

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

| | | |
|-------------------------|---|-----------------------|
| OPINION | : | No. 79-1104 |
| | : | |
| of | : | <u>April 22, 1980</u> |
| | : | |
| GEORGE DEUKMEJIAN | : | |
| Attorney General | : | |
| | : | |
| Victor D. Sonenberg | : | |
| Deputy Attorney General | : | |
| | : | |

SUBJECT: ADOPTING ADMINISTRATIVE REGULATION—To the extent that any particular procedural step, which an agency must undertake prior to its tendering a regulation for filing is completed prior to the new statute’s operative date, no such step need be repeated pursuant to the requirements of the new statute, even though the agency tenders the regulation for filing after the new statute’s operative date.

The Honorable Herbert W. Nobriga, Director of the Office of Administrative Hearings, has requested an opinion on the following question:

Where a state agency has adopted an administrative regulation in accordance with the procedural steps specified in the old statute governing such procedures and, before the agency has submitted the adopted regulation for filing with the Secretary of State, the new statute, which replaces the old statute, becomes operative, are the procedural steps taken by the agency prior to such filing controlled by the old statute or must such steps be repeated by the agency to reflect any changes effected by the new statute?

CONCLUSION

Where an agency had adopted an administrative regulation in accordance with the procedural steps specified in the old statute governing such procedures and, before the agency has submitted the adopted regulation for filing with the Secretary of State, the new statute, which replaces the old statute, becomes operative, the procedural steps taken by the agency prior to such filing are controlled by the old statute to the extent such steps were completed prior to the new statute's operative date, and such steps need not be repeated to reflect any changes effected by the new statute. However, where the new statute imposes a new procedural step, as opposed to modifying a preexisting step, the provisions for such new step must be complied with by the regulation adopting agency in those instances where requiring such compliance would not render previously completed steps invalid.

ANALYSIS

Presently the Administrative Procedure Act (Gov. Code §§ 11370-11528)¹ consists of two major components: that which specifies the procedures governing adjudicatory hearings before state administrative agencies (§§ 11500–11528) and that which specifies the procedures governing the adoption of administrative regulations by such state agencies. (§§ 11371–11445.)

The Legislature has recently repealed and reenacted in substantially modified form that component of the law concerning the adoption of administrative regulations. (Stats. 1979, ch. 567.) That administrative regulation component was also taken out of the Administrative Procedure Act and placed in a separate chapter.² The new statute and the repeal of the old statute become operative on July 1, 1980. (Stats. 1979, ch. 567, §§ 2, 3.)

One of the more significant modifications produced by the new statute is the establishment of a new agency, the Office of Administrative Law (§ 11340.2(a)), which will assume, with expanded authority, the coordinating and review functions relating to the adoption of administrative regulations which are now performed by the Office of Administrative Hearings. (See §§ 11371–11445 in effect until July 1, 1980.)

Under the old statute this coordinating and review function was facilitated submit by the requirement that an agency adopting a regulation had the proposed regulation to the Office of Administrative Hearings prior to its becoming effective, for that office's

¹ Hereafter all section references are to the Government Code unless otherwise specified.

² The Administrative Procedure Act as provided in section 11370 comprehends chapters 4, 4.5, and 5 (of part 1. div. 3. title 2 of the Government Code), and the new provisions constitute chapter 3.5.

determination of whether the regulation complied with the prescribed form and style. (§§ 11380, 11380.2.)

Under the new statute the Office of Administrative Law is given this function of reviewing regulations for form and style (§ 11343.2) and also the further authority to disapprove regulations which do not meet standards concerning the need for a particular regulation, or standards concerning its clarity or its consistency with existing laws. (§§ 11349, 11349.1, 11349.3. See also § 11349.5 permitting the Governor to overrule the Office’s decision disapproving a proposed regulation.)

The present question is concerned with the effect of the new statute upon regulation adoption procedures undertaken by a state agency during a period which commenced before and continued after the operative date of the new statute. In considering this question it would appear helpful at this point to set forth in chart form a general summary of the procedural steps to be taken by a state agency in the regulation making process under both the old and the new statutes.

