



The National Agricultural Law Center

The Nation's Leading Source of Agricultural and Food Law Research and Information

Summary of a Recent Judicial Development in Administrative Law

Agency Issues Legislative Rule in Violation of Administrative Procedures Act

Harrison M. Pittman
Staff Attorney

Summary of Decision

In *Hemp Industries Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082 (9th Cir. 2003), the United States Court of Appeals for the Ninth Circuit held that a rule issued by the Drug Enforcement Administration (DEA) was a procedurally invalid legislative rule because the DEA failed to comply with the notice and comment requirements established by the Administrative Procedures Act (APA), 7 U.S.C. §§ 500-504, 551-584, 701-706, 801-808.

Background

Several companies that manufacture, distribute, and sell processed hemp seed or oil products (hereinafter plaintiffs) challenged a regulation promulgated by the DEA that purported to interpret the Controlled Substances Act, 21 U.S.C. § 877, and DEA regulations as banning all naturally-occurring tetrahydrocannabinols (THC), including that found in hemp seed and oil. *Hemp Industries*, 333 F.3d at 1085-86. The DEA did not provide notice that this regulation would be promulgated or solicit comments with respect to this regulation. *See id.* at 1085.

Arguments

The plaintiffs argued that the regulation was a "legislative rule" and was therefore invalid because the DEA did not subject the regulation to the notice and comment requirements set forth in the APA. *See id.* The DEA argued that the regulation was an "interpretive rule" and was therefore not subject to the APA's notice and comment requirements. *See id.*

Analysis and Holdings

The Ninth Circuit explained that an agency "can issue a legislative rule only by using the notice and comment procedure described in the APA, unless it publishes a specific finding of good cause documenting why such procedures 'are impracticable, unnecessary, or contrary to the public interest'" and that "an agency need not follow the notice and comment procedure to issue an interpretive rule." *Id.* at 1087 (citations omitted). While acknowledging that other courts have struggled with determining the difference between legislative rules and interpretative rules, the court noted that in *American Mining Congress v. Mining Safety & Health Administration*, 995 F.2d 1106, 1109 (D.C. Cir. 1993), it was stated that "valid legislative rules, unlike interpretative rules, have the 'force of law.'" *Id.* (citing *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995) (stating that "[i]nterpretive rules . . . do not have the force and effect of law and are not accorded that weight in the adjudicatory process . . ."). The court further noted that in *American Mining* the D.C. Circuit set forth three instances in which a rule has the "force of law": "(1) when, in the absence of the rule, there would not be an adequate legislative basis for enforcement action; (2) when the agency has explicitly invoked its general legislative authority; or (3) when the rule effectively amends a prior legislative rule." *Id.* (citation omitted). *See also id.* at n.5.

The court noted that the DEA's principle argument was that it "it does not represent its putative interpretive rule as having the force of law" and that it relied on *Splane v. West*, 216 F.3d 1058 (Fed. Cir. 2000), a case that held that

"references to regulations having 'the force and effect of law' are to the binding effect of that regulation on tribunals outside the agency." *Id.* at 1087-88. The court rejected this argument and stated that

[t]he fact that an agency claims that its rule does not bind tribunals outside the agency, however, does not end the inquiry into whether the rule is legislative. Regardless of the agency's claims, if there is no legislative basis for enforcement action on third parties without the rule, then the rule necessarily creates new rights and imposes new obligations. This makes it legislative. In addition, when an agency does not

hold out a rule as having the force of law, it may still be legislative if it is inconsistent with a prior rule having the force of law.

Id. at 1088 (citations and quotations omitted).

Having made this determination, the court explained that it also had to determine whether the DEA's regulation "effectively amends a prior legislative rule." *Id.* The court further explained that if the regulation did amend a prior legislative rule, "it cannot be an interpretative rule because only legislative rules (i.e. rules having the force of law) can amend a prior legislative rule." *Id.* The court examined the DEA's legislative rule and the regulation at issue and held that because "the DEA's rule is inconsistent with the . . . regulation in effect at the time of its promulgation, it is a procedurally invalid legislative rule, not an interpretative rule." *Id.* at 1088-91.

The case was decided on June 30, 2003; this summary was posted Apr. 30, 2004.

Web site: www.NationalAgLawCenter.org | Phone: (479)575-7646 | Email: NatAgLaw@uark.edu