1036 (9th Cir. 1976) (rejected on other grounds by, Superior Oil Co. v. Federal Energy Regulatory Commission, 563 F.2d 191 (5th Cir. 1977)).

4 National Welfare Rights Organization v. Mathews, 533 F.2d 637 (D.C. Cir. 1976).

5 Ohio Valley Environmental Coalition v. Hurst, 604 F. Supp. 2d 860 (S.D. W. Va. 2009).

6 Bedford County Memorial Hosp. v. Health and Human Services, 769 F.2d 1017 (4th Cir. 1985).

[7] Superior Oil Co. v. Federal Energy Regulatory Commission, 563 F.2d 191 (5th Cir. 1977).

End of Document

2 Am. Jur. 2d Administrative Law § 166

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

3. Publication

§ 166. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 406 to 409

A.L.R. Library

Compliance with provision of Administrative Procedure Act, 5 U.S.C.A. sec. 553(d), providing that, with certain exceptions, required publication of a substantive rule must be made at least 30 days before its effective date, 54 A.L.R. Fed. 553

Treatises and Practice Aids

As to publication of rule, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

The Federal Administrative Procedure Act (APA) requires the publication or service of legislative rules[1] in the Federal Register.[2] The requirement for publication of rules stems from the government's duty to inform the public by publishing those matters that may adversely impact a member of the public.[3] When regulations are published in the Federal Register they give legal notice of their contents to all who may be affected thereby[4] and have the force and effect of law.[5] Indeed, the purpose of the requirement that an agency publish general notice of a proposed rule in the Federal Register is to give the public an opportunity to participate in the rulemaking process and to enable the agency to educate itself before establishing rules and procedures which have a substantial impact on those regulated.[6] Absent a case where the publication would be insufficient at law, publication in the Federal Register will provide constructive notice.[7] Duly promulgated regulations provide constructive

notice of their requirements and are legally binding regardless of actual notice.[8]

Observation:

Internet notice is not an acceptable substitute for the publication of a proposed rule in the Federal Register.[9]

There is some authority that actual knowledge or notice of agency policy precludes reliance on an agency's failure to comply with the publication requirement.[10]However, there is also authority to the contrary holding that a member of the general public cannot be prosecuted for a violation of an unpublished regulation[11]even when he or she has had actual knowledge of it.[12]

While a rule required to be published which is not published may be void and unenforceable against a noncomplying party,[13]under other authority, nonpublication in the Federal Register is a strong indication that a rule has not taken effect,[14]or an indication that the statement by the agency was not meant to be a binding regulation but simply a statement of policy.[15]However, a regulation need not necessarily be published in order to be enforced *against* the government.[16]

Footnotes

1 5 U.S.C.A. § 553(d).
As to substantive or legislative rules, generally, see § 140.

2 44 U.S.C.A. § 1505(a)(3).

3 Nolan v. U.S., 44 Fed. Cl. 49 (1999).

4 Tansil v. United States, 113 Fed. Cl. 256 (2013).

5 First Tennessee Bank Nat. Ass'n v. Johanns, 618 F. Supp. 2d 778 (M.D. Tenn. 2008).

6 Louisiana Forestry Ass'n Inc. v. Secretary U.S. Dept. of Labor, 745 F.3d 653 (3d Cir. 2014).
The APA requires all federal agencies to publish proposed rules in the Federal Register in order to provide the public with notice and an opportunity to comment. Warshauer v. Solis, 577 F.3d 1330 (11th Cir. 2009).

7 U.S. v. Caseer, 399 F.3d 828, 2005 FED App. 0098P (6th Cir. 2005).

8 Grossman v. Department of Transportation, National Transportation Safety Board, 11 Fed. Appx. 780 (9th Cir. 2001).

9 Utility Solid Waste Activities Group v. E.P.A., 236 F.3d 749 (D.C. Cir. 2001).

10 Central Arkansas Auction Sale, Inc. v. Bergland, 570 F.2d 724 (8th Cir. 1978).
To state a claim that a federal agency violated the APA by failing to publish a policy in the Federal Register, the plaintiff must demonstrate that he or she has been adversely affected by the unpublished policy and did not have actual notice of the content of that policy. Sherwood v. Tennessee Valley Authority, 925 F. Supp. 2d 906 (E.D. Tenn. 2013).

11 U.S. v. Gavrilovic, 551 F.2d 1099 (8th Cir. 1977).

12 Hotch v. U S, 14 Alaska 594, 212 F.2d 280 (9th Cir. 1954).

13 Nolan v. U.S., 44 Fed. Cl. 49 (1999).

14 Zhang v. Slattery, 55 F.3d 732 (2d Cir. 1995).

15 Beshir v. Holder, 2014 WL 284886 (D.D.C. 2014).

16 Zhang v. Slattery, 55 F.3d 732 (2d Cir. 1995).

End of Document

2 Am. Jur. 2d Administrative Law § 167

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

3. Publication

§ 167. Time of publication; effective date

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 406, 407.1, 418

Treatises and Practice Aids

As to effective date of rule, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

Generally, under the Federal Administrative Procedure Act, a legislative rule must be published not fewer than 30 days before its effective date.[1]The delay assures that affected persons have a reasonable time to prepare for the effective date of the rule.[2]The delay may also give affected persons another opportunity to bring difficulties with the rule to the attention of the agency.[3]

Generally, a rule which is not published at least 30 days before its effective date can be invalidated.[4]However, failure to publish a regulation within a prescribed period of time after its adoption may not defeat its effectiveness after adequate notice is effected by subsequent publication.[5]

The requirement that a substantive rule be published or served at least 30 days before its effective date does not apply—
— to a substantive rule which grants or recognizes an exemption or relieves a restriction.[6]
— to interpretive rules and statements of policy.[7]
— as otherwise provided by the agency for good-cause found and published with the rule.[8]
In addition, rules relating to a military function of the United States, including delegations and reservations, can be effective regardless of publication in the Federal Register or the Code of Federal Regulations.[9]Similarly, a regulation relating to a military function may be lawful, even though it was not published until after its implementation, to the extent that the defendants had actual notice of the regulation.[10]

Footnotes

1 5 U.S.C.A. § 553(d).

2 British Am. Commodity Options Corp. v. Bagley, 552 F.2d 482 (2d Cir. 1977).

3 Sannon v. U.S., 460 F. Supp. 458 (S.D. Fla. 1978).

4 Universal Specialties, Inc. v. Blount, 331 F. Supp. 52 (C.D. Cal. 1971).

5 Go Leasing, Inc. v. National Transp. Safety Bd., 800 F.2d 1514 (9th Cir. 1986).

6 5 U.S.C.A. § 553(d)(1).

7 5 U.S.C.A. § 553(d)(2).
As to interpretive rules and general statements of policy, generally, see §§ 142, 145.

8 § 168.