PROCEDURAL STEPS LEADING TO THE ADOPTION AND PROMULGATION OF ADMINISTRATIVE REGULATIONS

| <u>Procedural Steps</u> | <u>Old Statute</u> | <u>New Statute</u> |
|---|--------------------------------|--|
| 1. Petition by any interested person requesting adoption of regulation (optional) | §§ 11426, 11427 | §§ 11347, 11347.1 |
| 2. Agency prepares General Statement of purpose of proposed regulation | Not required under old statute | §§ 11346.6, 11346.7 |
| 3. Agency prepares and issues public notice of proposed action at least 30 days prior to hearing on proposed regulation | §§ 11423, 11425 | §§ 11346.4, 11346.5, 11346.51, 11346.6 |
| 4. Agency conducts hearing on proposed regulation | §§ 11425 | §§ 11346.8 |
| 5. Agency updates previously prepared General Statement of purpose | Not required under old statute | §§ 11346.7 |
| 6. Agency adopts regulation | §§ 11380, 11425 | §§ 11343, 11346.8 |

| <u>Procedural Steps</u> | <u>Old Statute</u> | <u>New Statute</u> |
|--|--------------------------------|------------------------------|
| 7. Printing of summary of § 11428 adopted regulation in Administrative Register notice supplement | § 11428 | § 11347.2 |
| 8. Agency maintains file of the rule making proceeding | Not required under old statute | § 11347.3 |
| 9. Agency submits adopted regulation for review to Office of Administrative Hearings or Office of Administrative Law | § 11380 | § 11343 |
| 10. Office of Administrative Hearings or Office of Administrative Law, after review, transmits regulation to the Secretary of State for filing | § 11380.2 | §§ 11343.2, 11349.1, 11349.3 |
| 11. Nonemergency regulation becomes effective 30 days after filing with Secretary of State | §§ 11382, 11422 | §§ 11343.5, 11346.2 |
| 12. Emergency regulation becomes effective upon filing or date set by agency | § 11422(c) | § 11346.1(d) |
| A. A regulation may be adopted as an emergency regulation where agency makes finding regulation is immediately necessary for public peace, health, etc. | § 11421(b) | § 11346.1(b) |
| B. Emergency regulation remains in effect for only 120 days unless prior to adoption, or within 120 days after adoption, agency substantially complies with procedures specified for adoption of ordinary regulations ³ | § 11422.1 | § 11346.1 |

³ Note that although we refer throughout this opinion to the adoption of a regulation, the procedural steps discussed also apply, for the most part, to the amending and repealing of a

In comparing the provisions of the old and the new statute it becomes apparent that the procedures to be followed by the regulation adopting agency are in many respects essentially the same under both statutes. However, substantial changes have been effected by the new statute in connection with the prehearing statements and notices the adopting agency must issue.⁴

Under the new statute, prior to the publication of the prehearing notice, the agency is required to prepare and make available to the public upon request, a general statement setting forth the reasons for proposing the regulation and specifying the purpose of the regulation, the factual basis for the agency's determination that the regulation is reasonably necessary, and the information and studies upon which the agency is relying in proposing the regulation. (§ 11346.7.) Such general statement of purpose is not required under the old statute.

The prehearing notice itself (§ 11346.5) aside from containing essentially the same information required under the old statute is additionally required to inform the reader that the agency has prepared the general statement described above. (§ 11346.6.) Further, if the agency determines that the proposed regulation would have a "significant effect on housing costs," such fact must also be set forth in the prehearing notice. (§ 11346.51(a).)

Prior to the agency's adopting a regulation it must update its previously prepared general statement to include a summary of statements in opposition to the regulation and a brief explanation of the reasons they were not followed. This statement is to be transmitted to the Office of Administrative law along with the adopted regulation. (§ 11346.7.)

At the time the agency "takes regulatory action which would significantly increase housing costs, the new statute also requires the agency to consider revisions which would offset such increased costs or explain in writing why it has not taken such "offsetting action." (§ 11346.51(b).)⁵

regulation.

⁴ As noted at the outset of this opinion the new statute also instituted significant changes with respect to the review of regulations which have been submitted for filing. However, this review function is carried out by the Office of Administrative Law. (See §§ 11349, 11349.1, 11349.3.) Because the present question is limited to those procedures that must be complied with by the adopting agency, this opinion does not make any determinations with respect to such review functions.

