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A Primer on Administrative Rules and Rule-Making in Kentucky*

BY EDWARD H. ZIEGLER, JR.**

INTRODUCTION

Promulgation of regulations is perhaps the most important administrative mechanism for implementing legislative policy. As early as 1909, the Kentucky Court upheld the constitutionality of agency authority to impose binding conditions on licensees.¹ In Kentucky, agency regulations have been held to be enforceable by civil fines² and, more recently, jail terms.³ The Kentucky Court has allowed the delegation of rule-making authority on the ground that agency rules operate by "filling in the necessary details" of a legislative enactment or that they constitute "the finding of certain facts upon which laws may depend to become operative in given instances."⁴ Regardless of the underlying rationale, it is now well-settled in Kentucky that agencies may exercise rule-making authority to impose binding obligations on all private parties within the jurisdiction of a particular regulatory scheme.⁵

Despite the growing importance of agency regulation, the Kentucky legislature has yet to enact a comprehensive administrative procedure act for the state. This article sets out the

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¹ State Racing Comm'n v. Latonia Agricultural Ass'n, 123 S.W. 681 (Ky. 1909).
² Board of Health v. Kollman, 160 S.W. 1052 (Ky. 1913).
⁵ State Racing Comm'n v. Latonia Agricultural Ass'n, 123 S.W. 681, 687 (Ky. 1909).
⁶ An analysis of the development of Kentucky case law upholding the delegation of powers to administrative agencies is found in Ziegler, Legitimizing The Administrative State: The Judicial Development of the Nondelegation Doctrine in Kentucky, 4 N. Ky. L. Rev. 87 (1977).
present statutory and common law in Kentucky regarding administrative rules and rule-making. Reference will also be made to relevant federal and non-Kentucky state cases. It is intended to serve not only as a research tool for private attorneys, state officials, and students, but also as a small step toward further development and clarification of Kentucky administrative law. Much more needs to be written as the development of administrative government progresses in Kentucky.\(^7\)

I. RULE-MAKING VS. DUE PROCESS ADJUDICATION

A fundamental distinction must be made between administrative rule-making and administrative adjudication. The distinction is important for determining whether the fourteenth amendment requires notice and the opportunity to be heard prior to agency action.\(^8\) Notice and the opportunity to be heard are only required prior to agency adjudicative action, not prior to agency rule-making.\(^9\) Any procedural requirement, including a hearing, that may apply to agency rule-making will be imposed by statute only.\(^10\)

\(^7\) It has been suggested that the most significant change in our legal system during the twentieth century has been the tremendous growth of discretionary power delegated to administrative agencies. FTC v. Rubberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). On this point, consider the following statement from R. Lorch, Democratic Process and Administrative Law 9 (1969):

\[\text{Among the revolutions of our time is an administrative revolution. Administrators are no longer merely administrators in the old sense of the word. They are now heavily involved in doing what the Fathers of the Republic surely would have called legislative and judicial. Anyone who still believes that lawmaking is mostly done by legislatures, or that dispute settling is mostly done by courts, is far behind the times.} \]


\(^8\) Notice and opportunity to be heard are required at trial-type evidentiary hearings. A listing of the usual procedural requirements at a due process hearing is set out in Goldberg v. Kelly, 397 U.S. 254 (1970).

\(^9\) Compare Londoner v. Denver, 210 U.S. 373 (1908) with Bi-Metallic Investment Co. v. Colorado, 239 U.S. 441 (1915). For Kentucky cases acknowledging this distinction, see Harrison's Sanitarium, Inc. v. Commonwealth Dep't. of Health, 417 S.W.2d 137, 138 (Ky. 1967); Sanitation Dist. No. 1 v. Campbell, 249 S.W.2d 767 (Ky. 1952).

\(^10\) E.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 98 S. Ct. 1197 (1978) (a court should not impose its own notions of proper rule-making procedure on an agency since an agency, when engaged in rule-making, is bound only by procedures required by statute or the agency's own regulations).
The label that an agency chooses to attach to its action does not control whether due process requires a prior hearing.\textsuperscript{11} Whether agency action is rule-making or adjudicative depends on the specific nature of and the factual basis for its proposed determination.\textsuperscript{12} It is often stated that rule-making is making law to apply in the future, while adjudication is the application of law to a present or past fact situation. However, that definition is not adequate in all cases. It is probably safer to state that any agency action which is directed toward a particular individual and which grants or denies a benefit or imposes an obligation or penalty on individual grounds is likely to constitute adjudicative action. It follows that a regulation, though technically of general applicability, may still be adjudicative action if it is directed toward a particular individual and factually supported upon individual grounds.\textsuperscript{13} As the Kentucky Court has stated in an analogous context, a regulation “may be valid as to one state of facts and invalid as to another.”\textsuperscript{14}

Also, the distinction cannot always be based on the fact that the administrative body is traditionally characterized as “legislative”\textsuperscript{15} and not “judicial.” In 1971, the Kentucky Court found that a putatively “legislative” body (a railroad commission) had engaged in adjudicative action and that an evidentiary hearing was required prior to that action.\textsuperscript{16} In that case, the Court stated that if agency action “is used as a vehicle not to make generally applicable law, rules or policy, but to decide whether a particular individual as a result of a factual situation peculiar to his situation is or is not entitled to some form of relief, then the so-called legislative body must act in accordance with the basic requirements of due process.”\textsuperscript{17} Thus, if an

\textsuperscript{12} See Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973).
\textsuperscript{13} Id.
\textsuperscript{14} Sanitation Dist. No. 1 v. Campbell, 249 S.W.2d 767, 770 (Ky. 1952).
\textsuperscript{15} Cf. City of Middlesboro v. Louisville & Nashville R.R., 252 S.W.2d 680 (Ky. 1952) (Railroad Commission adjudication characterized as exercise of “legislative function”).
\textsuperscript{16} City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971) (trial-type evidentiary hearing required prior to legislative body’s decision on rezoning particular parcel of land).
\textsuperscript{17} Id. at 178.
agency rule is not directed toward a particular individual and
the rule is based on "legislative" and not "adjudicative"
facts,\(^8\) no prior due process hearing is required.