9 Nolan v. U.S., 44 Fed. Cl. 49 (1999).

10 U.S. v. Ventura-Melendez, 321 F.3d 230 (1st Cir. 2003).

2 Am. Jur. 2d Administrative Law § 168

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

3. Publication

§ 168. “Good cause” exception

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Administrative Law and Procedure 408

A.L.R. Library

What constitutes “good cause” under provision of Administrative Procedure Act (5 U.S.C.A. sec. 553(d)(3)) allowing agency rule to become effective less than 30 days after publication, 55 A.L.R. Fed. 880

Treatises and Practice Aids

As to effective date of rule, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

There is a “good-cause” exception to the Federal Administrative Procedure Act’s requirement of notice of the rule by publication or service 30 days before its effective date.[1]An agency attempting to determine whether the good-cause exception is to be invoked must balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable time to prepare for the effective date of a new rule.[2]When the consequences of agency rulemaking is to make previously lawful conduct unlawful and to impose criminal sanctions, the balance of these competing policies imposes a heavy burden upon the agency to show “public necessity.”[3]In order to avail itself of the “good-cause” exception to the 30-day notice rule, the agency must determine that compliance with the 30-day requirement is either impracticable, unnecessary, or contrary to the public interest.[4]An agency may be required to include this

finding and a short statement of reasons with the new regulations.[5]

The good-cause exception should be narrowly construed.[6]Thus, an agency’s desire to provide immediate guidance, without more, does not suffice for good cause to invoke the exception to providing notice before the effective date of the rule.[7]On the other hand, a finding of good cause for accelerating the effective date of a rule may be based upon the urgency of the public problem addressed by the rule,[8]such as the lack of protection in an area historically fraught with abuses.[9]A much greater showing of good cause is required if violations of the rule can constitute crimes.[10]

Caution:

The “good-cause” exception for the requirement of notice of the rule by publication or service 30 days before its effective date[11]should not be confused with the “good-cause” exception from the requirement of notice and comment.[12]

Footnotes

1 5 U.S.C.A. § 553(d)(3).

2 Nance v. E.P.A., 645 F.2d 701 (9th Cir. 1981).

3 U.S. v. Gavrilovic, 551 F.2d 1099 (8th Cir. 1977).

4 Buschmann v. Schweiker, 676 F.2d 352 (9th Cir. 1982).

5 Buschmann v. Schweiker, 676 F.2d 352 (9th Cir. 1982).

6 Buschmann v. Schweiker, 676 F.2d 352 (9th Cir. 1982).

7 U.S. v. Valverde, 628 F.3d 1159 (9th Cir. 2010), cert. denied, 132 S. Ct. 1534, 182 L. Ed. 2d 219 (2012); U.S. v. Cotton, 760 F. Supp. 2d 116 (D.D.C. 2011), appeal dismissed, 2012 WL 1183728 (D.C. Cir. 2012).

8 Texaco, Inc. v. Federal Energy Administration, 531 F.2d 1071 (Temp. Emer. Ct. App. 1976).

9 British Am. Commodity Options Corp. v. Bagley, 552 F.2d 482 (2d Cir. 1977).

10 U.S. v. Gavrilovic, 551 F.2d 1099 (8th Cir. 1977).

11 5 U.S.C.A. § 553(d)(3).

12 § 177.

End of Document

2 Am. Jur. 2d Administrative Law § 169

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

4. Regulatory Flexibility Act

§ 169. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392.1

Treatises and Practice Aids

As to procedures under Regulatory Flexibility Act, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

The Regulatory Flexibility Act (RFA)[1] requires a federal agency to prepare a regulatory flexibility analysis and assessment of the economic impact of a proposed rule on small business entities unless the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities and provides a factual basis for that certification.[2] The RFA was passed to encourage administrative agencies to consider the potential impact of nascent federal regulations on small businesses.[3] Specifically, whenever an agency is required to publish general notice of proposed rulemaking for any proposed rule, the agency must prepare and make available for public comment an initial regulatory flexibility analysis.[4] The initial analysis must describe the impact of the proposed rule on small entities, which must be published in the Federal Register at the time of the publication of general notice of the proposed rulemaking.[5]

When the agency promulgates its final rule, the agency must prepare a final regulatory flexibility analysis.[6] The final analysis must include, among other items—

— a statement of the need for, and objectives of, the rule.[7]

— the steps the agency took to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes.[8]

The agency must make copies of the final regulatory flexibility analysis available to members of the public and must publish the final analysis or a summary of it in the Federal Register.[9]

The RFA imposes no substantive requirements on an agency[10] and thus imposes no obligation on an agency proposing a rule to conduct a small entity impact analysis of effects on entities that it does not regulate.[11] Its requirements are purely procedural in nature,[12] requiring nothing more than the filing of a statement demonstrating a good-faith effort to carry out its mandate.[13] Failure to comply with the RFA may be, but does not have to be, grounds for overturning the rule.[14]

Footnotes

1 5 U.S.C.A. §§ 601 to 612.

2 Environmental Defense Center, Inc. v. U.S. E.P.A., 344 F.3d 832 (9th Cir. 2003).
An agency need only put forth a reasonable, good-faith effort to fulfill the procedural requirements of the RFA. North Carolina Fisheries Ass'n, Inc. v. Gutierrez, 518 F. Supp. 2d 62 (D.D.C. 2007), subsequent determination, 518 F. Supp. 2d 105 (D.D.C. 2007); Tafas v. Dudas, 530 F. Supp. 2d 786 (E.D. Va. 2008).

3 Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Dept. of Agriculture, 415 F.3d 1078 (9th Cir. 2005), for additional opinion, see, 143 Fed. Appx. 751 (9th Cir. 2005) and as amended, (Aug. 17, 2005).

4 5 U.S.C.A. § 603(a).

5 5 U.S.C.A. § 603(a).
The specific requirements for the content of the initial analysis are set out in 5 U.S.C.A. § 603(b), (c), (d).

6 5 U.S.C.A. § 604(a).

7 5 U.S.C.A. § 604(a)(1).

8 5 U.S.C.A. § 604(a)(6).

9 5 U.S.C.A. § 604(b).

10 Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Dept. of Agriculture, 415 F.3d 1078 (9th Cir. 2005), for additional opinion, see, 143 Fed. Appx. 751 (9th Cir. 2005) and as amended, (Aug. 17, 2005); Tafas v. Dudas, 530 F. Supp. 2d 786 (E.D. Va. 2008).

11 Michigan v. U.S. E.P.A., 213 F.3d 663 (D.C. Cir. 2000).

12 Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Dept. of Agriculture, 415 F.3d 1078 (9th Cir. 2005), for additional opinion, see, 143 Fed. Appx. 751 (9th Cir. 2005) and as amended, (Aug. 17, 2005); National Telephone Co-op. Ass'n v. F.C.C., 563 F.3d 536 (D.C. Cir. 2009); National Ass'n of Mortg. Brokers v. Board of Governors of Federal Reserve System, 773 F. Supp. 2d 151 (D.D.C. 2011); Tafas v. Dudas, 530 F. Supp. 2d 786 (E.D. Va. 2008).

13 U.S. Cellular Corp. v. F.C.C., 254 F.3d 78 (D.C. Cir. 2001).

14 Cement Kiln Recycling Coalition v. E.P.A., 255 F.3d 855 (D.C. Cir. 2001); National Women, Infants, and Children Grocers Ass'n v. Food and Nutrition Service, 416 F. Supp. 2d 92, 26 A.L.R. Fed. 2d 683 (D.D.C. 2006).