⁵ It should be noted that the provisions of section 11346.51, requiring notice of the effect of the proposed regulation on housing costs and requiring consideration of action to offset increased housing costs were, in effect, made effective on January 1, 1980, by virtue of the enactment of section 11424.5 on September 22, 1979, which contained essentially the same provisions as section

The requirements under the new statute governing the agency's conduct of the hearing (§ 11346.8) and its transmittal of the adopted regulations for filing (§ 11343) remain as they were under the old statute. Similarly, with respect to emergency regulations, the statute has not imposed any additional duties upon the adopting agency other than those which would be operative in the case of nonemergency regulations.

However, with respect to the information that an agency must publish and otherwise make available to the public and interested parties prior to its adopting a regulation and submitting it for filing, it can be seen that a procedure which would be in compliance with the old statute would be substantially insufficient under the new statute.

Thus the specific question we consider here is which statute, the old or the new, determines the sufficiency of procedures followed by an agency when the regulation adopting process was begun before July 1, 1980 under the old statute and was completed after that date under the new statute.

The rules concerning the retroactive operation of statutes are directly pertinent to the resolution of this question. Fundamental among these is the general rule that statutes will not be given retroactive effect unless the Legislature has clearly indicated a contrary intent in the statute. (*DiGenova v. State Board of Education* (1962) 57 Cal. 2d 167, 172–174, 176; see also *Thompson v. Modesto City High School Dist.* (1977) 19 Cal. 3d 620, 625, fn. 3; *Tillie Lewis Foods, Inc. v. City of Pittsburg* (1975) 52 Cal. App. 3d 983, 1009; *Brown v. Friesleben Estate Co.* (1956) 139 Cal. App. 2d 1, 4.)

Also pertinent, because we are concerned here with a procedural statute, is the rule that “. . . Statutes affecting only matters of procedure are applicable to actions which are pending when the statute becomes effective.” (*Romero v. Hertz* (1969) 276 Cal. App. 2d 787, 791.)⁶ However this rule is, in essence, merely an application, in the procedural context, of the general rule against retroactive application of statutes.

11346.51. Section 11424.5 will be repealed on July 1, 1980, the date section 11346.51 goes into effect. (Stats. 1979, ch. 940, §§ 1, 2.)

⁶ This rule relating to the application of new procedural statutes to pending matters is not confined to court or judicial actions. This is indicated by *Romero v. Hertz, supra*, which applied the rule to an administrative discovery statute operative in proceedings before an administrative agency. And see *Governing Board v. Commission on Professional Competence* (1977) 72 Cal. App. 3d 447, 461, which applied the rule to a statute affecting the scope of disciplinary powers in proceedings before an administrative agency. This rule would thus appear to be applicable to a statute affecting regulation making procedures implemented by an administrative agency.

As stated in *Brown v. Friesleben Estate Co.*, *supra*, 139 Cal. App. 2d at pp. 4–5:

“. . . There is no question but that the statute here in question is procedural, and while procedural changes operate on existing causes of action, that is not to say that they have retrospective effect. ‘in other words, procedural statutes may become operative only when and if the procedure or remedy is invoked, and if the trial postdates the enactment, the statute operates in the future regardless of the time of occurrence of the events giving rise to the cause of action. [Citation.] In such cases the statutory changes are said to apply not because they constitute an exception to the general rule of statutory construction, but because they are not in fact retrospective’ The effect of such statutes is actually prospective in nature since they relate to procedure to be followed in the future. . . .’ (See also *Aetna Cas. & Surety Co. v. Industrial Acc. Com.* (1947) 30 Cal. 2d 388, 394; *Olivas v. Weiner* (1954) 127 Cal. App. 2d 597, 601.)

Thus while the rule proscribing retroactive application of statutes does not prevent a new procedural statute from being applied to proceedings already under way at the time of the statute’s enactment, such a statute will operate only as to those procedures which are “invoked” after such statute comes into effect and will not affect previously implemented procedures. Accordingly, in *Bear Valley Mut. Wat. Co. v. County of San Bernardino* (1966) 242 Cal. App. 2d 68, where the sufficiency of a petition to form a water district was in question, the court concluded that, while the formation petition was not signed by enough voters as required by the statute in effect at the time of the board’s order, the board of supervisors could nonetheless order an election for the formation of a water district because the formation petition did have enough signatures under the statute in effect at the time the petition was signed and submitted to the board.