II. AGENCY REGULATIONS: AUTHORITY AND EFFECT

A determination of the authority that is necessary to issue
a regulation and the binding effect of a regulation will depend
on the type of regulation in question. An agency regulation is
defined in Kentucky as "each statement of general applicabil-
ity issued by an administrative body that implements, inter-
prets, or prescribes law or policy, or describes the organization,
procedure, or practice requirements of any administrative
body."\(^9\) This definition of a "regulation" includes the three
general types of agency rules: (1) substantive regulations; (2)
procedural regulations; and (3) interpretive regulations.

A. Agency Authority

1. Substantive Regulations

Substantive regulations are those which impose obliga-
tions on private individuals or businesses. The authority to
issue substantive regulations is usually held to exist only if
there is an express grant of rule-making authority to the
agency.\(^2\) Such power may not be implied from a general dele-
gation of regulatory authority. Since valid substantive rules
have the force of law and are binding on private parties and the
courts, our constitutional system of government dictates that

\(^{11}\) Professor Davis describes "adjudicative facts" as those which relate directly to
the immediate parties and to the question of who did what. Davis, An Approach to
the Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 402
(1942).


\(^{24}\) See, e.g., National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir.
1973), cert. denied, 415 U.S. 951 (1974); Phelps v. Sallee, 529 S.W.2d 361 (Ky. 1975)
(by implication). At least one state has held that authority to issue substantive regula-
tions may be implied from a general delegation of authority. See City of East Chicago
v. Sigler, 36 N.E.2d 760 (Ind. 1941). This case is clearly inconsistent with the funda-
mental principle of administrative law that an agency, being a creature of statute,
possesses only those powers conferred on it by statute. See Department of Motor
Transp. v. Eck Miller Transfer Co., 249 S.W.2d 802 (Ky. 1952); Goodpaster v. South-
ern Ins. Agency, 169 S.W.2d 1 (Ky. 1943); C.C.T. Equipment Co. v. The Hertz Corp.,
123 S.E.2d 802, 807 (N.C. 1962).
rule-making power should exist only if it is expressly conferred by statute.

The Kentucky Court has applied this rule in numerous cases. In cases in which the Court has upheld the exercise of substantive rule-making power, it has always pointed to an express statutory provision conferring such authority on the agency. In *Lovern v. Brown*, the Court stated that “the validity of a rule or regulation depends upon whether the administrative agency was empowered to adopt the particular rule.” Similar statements in other cases indicate that the Court will not imply substantive rule-making power from a general grant of administrative or regulatory authority.

Although the grant of substantive rule-making power must rest upon an express statutory delegation, such a provision in a statute need not specifically authorize the issuance of “substantive” rules. The cases in Kentucky clearly indicate that a general grant of rule-making authority (not regulatory authority) includes the power to issue substantive regulations. Also, a general grant of rule-making power will usually be liberally construed by the Kentucky Court to authorize the promulgation of any substantive rule which appears to be reasonably related to the intent or the purpose of the delegating statute. The limitation imposed by the Court on the exercise

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21 See, e.g., Yeary v. Union Transfer & Storage Co., 209 S.W.2d 77 (Ky. 1948); Reliance Mfg. Co. v. Board of Prison Comm’rs, 170 S.W. 941 (Ky. 1914).
22 See, e.g., Southeastern Displays, Inc. v. Ward, 414 S.W.2d 573 (Ky. 1967); Dicken v. Kentucky State Board of Educ., 199 S.W.2d 977 (Ky. 1947); State Racing Comm’n v. Latonia Agricultural Ass’n, 123 S.W. 681 (Ky. 1909).
23 390 S.W.2d 448 (Ky. 1965).
24 Id. at 449.
25 Louisville & Jefferson County Bd. of Health v. Haunz, 451 S.W.2d 407, 409 (Ky. 1969) (“the regulations were adopted pursuant to enabling legislation”); Alcoholic Beverage Control Bd. v. Hunter, 331 S.W.2d 280, 283 (Ky. 1960) (“statutory provisions control with respect to what rules and regulations may be promulgated”).
26 This is especially so since the legislature repealed KRS § 13.081 in 1974. 1974 Ky. Acts, ch. 73, § 7. This statute provided broad rule-making authority to all state agencies.
28 E.g., Lovern v. Brown, 390 S.W.2d 448 (Ky. 1965); State Racing Comm’n v. Latonia Agricultural Ass’n, 123 S.W. 681 (Ky. 1909).
29 See, e.g., Sturgill v. Beard, 303 S.W.2d 908 (Ky. 1957); Kentucky Alcoholic Beverage Control Bd. v. Klein, 192 S.W.2d 735 (Ky. 1946).
of the power requires only that such a rule not "amend, alter, enlarge or limit" the express terms of a statute.30