2 Am. Jur. 2d Administrative Law § 170

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

5. Exceptions to Rule-Making Procedures

a. Overview; Certain Functions

§ 170. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 394

Treatises and Practice Aids

As to exceptions to rule-making procedures, generally, see Federal Procedure, L. Ed., Administrative Procedure
[Westlaw®: Search Query]

The rule-making provisions of the Federal Administrative Procedure Act do not apply to—
— a rule involving a military function[1] or foreign affairs function of the United States.[2]
— a matter relating to agency management, personnel, public property, loans, grants, benefits, or contracts.[3]
— interpretive rules; general statements of policy; or rules of agency organization, procedure, or practice.[4]
In addition, when agencies follow negotiated rule-making procedures, the notice-and-comment rule-making procedures do not generally apply.[5] Furthermore, a "good-cause" exception exists to the rule-making requirements where notice is impracticable, unnecessary, or contrary to public interest,[6] and some other miscellaneous exceptions exist as well.[7]

The exemptions must, however, be narrowly construed,[8] or else broad construction of terms such as "public benefits" could lead to the exemption of nearly all rules from the rule-making requirements of the Federal Administrative Procedure Act (APA).[9]

Practice Tip:

The good cause requirement that an agency articulate its basis for dispensing with normal notice and comment is not a procedural formality but serves the crucial purpose of ensuring that the exceptions do not "swallow the rule."[10]

Inevitably, in determining whether the APA requires notice-and-comment rulemaking, the interest of agency efficiency and public input are in tension.[11]However, when an exemption is clearly and directly involved, the rule is exempt even though it is not a mechanical or procedural rule.[12]An enormous quantity of rulemaking is exempt under these exceptions.[13]

Footnotes

1 § 172.

2 § 171.

3 § 173.

4 § 174.

5 § 161.

6 § 177.

7 § 181.

8 City of New York v. Permanent Mission of India to United Nations, 618 F.3d 172, 58 A.L.R. Fed. 2d 689 (2d Cir. 2010); Coalition for Parity, Inc. v. Sebelius, 709 F. Supp. 2d 10 (D.D.C. 2010); Record Buck Farms, Inc. v. Johanns, 510 F. Supp. 2d 868 (M.D. Fla. 2007).

9 Housing Authority of City of Omaha, Neb. v. U.S. Housing Authority, 468 F.2d 1 (8th Cir. 1972).

10 North Carolina Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755 (4th Cir. 2012).

11 U.S. Dept. of Labor v. Kast Metals Corp., 744 F.2d 1145 (5th Cir. 1984).

12 Humana of South Carolina, Inc. v. Califano, 590 F.2d 1070 (D.C. Cir. 1978).

13 Center for Auto Safety v. Tiemann, 414 F. Supp. 215 (D.D.C. 1976).

End of Document

2 Am. Jur. 2d Administrative Law § 171

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

5. Exceptions to Rule-Making Procedures

a. Overview; Certain Functions

§ 171. Rules regarding foreign affairs

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 394

Treatises and Practice Aids

As to exceptions to rule-making procedures, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

The rule-making provisions of the Federal Administrative Procedure Act do not apply to a rule involving a foreign affairs function of the United States.[1] However, the foreign affairs exception is not limited to diplomatic activities and clearly applies when the President defines, modifies or even violates the terms of an international agreement, or directs a subordinate to do so.[2]

Nonetheless, the exemption was intended by Congress to receive limited application.[3] It does not apply to functions merely because they have an impact beyond the borders of the United States.[4] Rather, the exemption applies if the subject matter in question is clearly and directly involved in a foreign affairs function,[5] such as matters which so affect relations with other governments that public rulemaking would clearly provoke definitively undesirable international consequences.[6]

CUMULATIVE SUPPLEMENT

Cases:

A rule falls within the foreign affairs function exception to the Administrative Procedure Act's (APA) notice-and-comment rulemaking procedures only if it clearly and directly involves a foreign affairs function of the United States. 5 U.S.C.A. § 553(a)(1). Capital Area Immigrants' Rights Coalition v. Trump, 471 F. Supp. 3d 25 (D.D.C. 2020).

[END OF SUPPLEMENT]

Footnotes

1 5 U.S.C.A. § 553(a).

2 Mast Industries, Inc. v. Regan, 8 Ct. Int'l Trade 214, 596 F. Supp. 1567 (1984).

3 Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), on reh'g, 727 F.2d 957 (11th Cir. 1984), judgment aff'd, 472 U.S. 846, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985).

4 Mast Industries, Inc. v. Regan, 8 Ct. Int'l Trade 214, 596 F. Supp. 1567 (1984).

5 City of New York v. Permanent Mission of India to United Nations, 618 F.3d 172, 58 A.L.R. Fed. 2d 689 (2d Cir. 2010) (quintessential foreign affairs functions such as diplomatic relations and the regulation of foreign missions are subject to the exemption without a case-by-case analysis).

6 City of New York v. Permanent Mission of India to United Nations, 618 F.3d 172, 58 A.L.R. Fed. 2d 689 (2d Cir. 2010); Rajah v. Mukasey, 544 F.3d 427, 55 A.L.R. Fed. 2d 717 (2d Cir. 2008), for additional opinion, see, 544 F.3d 449 (2d Cir. 2008).

2 Am. Jur. 2d Administrative Law § 172

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

5. Exceptions to Rule-Making Procedures

a. Overview; Certain Functions

§ 172. Rules regarding military functions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 394

A.L.R. Library

Construction and application of "Military Function" exception to notice and comment requirements of Administrative Procedure Act (5 U.S.C.A. sec. 553(a)(1)), 133 A.L.R. Fed. 537

Treatises and Practice Aids

As to exceptions to rule-making procedures, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

Rules involving a military function of the federal government are exempt from the rule-making process of the Federal Administrative Procedure Act (APA).[1] Indeed, a rule involving a military function may be exempt from the notice requirements of the Federal APA even if it regulates civilians.[2]

Footnotes

1 5 U.S.C.A. § 553(a).

2 U.S. v. Ventura-Melendez, 321 F.3d 230 (1st Cir. 2003).

End of Document

2 Am. Jur. 2d Administrative Law § 173

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

5. Exceptions to Rule-Making Procedures

a. Overview; Certain Functions

§ 173. Rules regarding management of personnel, public property, loans, grants, benefits, and contracts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 394

A.L.R. Library

Construction and application of 5 U.S.C.A. sec. 553(a)(2), exempting from Administrative Procedure Act's rulemaking requirements matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts, 41 A.L.R. Fed. 926

Treatises and Practice Aids

As to exceptions to rule-making procedures, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

The rule-making provisions of the Federal Administrative Procedure Act (APA) do not apply to the extent that a rule involves a matter relating to agency management or personnel, or public property, loans, grants, benefits, or contracts.[1] These exemptions apply when any one of the enumerated categories is clearly and directly involved in the regulatory effort at issue.[2] The exemptions for public property, grants, benefits, and contracts should be narrowly construed.[3]

Agency action that directly concerns the agency's ability to set medical standards for its own personnel and to implement those standards through contract is exempted from the notice and comment rulemaking provisions of the APA.[4]It has been held generally that the rule-making requirements of the APA do not apply to matters concerning public lands.[5]

The exception for public grants exists because where public benefits or entitlements are concerned, the congressional aim was to afford agencies procedural latitude regardless of the interest of affected parties and the public generally in contributing to the formulation of the exempted rule.[6]

Footnotes

1 5 U.S.C.A. § 553(a).