In so concluding, the court declared:

“Nor does the principle that a remedial statute should be liberally construed override the rule against retrospective application. [Citation.]

“‘A retrospective law is one that relates back to a previous transaction and gives it a different legal effect from that which it had under the law when it occurred.’ [Citations.] The petition was signed by the requisite number of voters and was so certified by the registrar of voters when it was filed and presented to the board of supervisors in 1961. Upon such certification and presentation, the board acquired jurisdiction to order the formation election. To now hold that it was divested of jurisdiction by virtue of the subsequent enactment of section 71121 would be giving the section retrospective effect.”

(242 Cal. App. 2d at pp. 72–73.)

The *Bear Valley* case was relied upon by this office in an unpublished opinion (IL 75–30, Feb. 18, 1975) dealing with procedures for filing a statewide initiative petition which were commenced under one statute and completed after a new statute was in effect. Among other things, it was concluded that in view of the rule against retroactivity the spending limitations pertaining to the circulation of petitions would be applied only to those expenditures incurred in circulating the petitions after the effective date of the new statute but not to those incurred while the petitions were being circulated prior to that date.

In Attorney General unpublished opinion IL 72–162, (1972) this office also concluded, consistent with the *Bear Valley* case, that where circulation of a recall petition was commenced prior to the effective date of a new law requiring the filing of a notice of intent to circulate, and signatures were acquired both before and after that date, the precirculation notice requirement of the new law should not be applied to the petition because to do so would give the new law an improper retroactive effect.

With respect to the present question we are also considering a situation involving a procedural process that embodies a series of steps extending over a period of time. Therefore, with respect to the process of adopting any particular regulation, the new statute might become operative either after the adopting agency has completed all of the procedural steps or while the agency is still engaged in the process of undertaking such steps. However, the rule that emerges from the cases and opinions discussed above is that, even though all of the steps in the procedural process have not been completed prior to the date the new statute goes into operation, such steps that have been completed remain valid and need not again be undertaken to conform to the provisions of the new statute.

This proposition is inherent in the definition of a retroactive law as set forth in *Bear Valley Mut. Wat. Co. v. County of San Bernardino, supra*, 242 Cal. App. 2d at p. 72 (and in numerous cases before and since⁷): “A retrospective law is one that relates back to a previous transaction and gives it a different legal effect from that which it had under the law when it occurred.”

Thus, for example, in the present situation if the agency has prepared and published the prehearing notice as required under the old statute (see §§ 11423, 11424) before the

⁷ (See, e.g.: *Ware v. Helter* (1944) 63 Cal. App. 2d 817, 821; *Halt v. Morgan* (1954) 128 Cal. App. 2d 113, 117; *Abrams v. Stone* (1957) 154 Cal. App. 2d 33, 40; *Westfield Palos Verdes Co. v. City of Rancho Palos Verdes* (1977), 73 Cal. App. 3d 486, 493, *Industrial Indem. Co. v. Teachers’ Retirement Bd.* (1978) 86 Cal. App. 3d 92, 97; see also 60 Ops. Cal. Atty. Gen. 197, 202, (1977); Attorney General unpublished opinion IL 72–162, *supra*, at p. 5.)

new statute became operative, the agency need not republish a revised notice to include the additional information required under the new statute (see §§ 11346.51, 11346.6, 11346.7) despite the fact that final action in the rule making process is taken after the new statute's operative date. To require that such procedural steps be repeated to conform to the new statute would be to give that statute retroactive effect because it would render invalid a completed "transaction," even though it was complete and valid as a prehearing notice under the statute in effect at the time it was undertaken. I.e., it would give "a previous transaction . . . a different legal effect . . ." (*Bear Valley Mut. Wat. Co. v. County of San Bernardino*, *ibid.*; see also Attorney General unpublished opinion IL 72-162, *supra*, at pp. 6.7.)

Conversely, if a specific procedural step or component remains in itself incomplete (for example, an agency has commenced to prepare but has not yet published the prehearing notice when the new statute becomes operative), such an inchoate procedural step cannot be regarded as a "transaction" having a "legal effect." Thus, requiring such a procedural step to comply with the new statute would not be affording that statute retroactive effect since it would not be giving the "transaction . . . a different legal effect from that which it had under the law when it occurred."