2. Procedural Rules

Procedural regulations set out the agency’s rules of practice. Such regulations are likely to regulate the filing of applications, the filing of petitions for intervention, the conduct of hearings, and the procedure for internal agency appeals. The authority to adopt procedural rules is usually considered to be an implied agency power.31 Administrative agencies possess the authority to fashion rules of procedure in order to carry out their statutory duties so long as the procedures are not inconsistent with those duties.32 In Kentucky, an exemption to such implied authority prevents an agency from adopting procedural rules that provide for reconsideration of its final decisions. The Court has held that authority to create such a rule must be delegated by statute.33 As stated in the Phelps v. Sallee,34 in which such a procedural rule of the Department of Banking and Securities was held invalid, “an administrative agency does not have any inherent or implied power to reopen or reconsider a final decision and . . . such power does not exist where it is not specifically conferred upon the agency by the express terms of the statute creating the agency.”35

3. Interpretive Regulations

Interpretive regulations are agency statements that inform the public and the courts of the agency’s understanding of

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30 E.g., Johnson v. Correll, 332 S.W.2d 843 (Ky. 1960); Hankins Appliance Co. v. Goebel, 284 S.W.2d 327 (Ky. 1955); Goodpaster v. Southern Ins. Agency, 169 S.W.2d 1 (Ky. 1943).
32 See Bandeen v. Howard, 299 S.W.2d 249 (Ky.), cert. denied, 355 U.S. 813 (1957); Jacobs v. Alcoholic Beverage Control Bd., 299 S.W.2d 613 (Ky. 1957) (by implication); Union Light, Heat & Power Co. v. Public Service Comm’n, 271 S.W.2d 361 (Ky. 1954).
33 Hennessy v. Bischoff, 240 S.W.2d 71 (Ky. 1951).
34 529 S.W.2d 361 (Ky. 1975).
35 Id. at 365. However, an agency has authority to reconsider and change its orders during the time it retains control over any question under submission to it, even if such orders relate to the matter currently before the agency. Union Light, Heat & Power Co. v. Public Serv. Comm’n, 271 S.W.2d 361 (Ky. 1954).
either a particular statute the agency is authorized to enforce or of one of its own regulations. The power to adopt interpretive regulations is generally considered to be impliedly granted to an agency in a general grant of regulatory authority.

4. Changes in Regulations

A statutory grant of rule-making authority to an agency necessarily confers on the agency the power to repeal, change, or amend its regulations as the agency deems necessary to effectuate its statutory duties. Changes in regulations must comply with applicable rule-making procedures and such changes, like all rules, are generally held to have prospective effect only.

B. Effect of Regulations

It is a settled principle of administrative law that a valid substantive or procedural rule has the full force and effect of law. Such a regulation will be treated by courts as if it were

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34 See J.B. Blanton Co. v. Lowe, 415 S.W.2d 376 (Ky. 1967).
35 Since an interpretive rule merely clarifies an agency's interpretation of a statute or regulation and does not determine issues of law or fact or impose substantive obligations on private parties, it is no more than a publicized opinion of the agency's legal staff. See American President Lines, Ltd. v. Federal Maritime Comm'n, 316 F.2d 419, 421-422 (D.C. Cir. 1963). An agency, therefore, is considered to have inherent authority to issue such rules. See Skidmore v. Swift & Co., 323 U.S. 134, 137-138 (1944) (interpretive guidelines considered by court though no delegation to agency of rule-making authority); K.C. Davis, Administrative Law Text 126-131 (3d ed. 1975).
36 E.g., South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974).
37 The general legislative principle that a statute will not have retroactive effect unless expressly stated otherwise seems to apply to administrative rules as well. See KRS § 446.080. A regulation may be given retroactive effect if such an intent is clearly expressed or necessarily implied in the rule and the retroactive effect of the rule is not unreasonable under the circumstances. This is clearly the view in federal courts and appears to be shared by the courts in Kentucky. See General Telephone Co. v. United States, 449 F.2d 846, 863 (5th Cir. 1971); City of Covington v. Sanitation Dist. No. 1, 301 S.W.2d 885 (Ky. 1957). See generally 73 C.J.S. Public Administrative Bodies and Procedure § 107 (1951). Cf. note 55 infra.
38 E.g., Union Light, Heat & Power Co. v. Public Serv. Comm'n, 271 S.W.2d 361 (Ky. 1954) (company bound by rule as if it were statute enacted by legislature); Page v. Board of Liquor Control, 212 N.W.2d 125 (Ohio 1954); Reeves v. Fenley's Model Dairy, 235 S.W.2d 995 (Ky. 1951) (substantive rules binding on private party).

Formerly, KRS § 13.081 provided that "regulations shall have the full force of law." Although this statute was repealed in 1974 (1974 Ky. Acts. ch. 73, § 7), the Kentucky Court is likely to continue to follow its earlier holdings.
embodied in a legislative enactment. The far-reaching effect of this principle is indicated by the U.S. Supreme Court's decision in *United States v. Howard.* There the Court held that a state agency regulation constituted "the law of the state" as that phrase is used in a federal criminal statute. In Kentucky, valid agency rules have "binding effect" and a violation of the rules could result in civil liability or criminal penalties.

1. *Binding Effect*

Valid substantive and procedural rules will be deemed by the Kentucky Court to have "binding effect" on all private parties within their scope. Violation of a substantive rule may be sanctioned by a civil fine, jail term, or an administrative remedy such as license revocation. In this respect, the "binding effect" of a valid substantive rule is identical to that of a statute or city ordinance.