2 International Union, Security, Police, and Fire Professionals of America (SPFPA) v. U.S. Marshal's Service, 350 F. Supp. 2d 522 (S.D. N.Y. 2004); Sherwood v. Tennessee Valley Authority, 925 F. Supp. 2d 906 (E.D. Tenn. 2013).

3 Sherwood v. Tennessee Valley Authority, 925 F. Supp. 2d 906 (E.D. Tenn. 2013).

4 International Union, Security, Police, and Fire Professionals of America (SPFPA) v. U.S. Marshal's Service, 350 F. Supp. 2d 522 (S.D. N.Y. 2004) (agency's promulgation of rules as to personnel's medical standards and certification procedures are exempt).

5 American Colloid Co. v. Babbitt, 145 F.3d 1152 (10th Cir. 1998).

6 National Women, Infants, and Children Grocers Ass'n v. Food and Nutrition Service, 416 F. Supp. 2d 92, 26 A.L.R. Fed. 2d 683 (D.D.C. 2006).

End of Document

2 Am. Jur. 2d Administrative Law § 174

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

5. Exceptions to Rule-Making Procedures

b. Nonsubstantive Rules

§ 174. Interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 394

A.L.R. Library

Exceptions under 5 U.S.C.A. sec. 553(b)(A) and sec. 553(b)(B) to notice requirements of Administrative Procedure Act rule making provisions, 45 A.L.R. Fed. 12 (secs. 5-10 superseded in part by What constitutes "interpretative rule" of agency so as to exempt such action from notice requirements of Administrative Procedure Act (5 U.S.C.A. sec. 553(b)(3)(A)), 126 A.L.R. Fed. 347, and secs. 25-39 superseded in part by Construction and Application of Good Cause Exception to Notice and Comment Rulemaking Under Administrative Procedure Act (APA), 5 U.S.C.A. s553(b)(B), 26 A.L.R. Fed. 2d 97)

Treatises and Practice Aids

As to exceptions to rule-making procedures, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

The Federal Administrative Procedure Act (APA) provides that except when notice or hearing is required otherwise by statute, the notice-and-comment rule-making procedures[1] do not apply to interpretive rules; general statements of policy; or

rules of agency organization, procedure, or practice.[2]

The federal courts have held on numerous occasions that interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice, are exempt from the notice-and-comment provisions of the APA.[3]However, the exception for interpretive rules and procedural rules, like the notice-and-comment exceptions generally,[4]is narrowly construed.[5]The function of the exemption for interpretive rules is to allow agencies to explain ambiguous terms[6]in legislative enactments without having to undertake cumbersome proceedings.[7]The function of the exception for procedural rules is to further the policies of serving the need for public participation in agency decisionmaking and of ensuring the agency has all the pertinent information before it when making a decision.[8]

A rule fits within the statutory exemption for "rules of agency organization, procedure, or practice" if the rule does not alter the rights or interests of the parties, as when a rule simply prescribes the manner in which the parties present themselves or their viewpoints to the agency.[9]Some courts have held that the exemption's application depends on whether the rule encodes a substantive value judgment.[10]The exemption from rule-making requirements for procedural rules is applied by the courts with an eye toward balancing the need for public participation in agency decisionmaking with the agency's competing interest in retaining latitude in organizing its internal operations.[11]

The function of the exemption from rule-making procedures that applies to general policy statements is to allow agencies to announce their tentative intentions for the future without binding themselves.[12]The term "general statement of policy" includes an agency's announcement that it will discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation.[13]

Observation:

An agency directive is not subject to the notice-and-comment requirements of the APA and may be modified or rescinded at any time.[14]

CUMULATIVE SUPPLEMENT

Cases:

Interpretive rules, which are not subject to the Administrative Procedure Act's (APA) notice-and-comment requirement, do not have the force and effect of law and are not accorded that weight in the adjudicatory process. 5 U.S.C.A. § 553(b)(A). Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

The *Paralyzed Veterans* doctrine, under which an agency must use the Administrative Procedure Act's (APA) notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from the agency's previous interpretation, is contrary to the clear text of the APA's rulemaking provisions and improperly imposes on agencies an obligation beyond the maximum procedural requirements specified in the APA; abrogating *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579; *Alaska Professional Hunters Ass'n, Inc. v. F.A.A.*, 177 F.3d 1030. 5 U.S.C.A. § 553. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

Because an agency is not required to use the Administrative Procedure Act's (APA) notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule. 5 U.S.C.A. § 553(b)(A). Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

Interpretive rules, which do not require notice and comment under the Administrative Procedure Act (APA), are issued by an agency to advise the public of the agency's construction of the statutes and rules that it administers. 5 U.S.C.A. § 553(b)(A). WildEarth Guardians v. Bernhardt, 501 F. Supp. 3d 1192 (D.N.M. 2020).

Interpretive rules, which are not subject to the notice-and-comment requirements of the Administrative Procedure Act (APA), are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers. 5 U.S.C.A. §§ 553(b)(A), 553(d)(2). Make the Road New York v. Pompeo, 475 F. Supp. 3d 232 (S.D. N.Y. 2020).

Critical feature of interpretive rules, which are not subject to notice and comment requirements of the Administrative Procedure Act (APA), is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules that it administers. 5 U.S.C.A. § 553(b). Guilford College v. McAleenan, 389 F. Supp. 3d 377 (M.D. N.C. 2019).

[END OF SUPPLEMENT]

Footnotes

1 As to notice-and-comment rulemaking, generally, under the APA, see §§ 147 to 159.

2 5 U.S.C.A. § 553(b)(A).

3 Erringer v. Thompson, 371 F.3d 625 (9th Cir. 2004); UPMC Mercy v. Sebelius, 793 F. Supp. 2d 62 (D.D.C. 2011); Moorestown Tp. Bd. of Educ. v. S.D., 811 F. Supp. 2d 1057, 276 Ed. Law Rep. 196 (D.N.J. 2011); Cohn v. Federal Bureau of Prisons, 302 F. Supp. 2d 267 (S.D. N.Y. 2004); Mares v. Federal Bureau of Prisons, 401 F. Supp. 2d 775 (S.D. Tex. 2005).

4 § 170.

5 Time Warner Cable Inc. v. F.C.C., 729 F.3d 137 (2d Cir. 2013); Steinhorst Associates v. Preston, 572 F. Supp. 2d 112 (D.D.C. 2008).

6 UPMC Mercy v. Sebelius, 793 F. Supp. 2d 62 (D.D.C. 2011) (exception also applies to interpretive rules that remind parties of existing duties).

7 American Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987).
However, to reap full benefit of judicial deference, the agency's interpretation of an ambiguous statute ought have gone through required notice-and-comment procedure mandated by the APA. Massachusetts ex rel. Executive Office of Health and Human Services v. Sebelius, 701 F. Supp. 2d 182 (D. Mass. 2010).