In this same regard we would also note that both the old (§ 11423) and the new statute (§ 11346.4) provide that if the action proposed in the prehearing notice is not commenced within one year from the date of the notice, the notice is no longer effective, and a new prehearing notice of proposed action must be issued.

Thus if a prehearing notice, issued while the old statute was in effect, becomes void for lack of action within the year period and a new notice is to be issued after the new statute becomes operative, the requiring of such notice to conform to the provisions of the new statute would not be giving that statute retroactive effect because it would not be changing the legal effect that the previous notice had under the old statute.

The provision of the new statute, which requires the adopting agency prior to its issuing the prehearing notice to prepare a general statement of the reasons and purpose of the proposed regulation, and to "update" that statement after the hearing (§ 11346.7), presents a somewhat more complex situation relative to the application of the retroactivity rules because that provision has inserted additional steps into the procedural sequence as opposed to merely modifying existing procedural steps.

If the new statute becomes operative after the agency has issued the prehearing notice, it need not prepare a general statement and reissue the prehearing notice to announce this fact. (See § 11346.6.) Following the hearing the agency cannot "update" a statement which was not made or required. However, it can make a statement summarizing

“the primary considerations raised by persons outside the agency in opposition to the regulations as adopted, together with a brief explanation of the reasons for rejecting those considerations” as required by section 11346.7. Such a post-hearing statement under that section must be made for any regulation adopted after June 30, 1980, though there is no prior statement which it updates.

Requiring this post-hearing statement would not compel the repetition of any previously completed procedural steps and would thus not be giving a retroactive effect to the new statute.

A similar determination applies to the procedure under section 11347.3 which imposes the new requirement that the adopting agency maintain a file of each “rule making proceeding,” which is to consist of various specified documents and materials prepared or received by the agency in the course of such proceeding. While such a file is not required before July 1, 1980, the new statute does require that such a file be created on that date with the information and availability as specified by section 11347.3. Requiring an agency to comply with this procedure after the new statute becomes operative would not affect the validity of any previous steps completed by the agency. Such compliance therefore would not constitute retroactive application of the statute.

Thus, we conclude that to the extent that any particular procedural step, which an agency must undertake prior to its tendering a regulation for filing is completed prior to the new statute’s operative date, no such step need be repeated pursuant to the requirements of the new statute, even though the agency renders the regulation for filing after the new statute’s operative date. However, with respect to newly established procedural steps, they must be undertaken by the agency to the extent that such compliance does not affect the validity of previously completed steps.

It should be noted that this conclusion, based upon the presumption against the retroactive operation of statutes, is applicable to procedures relating to the adoption of emergency as well as nonemergency regulations.

Finally, the fact that the Legislature deferred until July 1, 1980 both the repeal of the old statute and the operative date of the new statute (see Stats. 1979, ch. 567, §§ 2, 3), constitutes a persuasive indication that the Legislature did not intend retroactive application of the new statute. As stated in *People v. Right house* (1937) 10 Cal. 2d 86, 88, where the court considered the analogous situation of the interim period between a statute’s enactment and its constitutionally determined effective date.⁸

⁸ See Cal. Const., art. IV, § 8(c).

“It has been uniformly held in this state that a statute has no force whatever until it goes into effect pursuant to the law relating to legislative enactments. It speaks from the date it takes effect and not before. Until that time it is not a law and has no force for any purpose. [Citations.] So where the legislature passes an act to amend a statute then existing, the latter remains in full force during the time between the passage of the amendatory act and the time when it becomes effective.” See also *Hersh v. State Bar* (1972) 7 Cal. 3d 241.

Thus, in the present situation, after the Legislature has specifically provided for the continuance of the old procedures during an interim period, and the rule adopting agency undertakes and completes steps during that interim period in conformity with the old procedures, it cannot reasonably be presumed that the Legislature intended to render such completed steps a nullity upon the operative date of the new statute.

“It is not to be presumed that the Legislature would command performance of a thoroughly useless act.” *Netwig v. Huntington Beach Union High Sch. Dist.* (1975) 52 Cal. App. 3d 529, 532.