A valid substantive or procedural rule is also binding on the courts. A court in Kentucky is not free to substitute its judgment for that of an agency regarding the wisdom or necessity of such a regulation. If a substantive or procedural rule is reasonable, within the scope of agency authority, and promulgated in accordance with required procedure, a court in Kentucky is bound to apply the rule as if it were a legislative enactment.

Substantive and procedural rules are also binding on the administrative agencies that promulgate them. Such rules

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41 Agency rules "have the same effect as statutes or ordinances enacted directly by the legislative body from which the administrative agency derives its authority." Reitze v. Williams, 458 S.W.2d 613, 617 (Ky. 1970).
42 352 U.S. 212 (1957).
43 Harrison's Sanitarium v. Kentucky Dept. of Health, 417 S.W.2d 137 (Ky. 1967); Reeves v. Fenley's Model Dairy, 235 S.W.2d 995 (Ky. 1951).
44 See Kentucky Milk Marketing and Anti-Monopoly Comm'n v. Borden Co., 456 S.W.2d 831 (Ky. 1970) (delegating statute and implementing regulations held valid when regulations backed by sanctions of monetary fine and jail term); Brown v. Buhmer, 191 S.W.2d 255 (Ky. 1945) (loss of liquor license for violation of agency regulation).
45 See, e.g., Lovern v. Brown, 390 S.W.2d 448 (Ky. 1965); Sanitation Dist. No. 1 v. Campbell, 249 S.W.2d 767 (Ky. 1952).
47 See, e.g., United States v. Wilbur, 427 F.2d 947 (9th Cir. 1970); Barash v. Seaton, 256 F.2d 714 (D.C. Cir. 1958); Shearer v. Dailey, 226 S.W.2d 955 (Ky. 1950).
may, of course, be changed or repealed by the agency. However, such a change must be made in compliance with applicable rule-making procedures and until a new rule becomes effective, the agency may not waive or disregard existing rules. Moreover, any change in an agency's regulations will generally be given prospective effect only. In Shearer v. Dailey, regulation of the Alcoholic Beverage Control Board fixed county quotas for retail package liquor licenses. The Board granted a new license, exceeding the limit provided for in the regulation. The Court held such action to be invalid, stating, "the Board is bound by its own quota regulations, and until such regulations have been effectively changed according to law, it may not authorize the issuance of a new license in excess of the limit so fixed." The Court concluded that "[p]ermitting such a practice would acknowledge the arbitrary power of the Board to disregard its own regulations at will and administer the law for preferred private persons .... [T]he possibilities of abuse are too significant to be ignored." Uniformity, stability, and fundamental fairness dictate that an agency is estopped from disregarding or retroactively changing its own regulations to fit the facts of a particular case.

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* This authority is deemed to be implied by a general grant of rule-making authority. E.g., South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974); Curly's Dairy Inc. v. State Dept. of Agriculture, 415 P.2d 740 (Ore. 1966).
* See KRS § 13.080(3) (Supp. 1976).
* Shearer v. Dailey, 226 S.W.2d 955 (Ky. 1950).
* As mentioned at note 39, supra, a regulation may be given retroactive effect if such an intent is clearly expressed or necessarily implied in the rule and retroactive application of the rule is not unreasonable under the circumstances. Bethlehem Steel Corp. v. United States, 511 F.2d 529 (Ct. Cl. 1975) (change in Navy procurement regulations retroactively applied to earlier ship-building contract). Compare Mahler v. Eby, 284 U.S. 32 (1924) (retroactive application of statute resulting in deportation of alien for prior acts upheld) with Maceren v. District Director, Immigration and Naturalization Serv., Los Angeles, Cal., 509 F.2d 934 (9th Cir. 1974) (retroactive application of change in regulations to affect status of resident alien held unreasonable).

Clearly, an agency regulation retroactively applied to impose a sanction on past conduct that was lawful when performed would violate the prohibition of the ex post facto clauses of the United States Constitution. U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 434-436 (1978).


226 S.W.2d 955 (Ky. 1950).

Id. at 956.

Id.
An exception to the general rule that an agency may not change its rules retroactively to fit the facts of a particular case should exist, perhaps, when an extraordinary situation arises and the action is necessary to protect an important public interest.\textsuperscript{55} With respect to procedural rules, one court has held that an administrative agency is not "a slave of its rules."\textsuperscript{56} However, in "a government of laws and not of men," the better view by far is that expressed by Felix Frankfurter:

[If there is one thing that is established in the law of administration, I take it that a (procedural) rule cannot be repealed specifically to affect a case under consideration by the administrative authorities; that is, if there is an existing rule which protects certain rights, it violates every sense of decency, which is the very heart of due process, to repeal that protection, just for the purpose of accomplishing the ends of the case.\textsuperscript{57}]

An agency is often required to follow its own procedures even if they are not embodied in formal regulations. Courts have estopped agencies from taking action inconsistent with their "usual practice,"\textsuperscript{58} with their procedures embodied in an "internal order,"\textsuperscript{59} and even with their procedures set out in a "news release."\textsuperscript{60}

Interpretive rules lack the force and effect of law and are generally considered not to be binding on private parties or courts.\textsuperscript{61} Although great weight may be given to such a rule, especially if it is long-standing or within an agency's technical expertise,\textsuperscript{62} a court may exercise independent judgment with respect to the meaning of statutory language.\textsuperscript{63} The extent of

\textsuperscript{55} For an example, a court is not likely to estop the U.S. Nuclear Regulatory Commission from retroactively applying a change in its radiation protection regulations to a particular nuclear utility if necessary to protect the public health.

