Recommendation 74-4

Preenforcement Judicial Review of Rules of General Applicability

(Adopted May 30-31, 1974)

With increasing frequency, rules of general applicability adopted by agencies informally pursuant to 5 U.S.C. § 553 are being reviewed by the courts directly, before they are applied to particular persons in adjudicative proceedings. Such review may be by courts of appeals under statutes, mostly older statutes, providing generally for judicial review of orders of specific agencies, or under recent statutes providing specifically for the direct review of rules issued by new agencies or by newly created authority. The district courts also review rules directly in the exercise of their power under, the Administrative Procedure Act to review agency action not otherwise reviewable.

The trend toward immediate review of agency rules has been accompanied by confusion over the appropriate scope and standard of review. In particular, conceptual and practical difficulties have arisen from the use by Congress and the courts of phrases such as "hearing," "record" and "substantial evidence on the record as a whole," traditionally associated with review of orders entered after a formal evidentiary hearing, in the new and different context of preenforcement review of agency rules adopted informally.

This recommendation, addressed to Congress, the Judicial Conference and the agencies, seeks to dispel the confusion by (1) stating what administrative materials should be included in the record on review and (2) clarifying the standards for reviewing the adequacy of the factual basis and rationality of rules. The recommendation accepts the present pattern of preenforcement review of rules and does not call for either more or less of such review. Nor does it suggest that any particular procedures should be followed by agencies in adopting rules.

Recommendation

1. In the absence of a specific statutory requirement to the contrary, the following are the administrative materials that should be before a court for its use in evaluating, on preenforcement judicial review, the factual basis for rules adopted pursuant to informal procedures prescribed in 5 U.S.C. § 553: (1) the notice of proposed rulemaking and any documents referred to therein; (2) comments and other documents submitted by interested

persons; (3) any transcripts of oral presentations made in the course of the rulemaking; (4) factual information not included in the foregoing that was considered by the authority responsible for promulgation of the rule or that is proffered by the agency as pertinent to the rule; (5) reports of any advisory committees; and (6) the agency's concise general statement or final order and any documents referred to therein.[1] References to the "record" or "whole record" in statutes pertaining to judicial review of rules adopted under section 553 should be construed as references to the foregoing in the absence of a legislative intent to the contrary. The Conference does not assume that the reviewing court should invariably be confined to the foregoing materials in evaluating the factual basis for the rule.

2. The term "substantial evidence on the record as a whole," or comparable language, in statutes authorizing judicial review should not, in and of itself, be taken by agencies or courts as implying that any particular procedures must be followed by the agency whose actions are subject to the statute and, in particular, should not be taken as a legislative prescription that in rulemaking agencies must follow procedures in addition to those specified in 5 U.S.C. § 553.

3. The appropriate standard for determining whether a rule of general applicability adopted after informal rulemaking rests on an adequate foundation is stated in 5 U.S.C. § 706(2)(A), which provides that a reviewing court must set aside action found to be "arbitrary, capricious [or] an abuse of discretion." Where such a rule is attacked on the ground that an asserted factual basis does not support it or that a necessary factual foundation is lacking, this standard requires a reviewing court to decide, in light of the information before it (including the administrative materials described in paragraph 1), whether the agency's conclusions concerning the significance of factual information can be said to be rationally supported.

4. Statutes providing for judicial review of rules adopted after informal rulemaking should refer only to the standards for review of such rules set forth in 5 U.S.C. § 706, including the "arbitrary, capricious, [or] abuse of discretion" standard of section 706(2)(A) (but not including the "substantial evidence" standard of section 706(2)(E), which by its terms is inapplicable to such rules). Properly applied, those standards are adequate to insure appropriate judicial scrutiny of rules adopted informally. Judicial review statutes that speak in terms of review according to the standard of "substantial evidence" should be construed as

[1] The court may of course limit its consideration to those materials that parties cite. Whether the agency may withhold from the parties to the judicial review proceeding or the court on the ground of confidentiality any materials otherwise called for is left by the recommendation to be decided under existing law.

establishing a standard of review over informal rulemaking comparable to that set forth in section 706(2)(A), unless a contrary intent clearly appears.

Citations:

39 FR 23044 (June 26, 1974)

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Separate Statement of Malcolm S. Mason

The debate on this Recommendation demonstrates that there are large differences of fundamental approach on many interrelated underlying issues. Under these circumstances, Professor Verkuil's paper, the Committee study, and the Conference debate have served a useful purpose in calling attention, in this influential forum, to the need for further thought on these matters. They do not, however, lay a rational foundation for a specific, formal, intricately constructed Recommendation, which purports to carry the authority of the Administrative Conference. Here the real disagreements have been hidden by the parliamentary process; that can only be harmful. This kind of rush to recommend is something I think the Conference should scrupulously avoid.