8 Time Warner Cable Inc. v. F.C.C., 729 F.3d 137 (2d Cir. 2013).

9 Inova Alexandria Hosp. v. Shalala, 244 F.3d 342 (4th Cir. 2001); U.S. v. Gonzales & Gonzales Bonds and Ins. Agency, Inc., 728 F. Supp. 2d 1077 (N.D. Cal. 2010).

10 Association of American Physicians & Surgeons, Inc. v. Sebelius, 901 F. Supp. 2d 19 (D.D.C. 2012), aff'd, 746 F.3d 468 (D.C. Cir. 2014).

11 Chamber of Commerce of U.S. v. U.S. Dept. of Labor, 174 F.3d 206 (D.C. Cir. 1999).

12 American Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987).

13 Mares v. Federal Bureau of Prisons, 401 F. Supp. 2d 775 (S.D. Tex. 2005).

14 Eastern Paralyzed Veterans Ass'n, Inc. v. Secretary of Veterans Affairs, 257 F.3d 1352 (Fed. Cir. 2001).

End of Document

2 Am. Jur. 2d Administrative Law § 175

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

5. Exceptions to Rule-Making Procedures

b. Nonsubstantive Rules

§ 175. Exception not absolute

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 394

A.L.R. Library

Exceptions under 5 U.S.C.A. sec. 553(b)(A) and sec. 553(b)(B) to notice requirements of Administrative Procedure Act rule making provisions, 45 A.L.R. Fed. 12 (secs. 5-10 superseded in part by What constitutes "interpretative rule" of agency so as to exempt such action from notice requirements of Administrative Procedure Act (5 U.S.C.A. sec. 553(b)(3)(A)), 126 A.L.R. Fed. 347, and secs. 25-39 superseded in part by Construction and Application of Good Cause Exception to Notice and Comment Rulemaking Under Administrative Procedure Act (APA), 5 U.S.C.A. s553(b)(B), 26 A.L.R. Fed. 2d 97)

Interpretive rules and general statements of policy are not entirely exempt from all rule-making requirements. For example, while interpretative rules and statements of policy are not subject to the requirement that their effective date be delayed until 30 days after publication,[1] the Freedom of Information Act still requires that such rules be published for the guidance of the public.[2]

Footnotes

1 § 167.

2 5 U.S.C.A. § 552(a)(1).

As to the disclosure of agency statements of organization and rules under the Freedom of Information Act, generally, see Am. Jur. 2d, Freedom of Information Acts §§ 39 to 46.

End of Document

2 Am. Jur. 2d Administrative Law § 176

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

5. Exceptions to Rule-Making Procedures

b. Nonsubstantive Rules

§ 176. Effect of agency characterization of rule as exempt

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 394

An agency's characterization of a rule as exempt is not controlling or binding on a court[1] and need not be accepted at face value[2] or deferred to by the court.[3] Thus, an agency may not escape the notice-and-comment requirements for rulemaking by labeling a major substantive legal addition[4] or substantive change[5] to a rule a mere interpretation. The court must independently inquire[6] into the substance and effect of a policy pronouncement[7] and will honor an agency's characterization of a rule as legislative or interpretive only if it reasonably describes what the agency has done.[8]

On the other hand, an agency's view or characterization of its own action, while not decisive,[9] is entitled to some consideration[10] and is a factor to consider in determining whether its action constitutes an interpretive rule exempt from notice-and-comment rulemaking.[11]

Footnotes

1 CropLife America v. E.P.A., 329 F.3d 876 (D.C. Cir. 2003).

2 Hemp Industries Ass'n v. Drug Enforcement Admin., 333 F.3d 1082 (9th Cir. 2003).

3 UPMC Mercy v. Sebelius, 793 F. Supp. 2d 62 (D.D.C. 2011).

4 Appalachian Power Co. v. E.P.A., 208 F.3d 1015 (D.C. Cir. 2000).

5 Air Transport Ass'n of America, Inc. v. F.A.A., 291 F.3d 49 (D.C. Cir. 2002).

6 UPMC Mercy v. Sebelius, 793 F. Supp. 2d 62 (D.D.C. 2011).

7 Mt. Diablo Hosp. Dist. v. Bowen, 860 F.2d 951 (9th Cir. 1988).

8 American Federation of Government Employees, AFL-CIO v. U.S., 622 F. Supp. 1109 (N.D. Ga. 1984), opinion aff'd, 780 F.2d 720 (Fed. Cir. 1986).
As to holdings regarding an agency's characterization of a rule as substantive or interpretative, see § 139.

9 Splane v. West, 216 F.3d 1058 (Fed. Cir. 2000).

10 Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250 (3d Cir. 1978).

11 Splane v. West, 216 F.3d 1058 (Fed. Cir. 2000).

End of Document

2 Am. Jur. 2d Administrative Law § 177

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

5. Exceptions to Rule-Making Procedures

c. Good Cause

§ 177. “Good-cause” exception where notice impracticable, unnecessary, or contrary to public interest

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Administrative Law and Procedure 394

A.L.R. Library

Construction and Application of Good Cause Exception to Notice and Comment Rulemaking Under Administrative Procedure Act (APA), 5 U.S.C.A. s553(b)(B), 26 A.L.R. Fed. 2d 97

Treatises and Practice Aids

As to exceptions to rule-making procedures, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

Forms

Forms relating to emergencies, generally, see Federal Procedural Forms, Administrative Procedure [Westlaw® Search

Query]

The Federal Administrative Procedure Act (APA) excuses noncompliance with the procedural requirements for rulemaking where they are impracticable, unnecessary, or contrary to the public interest.[1]Under the APA, any finding of good cause must be incorporated into the rules as issued, along with a brief statement of reasons supporting the finding.[2]This requires the agency to publish a specific finding of good cause documenting why the statutory procedures are impracticable, unnecessary, or contrary to the public interest.[3]The finding is not, however, binding on the courts.[4]

The good-cause exception is essentially an emergency procedure.[5]The exception may also be used in cases when delay could result in serious harm,[6]but it is not an escape clause.[7]It should be narrowly construed and only reluctantly countenanced.[8]Further, it is important to note that the agency bears the burden of demonstrating the grounds for good cause.[9]

A finding of good cause indicates the agency’s intention to promulgate a legislative-type rule.[10]Later attempts by the agency to recharacterize the rule as interpretative are given very little weight.[11]Under other authority, the use of the good-cause exception merely assures that if a court determined that any portion of the final rule was legislative, the agency had on record its justification for invocation of the “good-cause” exception.[12]

The type of emergency situation which justify resort by the agency to the “good-cause” exception is one in which delay would unavoidably frustrate agency powers.[13]Notice and comment on a rule may be impracticable when the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings.[14]In other words, the “good-cause” exception authorizes departures from the APA’s requirements only when compliance would interfere with the agency’s ability to carry out its mission.[15]Additionally, narrowly focused and temporary emergency regulations that address only the problem at hand may be promulgated without notice and comment since they legitimately fall within the APA’s good cause exception.[16]However, where the agency has been considering the problem addressed by the regulation “for some time,” a court may conclude that no emergency exists and that normal rule-making procedures can and should be followed.[17]The exemption should similarly not be used to circumvent the notice and comment requirements because an agency finds them inconvenient to follow.[18]

The “unnecessary” prong of the good cause exception for dispensing with normal notice and comment requirements for rulemaking applies when an administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.[19]

Footnotes

1 5 U.S.C.A. § 553(b)(B).