\textsuperscript{56} NLRB v. Grace Co., 184 F.2d 126 (8th Cir. 1950).


\textsuperscript{58} Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 223-24 (D.C. Cir. 1969).


\textsuperscript{60} United States v. Heffner, 420 F.2d 809, 811-13 (4th Cir. 1969).


\textsuperscript{62} See J.B. Blanton Co. v. Lowe, 415 S.W.2d 376 (Ky. 1967).

\textsuperscript{63} Id.
judicial deference to an interpretive rule will depend, in Justice Jackson’s words, “upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”64

Interpretive rules which explain an agency’s understanding of one of its own regulations, however, will often be binding on a court if the rule is reasonable.65 The Kentucky Court has followed this approach66 but the question in such a case seems to be limited to the question of agency intent.67

Interpretive rules are generally not binding on the agency.68 However, some courts in recent years have prevented agencies from acting inconsistently with an officially adopted interpretive rule.69 For the most part, though, courts continue to hold that informal agency interpretations or advice provided in response to a private party’s request will generally not be binding on an agency, especially when inconsistent with the terms of an agency rule or the agency’s governing statute.70

2. Effect on Civil Liability

Since a valid administrative rule has the force and effect of law,71 the Kentucky Court has held that a violation thereof may constitute negligence per se.72 As stated in Kidd v. Price, “noncompliance with applicable safety laws and regulations which results in injuries they were designed to prevent constitutes negligence.”73

66 See J.B. Blanton Co. v. Lowe, 415 S.W.2d 376 (Ky. 1967).
67 Id.
68 See Etter Grain Co. v. United States, 462 F.2d 259 (5th Cir. 1972).
70 E.g., Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); Schuster v. Commissioner of Internal Revenue, 312 F.2d 311 (9th Cir. 1962). See text accompanying notes 89-109 infra.
71 E.g., Linkous v. Darch, 323 S.W.2d 850 (Ky. 1959).
72 E.g., Rietze v. Williams, 458 S.W.2d 613 (Ky. 1970); Blue Grass Restaurant Co. v. Franklin, 424 S.W.2d 594 (Ky. 1968); Phoenix Amusement Co. v. White, 208 S.W.2d 64 (Ky. 1948). A discussion of contributory negligence as a bar to recovery when suit is based on a violation of a safety regulation is found in Comment, Negligence—Violation of Safety Regulation as Negligence Per Se: The Perishable Sanction, 62 Ky. L.J. 254 (1973).
73 461 S.W.2d 565, 567 (Ky. 1971).
However, the doctrine will be applied only when all of the following conditions are satisfied: (1) the rule must be enacted for safety purposes and not just governmental convenience;\(^7\) (2) the injury sustained must be one that the regulation was intended to prevent;\(^7\) (3) the injury must be sustained by a person or by a property interest which the rule contemplated protecting;\(^7\) (4) the violation of the regulation must be the proximate cause of the injury;\(^7\) and (5) the rule must be valid in all respects.\(^7\)

On the other hand, a federal court sitting in Kentucky has held that the maintenance of a building or instrumentality in accordance with safety regulations is prima facie evidence of the absence of negligence.\(^9\) However, in the only Kentucky case directly on point, *Vaught's Administratrix v. Kentucky Utilities Co.*,\(^8\) it was held that compliance with safety regulations is not controlling and should be used only "as a guide in measuring the care exercised" by a defendant.\(^8\)

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\(^7\) E.g., *Rietze v. Williams*, 458 S.W.2d 613 (Ky. 1970) (violation of plumbing code); *Vissman v. Koby*, 309 S.W.2d 345 (Ky. 1958); *Phoenix Amusement Co. v. White*, 208 S.W.2d 64 (Ky. 1948) (violation of fire code).

\(^8\) *Phoenix Amusement Co. v. White*, 208 S.W.2d 64 (Ky. 1948).


\(^8\) *Bostic v. East Construction Co.*, 497 F.2d 712 (6th Cir. 1974) (rule invalid since vague and unintelligible); *Linkous v. Darch*, 323 S.W.2d 850 (Ky. 1959) (rule invalid since beyond the scope of agency authority).


\(^8\) 296 S.W.2d 459 (Ky. 1956).

\(^8\) Id. at 462.

Compliance with safety regulations will not excuse a landlord who has allowed others to violate rules that apply to the landlord. In *Rietze v. Williams*, 458 S.W.2d 613 (Ky. 1970), a landlord under a duty imposed by an administrative rule could not avoid liability for violation of such rules because an independent contractor had violated the rules. "[W]e cannot hold that a landlord may shift to an independent contractor the responsibility of compliance with laws designed for the physical safety and protection of his tenants." Id. at 617-18. The *Rietze* decision has been held not to place liability on a landlord for injuries to the employees of independent contractors injured on a landlord's premises. *Courtney v. Island Creek Coal Co.*, 474 F.2d 468 (6th Cir. 1973); *Cochran v. International Harvester Co.*, 408 F. Supp. 598 (W.D. Ky. 1975).
III. AGENCY ADVICE

A. Declaratory Rulings

Administrative regulation is usually carried on under broad and indeterminate delegations. Although rule-making fills in the details of a regulatory scheme, legitimate questions are likely to arise regarding the application of a statute or agency regulation to a proposed private course of conduct. In such a situation, a private party may seek an advance agency ruling on the legality of the proposed action rather than violate the rule and risk the imposition of an agency sanction. Pursuant to such a request, an agency in Kentucky may issue a formal declaratory order or ruling which sets out its opinion of the legality of a planned transaction or course of conduct that is within the scope of the agency’s authority to regulate.\footnote{An agency in Kentucky appears to possess implied power to issue a declaratory order or ruling. This view is apparent in Kentucky Rule of Appellate Procedure § 3.530(c) (1974) which provides that an informal or formal advisory opinion concerning attorney ethics issued by the Kentucky Bar Association will be binding on that agency so long as the attorney’s petition for such an opinion “clearly, fairly, accurately and completely states his contemplated professional act.” No constitutional or statutory provision expressly confers such authority on the Kentucky Bar Association. On the implied power of an agency to issue declaratory rulings without specific statutory authorization, see Electrolux Corp. v. Miller, 36 N.W.2d 633 (N.Y. 1941).

At the federal level, the Administrative Procedure Act, 5 U.S.C. 554(e) (1976), authorizes agency issuance of a declaratory order without a hearing on matters that normally require an agency hearing. Many federal agencies now provide in their regulations for the issuance of declaratory orders or binding advisory opinions. See M. Asimow, ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES 141-186 (1973).}

A declaratory order or ruling is often issued when an agency wishes to terminate a controversy or to remove uncertainty and rule-making is inappropriate because of the uniqueness of the particular fact situation. In effect, it is a substitute for formal adjudication which is impossible since the conduct has not yet occurred. An agency is usually considered to have absolute discretion to refuse to issue such an order.\footnote{However, an agency may by regulation provide that such an order “shall” be issued upon request. See Kentucky Rules of Appellate Procedure § 3.530(a) (1974).} Agency refusal is generally not reviewable in the courts\footnote{E.g., W.J. Dillner Transfer Co. v. McAndrew, 226 F. Supp. 860 (W.D. Pa. 1963), aff’d 328 F.2d 601 (2d Cir. 1964).} since the decision will often be based on an agency’s own uncertainty or wariness of spelling out the exact letter of the law in order to
encourage generous compliance. However, a declaratory order, when issued, is usually reviewable in the courts, provided that available administrative remedies have been exhausted.  

It should be noted that declaratory rulings are expressly exempted from formal rule-making procedures in Kentucky. But a declaratory order or ruling, just as a regulation, is considered to be binding on an agency with respect to the submitted facts until changed prospectively by the agency. The declaratory ruling is considered to be the agency’s formal and official opinion in a specific case. The source of the order within the agency must have been acting within the authorized scope of his authority. For this reason, the request for a declaratory order or ruling should be made to the head of the agency unless a specific regulation or document clearly confers such authority on an agency employee. Some agencies may have other names for what is, in effect, a declaratory order or ruling. But, in the absence of a specific statute or rule providing otherwise, a request should be styled as one for a declaratory order or ruling.

B. Estoppel and Agency Advice

When an agency has taken action, a question of estoppel often arises if that action is inconsistent with earlier advice. Normally, an agency will be estopped from taking action inconsistent with its own regulation. However, when agency action is inconsistent with the agency’s own prior advice, the Government will not be estopped if the previous advice was unauthorized.

1. Action Outside the Scope of Authority

The U.S. Supreme Court expressly held in the landmark

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59 A declaratory order or ruling is generally considered to have the same status as final agency decisions or orders in contested cases. See Federal Administrative Procedure Act, 5 U.S.C. § 554(e) (1976), and Section 8 of the Revised Model State Administrative Procedure Act. The status of a declaratory order or ruling is not defined by statute in Kentucky.
60 E.g., Shearer v. Dailey, 226 S.W.2d 955 (Ky. 1950).
case of *Federal Crop Insurance Corp. v. Merrill*\(^{1}\) that prior agency advice or action will not be binding on an agency when it is inconsistent with the terms of a statute or agency regulation. In *Merrill*, an Idaho farmer was advised that four hundred acres of reseeded wheat was covered by a policy of insurance issued by the Federal Crop Insurance Corporation. After a drought destroyed the farmer's crop, the Corporation refused to pay on the ground that its regulations prohibited insurance for reseeded wheat. The Court allowed the agency to enforce its own regulations despite the prior inconsistent advice, stating that "'[w]hatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.'"\(^{2}\) Although there are a few lower federal court decisions that repudiate the *Merrill* "no-estoppel" rule,\(^{3}\) it is still generally followed today.\(^{4}\) "[T]o the extent it held that government agents have no authority to make mistakes about statutes or regulations, *Merrill* remains largely intact."

The Kentucky courts adopted the no-estoppel rule early.\(^{5}\) "Persons dealing with public officials [in Kentucky] must take notice of their authority expressly or by necessary implication conferred upon them by law."\(^{6}\) In Kentucky and elsewhere, it seems to make little difference whether the incorrect advice is in writing\(^{7}\) or whether it is given by a low-level bureaucrat or the head of an agency.\(^{8}\)

\(^{1}\) Id.

\(^{2}\) Id. at 384.

\(^{3}\) See United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973); *In Re La Voie*, 349 F. Supp. 68 (D. V.I. 1972).

\(^{4}\) *E.g.*, Automobile Club of Michigan v. Comm'r of Internal Revenue, 353 U.S. 180 (1957); Etter Grain Co. v. United States, 462 F.2d 259 (5th Cir. 1972); Montilla v. United States, 457 F.2d 978 (Ct. Cl. 1972).