2 5 U.S.C.A. § 553(b)(B).

3 Hemp Industries Ass’n v. Drug Enforcement Admin., 333 F.3d 1082 (9th Cir. 2003).

4 Mobil Oil Corp. v. Department of Energy, 610 F.2d 796 (Temp. Emer. Ct. App. 1979).

5 North Carolina Growers’ Ass’n, Inc. v. United Farm Workers, 702 F.3d 755 (4th Cir. 2012); U.S. v. Valverde, 628 F.3d 1159 (9th Cir. 2010), cert. denied, 132 S. Ct. 1534, 182 L. Ed. 2d 219 (2012).

6 North Carolina Growers’ Ass’n, Inc. v. United Farm Workers, 702 F.3d 755 (4th Cir. 2012); U.S. v. Dean, 604 F.3d 1275 (11th Cir. 2010); Chamber of Commerce of U.S. v. S.E.C., 443 F.3d 890 (D.C. Cir. 2006).

7 Record Buck Farms, Inc. v. Johanns, 510 F. Supp. 2d 868 (M.D. Fla. 2007).

8 Record Buck Farms, Inc. v. Johanns, 510 F. Supp. 2d 868 (M.D. Fla. 2007); U.S. v. Rebelo, 646 F. Supp. 2d 682 (D.N.J. 2009), aff’d, 394 Fed. Appx. 850 (3d Cir. 2010); U.S. v. Torres, 573 F. Supp. 2d 925 (W.D. Tex. 2008).

9 Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 6 Fed. R. Serv. 3d 1248 (10th Cir. 1987).

10 Levesque v. Block, 723 F.2d 175 (1st Cir. 1983).

11 Levesque v. Block, 723 F.2d 175 (1st Cir. 1983).

12 United Technologies Corp. v. U.S. E.P.A., 821 F.2d 714 (D.C. Cir. 1987).

13 National Nutritional Foods Ass’n v. Kennedy, 572 F.2d 377 (2d Cir. 1978).

14 North Carolina Growers’ Ass’n, Inc. v. United Farm Workers, 702 F.3d 755 (4th Cir. 2012).

15 Natural Resources Defense Council, Inc. v. Evans, 316 F.3d 904 (9th Cir. 2003).

16 Northern Mariana Islands v. U.S., 686 F. Supp. 2d 7 (D.D.C. 2009).

17 Texas Food Industry Ass’n v. U.S. Dept. of Agriculture, 842 F. Supp. 254 (W.D. Tex. 1993).

18 Record Buck Farms, Inc. v. Johanns, 510 F. Supp. 2d 868 (M.D. Fla. 2007).

19 North Carolina Growers’ Ass’n, Inc. v. United Farm Workers, 702 F.3d 755 (4th Cir. 2012); Mack Trucks, Inc. v. E.P.A., 682 F.3d 87 (D.C. Cir. 2012).

End of Document

2 Am. Jur. 2d Administrative Law § 178

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

5. Exceptions to Rule-Making Procedures

c. Good Cause

§ 178. Impracticability; time constraints

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 394

Treatises and Practice Aids

As to exceptions to rule-making procedures, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

"Impracticable" means a situation in which the due and required execution of the agency functions would be unavoidably prevented by public rule-making proceedings.[1]Impracticability exists when the agency cannot both follow the notice-and-comment procedure and execute its statutory duty.[2]For example, where the rulemaking deadline imposed by Congress places the administrative agency in a bind such that adherence to Administrative Procedure Act's (APA) requirements would prevent the statutory program from having effect, courts will defer to an agency's assertion of the good cause exception.[3]Furthermore, there is good cause to forego notice and comment procedures in promulgating an interim rule implementing a statute where Congress granted the agency some discretion to issue an interim rule without first providing notice and comment in order to ensure that a rule was in place by the effective date, it would have been difficult for the agency to have set aside a period of time to undertake notice and comment, there was a compelling need to have a rule in effect by the statute's effective date, and the rule was only temporary.[4]

However, while time constraints,[5]imminence of a deadline,[6]or the urgent need for agency action[7]are factors to be considered, they are inadequate justification to invoke the good-cause exception, especially when it would have been possible to comply with both the Federal Administrative Procedure Act and with the statutory deadline.[8]Thus, good cause for eliminating notice and the opportunity to comment may not exist, even though an agency feels the need to provide immediate guidance

regarding the operation of a new program[9]or wishes to have the regulations in effect during the current harvest season.[10]Further, statutory language imposing strict deadlines, standing alone, does not constitute sufficient good cause justifying departure from the standard notice-and-comment requirements for agency rulemaking.[11]

Footnotes

1 Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 6 Fed. R. Serv. 3d 1248 (10th Cir. 1987).

2 Natural Resources Defense Council, Inc. v. Evans, 316 F.3d 904 (9th Cir. 2003).

3 U.S. v. Rebelo, 646 F. Supp. 2d 682 (D.N.J. 2009), aff'd, 394 Fed. Appx. 850 (3d Cir. 2010).

4 National Women, Infants, and Children Grocers Ass'n v. Food and Nutrition Service, 416 F. Supp. 2d 92, 26 A.L.R. Fed. 2d 683 (D.D.C. 2006).

5 Levesque v. Block, 723 F.2d 175 (1st Cir. 1983).

6 U.S. v. Rebelo, 646 F. Supp. 2d 682 (D.N.J. 2009), aff'd, 394 Fed. Appx. 850 (3d Cir. 2010).

7 Natural Resources Defense Council, Inc. v. U.S. E.P.A., 683 F.2d 752 (3d Cir. 1982).

8 Natural Resources Defense Council, Inc. v. U.S. E.P.A., 683 F.2d 752 (3d Cir. 1982).

9 Mobil Oil Corp. v. Department of Energy, 610 F.2d 796 (Temp. Emer. Ct. App. 1979).

10 National Ass'n of Farmworkers Organizations v. Marshall, 628 F.2d 604 (D.C. Cir. 1980).

11 Asiana Airlines v. F.A.A., 134 F.3d 393 (D.C. Cir. 1998).

End of Document

2 Am. Jur. 2d Administrative Law § 179

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

5. Exceptions to Rule-Making Procedures

c. Good Cause

§ 179. Minor amendment not affecting public interest

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 394

An agency wishing to correct a mistake in a rule must either undergo the notice and comment process or invoke an exception thereto.[1] Notice and opportunity to comment may be unnecessary if the agency is making only a minor or technical amendment to its rules which does not affect the public interest.[2] "Unnecessary" means unnecessary so far as the public is concerned, as is the case if a minor or merely technical amendment in which the public is not particularly interested is involved.[3]

Footnotes

1 Select Specialty Hospital-Akron, LLC v. Sebelius, 820 F. Supp. 2d 13 (D.D.C. 2011) (correction of a ministerial error in a rule does not require an exception to the notice and comment requirement).

2 National Nutritional Foods Ass'n v. Kennedy, 572 F.2d 377 (2d Cir. 1978).

3 Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 6 Fed. R. Serv. 3d 1248 (10th Cir. 1987).