\(^{5}\) M. ASIMOW, ADVISE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES 41 (1973).

\(^{6}\) *E.g.*, Campbell County v. Braun, 174 S.W.2d 1 (Ky. 1943); Calvert v. Allen County Fiscal Court, 67 S.W.2d 701 (Ky. 1934); Clark County Constr. Co. v. State Highway Comm'n, 58 S.W.2d 388 (Ky. 1933).

\(^{7}\) Dade Park Jockey Club v. Commonwealth, 69 S.W.2d 363 (Ky. 1934).

\(^{8}\) Etter Grain Co. v. United States, 462 F.2d 259 (5th Cir. 1972); Calvert v. Allen County Fiscal Court, 67 S.W.2d 701 (Ky. 1934).

\(^{9}\) Compare Dade Park Jockey Club v. Commonwealth, 69 S.W.2d 363 (Ky. 1934)
The reasoning behind the no-estoppel rule is that an agency lacks the authority either to amend the terms of a statute or to change its own regulations except through established rule-making procedures. Even though the no-estoppel rule may result in substantial harm to the private party and "appear to be harsh and inequitable," this approach is followed since its "abrogation would invite fraud, collusion, and unwarranted expenditure of public funds." Here, as elsewhere, ignorance of the law is no excuse. As stated in Calvert v. Allen County Fiscal Court, "One dealing with public officials, boards, or commissions must take notice of their authority to act" since "the law charges him with knowledge of any and all limitations upon such power."

It should be noted that the Kentucky cases in point are all very early cases. It remains to be seen whether the Kentucky courts will follow the approach of the few recent decisions, both federal and state, which indicate that there may be a trend away from the blanket no-estoppel rule of Merrill. In such cases, no estoppel would have resulted in substantial harm to the private party and the application of estoppel did not significantly impair an important public interest. Under similar circumstances, the Kentucky courts may find that "good government" requires the application of estoppel to prevent a gross and needless injustice. When applied conservatively on a case-by-case basis, it seems unlikely that this approach will promote the fraud and collusion feared in the early Kentucky cases.

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(action by revenue agent) with Clark County Constr. Co. v. State Highway Comm'n, 58 S.W.2d 388 (Ky. 1933) (action by head of agency).

100 See, e.g., Nelson v. Secretary of Agriculture, 133 F.2d 453 (7th Cir. 1943); SEC v. Torr, 22 F. Supp. 602 (S.D.N.Y. 1938).

101 Calvert v. Allen County Fiscal Court, 67 S.W.2d 701, 703 (Ky. 1934).

102 Clark County Constr. Co. v. State Highway Comm'n, 58 S.W.2d 388, 391 (Ky. 1933).

103 67 S.W.2d 701, 703 (Ky. 1934).


105 Compare Gestuvo v. District Director, 337 F. Supp. 1093 (C.D. Cal. 1971) (Immigration and Naturalization Service estopped to deny professional classification when petitioner relied on classification and the service expected him to rely on it) with Montilla v. United States, 457 F.2d 978 (Ct. Cl. 1972) (army reserve officer allegedly misled to believe that he had 20 years of service, government not estopped to deny that he had completed 20 years — officers did not have authority to waive this requirement).
2. Action Within Scope of Authority

The Kentucky Court is likely to limit application of the no-estoppel rule to those situations in which the prior advice is directly inconsistent with the express terms of a statute or rule, or is otherwise clearly unauthorized. A growing number of federal decisions hold that the Government may be estopped if the prior advice or action is not clearly inconsistent with existing law and is within the implied scope of the employee's or agency's authority. As stated in Oil Shale Corp. v. Morton, "the government can be estopped by the conduct of its agents, within the scope of their authority. The notion that the government is immune from estoppel is only true when we are presented with an attempted estoppel of the government resulting from the erroneous, illegal, or unauthorized acts of its agents."

Although there appears to be no Kentucky case directly on point, when an important public interest will not be significantly affected, the Kentucky courts may hold, out of a sense of justice and fair play, that estoppel is available as a defense against agency action if the inconsistent prior agency advice relied upon was not outside the lawful scope of the agency's authority and substantial harm would otherwise result to the private party. To allow the government to say, in this situation, "The joke is on you. You shouldn't have trusted us," is hardly worthy of our great nation.

IV. Rule-Making Procedure

Rule-making procedure has been called "one of the greatest inventions of modern government." It allows public participation in the formation of agency policies by giving notice to interested parties of proposed agency rules and by providing

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106 E.g., Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970); Lesavoy Foundation v. Comm'r of Internal Revenue, 238 F.2d 589 (3d Cir. 1956); Emeco Industries, Inc. v. United States, 485 F.2d 652 (Ct. Cl. 1973).
108 A case where the no-estoppel rule was apparently applied due to the important public interest involved is Sanitation Dist. No. 1 v. Campbell, 249 S.W.2d 767 (Ky. 1952).
109 Brandt v. Hickel, 427 F.2d 53, 57 (9th Cir. 1970).
110 K. DAVIS, ADMINISTRATIVE LAW TEXT 142 (2d ed. 1972).
an opportunity for affected persons to be heard. The public
ing of problems through rule-making procedure is an at-
tempt to make bureaucracy more responsive to public needs.\textsuperscript{111}
It embodies the recognition that agencies are not always reposi-
tories of ultimate wisdom and that they may often benefit from
the suggestions of outsiders. Since the agency rule formulation
process has been opened up to widespread participation by
affected citizens, businesses, and special interest groups, attor-
neys are increasingly called upon to represent a broad range of
interests in such proceedings.