End of Document

2 Am. Jur. 2d Administrative Law § 180

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

5. Exceptions to Rule-Making Procedures

c. Good Cause

§ 180. Significant harm from proposal of rule

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 394

In special circumstances, good cause can exist when the very announcement of a proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare.[1] For example, the public interest prong of the good cause exception is appropriately invoked when the timing and disclosure requirements of the usual procedures would defeat the purpose of the proposal if, for example, announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent, and in such a circumstance, notice and comment could be dispensed with in order to prevent the amended rule from being evaded.[2] However, if the exception is not to become an all-purpose escape clause, the anticipated response must involve a significant threat of serious damage to an important public interest.[3]

Footnotes

1 Chamber of Commerce of U.S. v. S.E.C., 443 F.3d 890 (D.C. Cir. 2006).

2 Mack Trucks, Inc. v. E.P.A., 682 F.3d 87 (D.C. Cir. 2012).

3 Mobil Oil Corp. v. Department of Energy, 728 F.2d 1477 (Temp. Emer. Ct. App. 1983).

End of Document

2 Am. Jur. 2d Administrative Law § 181

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

5. Exceptions to Rule-Making Procedures

d. Other Exceptions; Waiver

§ 181. Other exceptions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 394

Treatises and Practice Aids

As to exceptions to rule-making procedures, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

The Federal Administrative Procedure Act (APA) does not govern rulemaking by territorial and commonwealth officials.[1] The APA rule-making requirements also do not apply if, under the pertinent regulatory statute, the administrator has the discretion to change policies or classifications at any time.[2] However, if no statute manifests a strong congressional intent that rule-making procedures should not be followed, and no exemption is granted under the APA, no exemption should be permitted by the courts.[3]

Footnotes

1 Nestle Products, Inc. v. U. S., 64 Cust. Ct. 158, 310 F. Supp. 792 (Cust. Ct. 3 Div. 1970).

2 Certified Color Mfrs. Ass'n v. Mathews, 543 F.2d 284 (D.C. Cir. 1976).

3 Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650 (D.D.C. 1978).

End of Document

2 Am. Jur. 2d Administrative Law § 182

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

C. Federal Procedure for Adoption of Rules

5. Exceptions to Rule-Making Procedures

d. Other Exceptions; Waiver

§ 182. Waiver of, or estoppel from asserting, exemption

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 394

Treatises and Practice Aids

As to exceptions to rule-making procedures, generally, see Federal Procedure, L. Ed., Administrative Procedure [Westlaw®: Search Query]

An agency's exemption from the rule-making requirements of the Federal Administrative Procedure Act (APA) may be waived by an announcement in the Federal Register.[1]Under some circumstances, an agency may also be estopped from claiming one exemption if it relies on another exemption, such as that notice is impracticable, unnecessary, or contrary to the public interest.[2]However, it has also been held that the voluntary publication of notice in the Federal Register and an invitation for public comment does not necessarily constitute an estoppel against the application of one of the exemptions.[3]

Where an agency issued a policy statement providing that it will give notice of proposed rulemaking and invited the public to participate in rulemaking where not required by law, including rulemaking relating to grants and benefits, the policy statement fully binds the agency to the procedural requirements of the APA and an otherwise exempt rule is subject to the notice and comment procedures.[4]

Footnotes

[1] Linoz v. Heckler, 800 F.2d 871 (9th Cir. 1986).

[2] City of New York v. Diamond, 379 F. Supp. 503 (S.D. N.Y. 1974) (disapproved of on other grounds by, U.S. v. Gavrilovic, 551 F.2d 1099 (8th Cir. 1977)).

[3] Lewis v. Richardson, 428 F. Supp. 1164 (D. Mass. 1977).

[4] National Women, Infants, and Children Grocers Ass'n v. Food and Nutrition Service, 416 F. Supp. 2d 92, 26 A.L.R. Fed. 2d 683 (D.D.C. 2006) (the court further discussing the policy statement's good cause exemption).

End of Document

2 Am. Jur. 2d Administrative Law V D Refs.

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

D. State Procedure for Adoption of Rules

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392.1 to 400, 402 to 411, 418

A.L.R. Library

A.L.R. Index, Administrative Law
West's A.L.R. Digest, Administrative Law and Procedure 392.1 to 400, 402 to 411, 418

End of Document

2 Am. Jur. 2d Administrative Law § 183

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

D. State Procedure for Adoption of Rules

1. In General

§ 183. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392.1

Administrative agencies may only regulate by a new rule if the proper rulemaking procedures have been followed.[1] State agencies generally must follow statutory requirements or procedures in rule-making proceedings[2] in compliance with the state's administrative procedure act.[3] These procedures include notice, public hearing,[4] and public comment requirements.[5] In addition, when an agency undertakes rulemaking, it ordinarily must follow publication procedures.[6]

In determining whether an agency policy or rule is a regulation that must be promulgated in compliance with the state's administrative procedure act requirements, a court examines its character and use.[7] When an agency exercises its authority to supplement a statute, not simply to construe it, it makes new law and thereby engages in substantive or legislative rulemaking, as must comply with the notice and comment provisions of its administrative procedure act.[8] The states may impose rulemaking procedures only upon those statements which are intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law.[9]

Footnotes

1 Villegas v. Silverman, 832 N.E.2d 598 (Ind. Ct. App. 2005).

2 Coalition of Greater Minnesota Cities v. Minnesota Pollution Control Agency, 765 N.W.2d 159 (Minn. Ct. App. 2009); Deborah Heart and Lung Center v. Howard, 404 N.J. Super. 491, 962 A.2d 577 (App. Div. 2009); Fidelity & Guar. Ins. Co. v. Bureau of Workers' Compensation, 13 A.3d 534 (Pa. Commw. Ct. 2010).

3 People v. Taylor, 174 Cal. App. 4th 920, 94 Cal. Rptr. 3d 756 (4th Dist. 2009), as modified on denial of reh'g, (June 29, 2009); Andrews v. District of Columbia Police and Firefighters Retirement and Relief Bd., 991 A.2d 763 (D.C. 2010); Mallinckrodt U.S. LLC v. Department of Environmental Protection, 2014 ME 52, 2014 WL 1317513 (Me. 2014); In re Authorization For Freshwater Wetlands Statewide General Permit 6, Special Activity Transition Area

Waiver For Stormwater Management, Water Quality Certification, 433 N.J. Super. 385, 80 A.3d 1132 (App. Div. 2013).

4 Labor Com'r of State of Nevada v. Littlefield, 123 Nev. 35, 153 P.3d 26 (2007).

5 Greenbriar Hills Country Club v. Director of Revenue, 47 S.W.3d 346 (Mo. 2001).

6 Andrews v. District of Columbia Police and Firefighters Retirement and Relief Bd., 991 A.2d 763 (D.C. 2010); Taylor v. Kansas Dept. of Health and Environment, 49 Kan. App. 2d 233, 305 P.3d 729 (2013).

7 Squires v. Alaska Bd. of Architects, Engineers & Land Surveyors, 205 P.3d 326 (Alaska 2009).

8 Andrews v. District of Columbia Police and Firefighters Retirement and Relief Bd., 991 A.2d 763 (D.C. 2010).

9 Agency for Health Care Admin. v. Custom Mobility, Inc., 995 So. 2d 984 (Fla. 1st DCA 2008).

End of Document

2 Am. Jur. 2d Administrative Law § 184

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

D. State Procedure for Adoption of Rules

1. In General

§ 184. Rationale; purpose

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392.1

The purposes behind procedural requirements for state rulemaking are to—
— ensure that all interested parties are made aware of or have notice of any proposed rule.[1]
— give the public and affected parties an opportunity to participate and express their views on the proposed rule.[2]
— provide information to the agency through statements of those in support of or in opposition to the proposed rule.[3]
— ensure that those persons or entities whom a regulation will affect have a voice in its creation, as well as notice of the law's requirements so that they can conform their conduct accordingly.[4]
— create an administrative record assuring effective judicial review.[5]
— permit a full and fair analysis of the impact and validity of a proposed rule.[6]
— prevent secret agency rulemaking when the agency uses undisclosed but authoritative interpretations of law or policy.[7]
— ensure that none of the essential functions of the legislative process are lost.[8]

CUMULATIVE SUPPLEMENT

Cases:

The rulemaking requirements of Administrative Procedure Act (APA) are mandatory protections against the arbitrary imposition of regulatory requirements; they are fundamental to the administrative process and apply broadly to any action by an agency that functions as a rule. R.C. § 119.01 et seq. Fairfield Cty. Bd. of Commrs. v. Nally, 143 Ohio St. 3d 93, 2015-Ohio-991, 34 N.E.3d 873 (2015).

[END OF SUPPLEMENT]

Footnotes

1 Women's and Children's Hosp. v. State, Dept. of Health and Hospitals, 984 So. 2d 760 (La. Ct. App. 1st Cir. 2008), writ granted, 983 So. 2d 1287 (La. 2008) and decision aff'd, 2 So. 3d 397 (La. 2009).
The administrative procedure act is meant to reduce the risk of arbitrary application and to inform the public of regulations. Friends of Willow Lake, Inc. v. State, Dept. of Transp. & Public Facilities, Div. of Aviation & Airports, 280 P.3d 542 (Alaska 2012).

2 In re Provision of Basic Generation Service for Period Beginning June 1 2008, 205 N.J. 339, 15 A.3d 829 (2011).

3 Beverly Enterprises-Missouri Inc. v. Department of Social Services, Div. of Medical Services, 349 S.W.3d 337 (Mo. Ct. App. W.D. 2008).

4 Reilly v. Superior Court, 57 Cal. 4th 641, 160 Cal. Rptr. 3d 410, 304 P.3d 1071 (2013).

5 POET, LLC v. California Air Resources Board, 218 Cal. App. 4th 681, 160 Cal. Rptr. 3d 69 (5th Dist. 2013), as modified on denial of reh'g, (Aug. 8, 2013) and review denied, (Nov. 20, 2013).

6 State ex rel. United Auto Aerospace & Agricultural Implement Workers of Am. v. Ohio Bur. of Workers' Comp., 95 Ohio St. 3d 408, 2002-Ohio-2491, 768 N.E.2d 1129 (2002).

7 City of Des Moines v. Employment Appeal Bd., 722 N.W.2d 183 (Iowa 2006).

8 Danse Corp. v. City of Madison Heights, 466 Mich. 175, 644 N.W.2d 721 (2002).

End of Document

2 Am. Jur. 2d Administrative Law § 185

American Jurisprudence, Second Edition | February 2022 Update

Administrative Law
Glenda K. Harnad, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D. and Karl Oakes, J.D.

V. Rulemaking

D. State Procedure for Adoption of Rules

1. In General

§ 185. Effect of noncompliance with rule-making procedures; substantial compliance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Administrative Law and Procedure 392.1, 395

An agency violates a state's administrative procedure act if it engages in rulemaking without following the act's procedural requirements.[1]Generally, rules not promulgated in accordance with the administrative procedure act are invalid,[2]without effect,[3]void,[4]and provide no one with a clear legal right to judicial relief.[5]

However, the administrative procedure act may require only substantial compliance for a rule to be valid.[6]This is the approach of the 1981 version of the Model State Administrative Procedure Act, which says that no rule is valid unless adopted in substantial compliance with the Model Act.[7]Substantial compliance, as required under state rulemaking procedures, is more than minimal compliance, but less than strict or absolute compliance.[8]It has alternatively been defined as actual compliance in respect to the substance essential to every reasonable objective of the statute.[9]Similarly, under the 2010 version of the Model State Administrative Procedure Act, an action taken under the rulemaking article is not valid unless it substantially complies with the rulemaking procedural requirements.[10]

Footnotes

1 State, Dept. of Taxation v. Chrysler Group LLC, 300 P.3d 713, 129 Nev. Adv. Op. No. 29 (Nev. 2013).

2 Niles Freeman Equipment v. Joseph, 161 Cal. App. 4th 765, 74 Cal. Rptr. 3d 690 (3d Dist. 2008); Bueno v. Board of Trustees, 422 N.J. Super. 227, 27 A.3d 1237, 271 Ed. Law Rep. 1030 (App. Div. 2011); El Paso Hosp. Dist. v. Texas Health and Human Services Com'n, 247 S.W.3d 709 (Tex. 2008).
An agency's failure to comply with the APA's procedures in enacting a rule requires invalidation of the rule. City of Vancouver v. State Public Employment Relations Com'n, 198 L.R.R.M. (BNA) 2899, 2014 WL 1226499 (Wash. Ct. App. Div. 2 2014).

3 Mallinckrodt U.S. LLC v. Department of Environmental Protection, 2014 ME 52, 2014 WL 1317513 (Me. 2014).

4 Taylor v. Kansas Dept. of Health and Environment, 49 Kan. App. 2d 233, 305 P.3d 729 (2013); Department of Social Services, Div. of Medical Services v. Little Hills Healthcare, L.L.C., 236 S.W.3d 637 (Mo. 2007).

5 Coordinating Council for Independent Living, Inc. v. Palmer, 209 W. Va. 274, 546 S.E.2d 454 (2001).

6 Seneca Nation of Indians v. State, 89 A.D.3d 1536, 933 N.Y.S.2d 500 (4th Dep't 2011), leave to appeal denied, 18 N.Y.3d 808, 942 N.Y.S.2d 36, 965 N.E.2d 263 (2012).
When an agency substantially fails to comply with rulemaking requirements of the State APA, courts are not limited to choosing between invalidation of the regulation and no remedy at all; furthermore, when selecting an appropriate remedy for a procedural violation of the APA, courts may consider the public interests affected by the remedy. POET, LLC v. California Air Resources Board, 218 Cal. App. 4th 681, 160 Cal. Rptr. 3d 69 (5th Dist. 2013), as modified on denial of reh'g, (Aug. 8, 2013) and review denied, (Nov. 20, 2013).

7 Model State Administrative Procedure Act (1981) § 3-113(a).

8 Brighton Pharmacy, Inc. v. Colorado State Pharmacy Bd., 160 P.3d 412 (Colo. App. 2007).

9 California Assn of Medical Products Suppliers v. Maxwell-Jolly, 199 Cal. App. 4th 286, 131 Cal. Rptr. 3d 692 (1st Dist. 2011).

10 Model State Administrative Procedure Act (2010) § 315.

End of Document