In 1974, the Kentucky General Assembly passed major
legislation amending the procedures for agency rule-making.\textsuperscript{112}
An important part of this legislation required that regulations
in effect prior to July 1, 1974, be resubmitted to the Legislative
Research Commission (LRC) by July 1, 1975, in order to be
promulgated in accordance with the new rule-making require-
ments.\textsuperscript{113} Any regulation that was not resubmitted by that date
is now rescinded and no longer valid.\textsuperscript{114} State agency regula-
tions are considered effective and binding only if they have
been promulgated in accordance with all the required rule-
making procedures set out in KRS chapter 13.\textsuperscript{115} The major
steps in the statutory rule-making scheme, in chronological
order, are as follows:

1. An agency submits the proposed regulation to the LRC.\textsuperscript{116}
2. The proposed regulation is published in the
   \textit{Administrative Register}.\textsuperscript{117}

\textsuperscript{111} For an excellent statement on this function of rule-making see NLRB v.
\textsuperscript{112} 1974 Ky. Acts, ch. 73. This legislation is now codified in KRS chapter 13.
\textsuperscript{113} KRS § 13.084 (Supp. 1976).
\textsuperscript{114} Id.
\textsuperscript{115} \textit{Id.} See Christian Appalachian Project, Inc. v. Berry, 487 S.W.2d 951, 953 (Ky.
1972); Kentucky State Bd. of Business Schools v. Electronic Computer Programming
Inst., Inc., 453 S.W.2d 534, 534 (Ky. 1970).

A statute may impose additional requirements on an agency's promulgation
prior to 1974 that are inconsistent with the present rule-making statutory scheme were
repealed by the 1974 legislation. KRS § 13.082(2) (Supp. 1976). A discussion of statu-
tory interpretation which supports the theory of implied amendment—as opposed to
repeal—of earlier inconsistent agency rule-making provisions is found in \textit{Ky. Op. Att'y
Gen.} 72-455.
\textsuperscript{116} KRS § 13.085(1) (Supp. 1976).
\textsuperscript{117} KRS § 13.085(1)(a) (Supp. 1976).
3. Comments are submitted to the agency and a public hearing is held if a request is made within 30 days following publication of the proposed rule.

4. The proposed regulation is submitted by the LRC to the Administrative Regulation Review Subcommittee for its review and if not objected to by this subcommittee the regulation is considered filed and effective.

5. If the subcommittee objects to the proposed regulation and the promulgating agency refuses to change the rule, then the LRC forwards the proposed regulation to the appropriate standing or interim legislative committee for its review and if not objected to by this committee the regulation is considered filed and effective.

6. If the standing committee objects to the proposed regulation, it is returned to the promulgating agency and if the agency refuses to change the rule, it is considered filed and effective when resubmitted by the agency to the LRC.

A. "Regulation" Defined

The procedural and publication requirements in Kentucky apply to the promulgation of any "regulation" as that term is defined in KRS § 13.080(3). As noted earlier, this statutory definition includes substantive rules, procedural rules, and interpretive rules. The term also "includes the amendment or repeal of a prior regulation."

The statute specifically states that the term "regulation" does not include:

a. statements concerning only the internal management of an administrative body and not affecting private rights or procedures available to the public, or
b. declaratory rulings, or
c. interdepartmental memoranda, or
d. statements relating to the acquisition of property for highway purposes and statements relating to the construction or maintenance of highways.

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122 See text following note 19 supra.
123 Id.
125 Id.
B. "Administrative Body" Defined

The rule-making statute in Kentucky applies to each regulation issued by any "administrative body." An "administrative body" includes "each state board, bureau, commission, department, division, authority, officer, or other entity, except the legislature and the courts, authorized by law to make regulations."

The above definition by its express terms applies to every state agency. Whether local or county agencies are included within the phrase "or other entity" is questionable. The answer is provided by application of the rule of statutory construction "ejusdem generis." This rule of construction requires that comprehensive expressions such as "and all others" or "any others" are restricted to persons or things of the same kind or class as those named in the preceding words. Since this rule of construction is followed by Kentucky courts, the phrase "or other entity" used in KRS § 13.080(1) should refer only to state entities that are related to the categories of state boards, state commissions, etc. and not to local or county agencies.

C. Publication of Notice

The LRC is required to print and publish the Administrative Register on a monthly basis for the purpose of giving notice of proposed regulations. Every proposed regulation is required to be submitted to the LRC; the complete text of the proposed rule along with required accompanying statements must then be published in the Administrative Register. Each of the following must accompany the publication of any proposed regulation:

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126 Id.
127 See City of Lexington v. Edgerton, 159 S.W.2d 1015 (Ky. 1942).
128 This conclusion is consistent with the Court's decision in City of Bardstown v. Nelson County, 78 S.W. 169 (Ky. 1904), in which the court held that a county board of health is not a state governmental entity. See Ky. Op. Att'y Gen. 75-595.
129 KRS § 13.096(2) (Supp. 1976). The Administrative Register is distributed the first day of each month and contains all proposed and emergency regulations and any regulation that has recently become effective if received or filed by the 15th day of the preceding month.
a. a citation of the authority pursuant to which it, or any part of it was adopted;

b. a brief statement which sets forth the necessity for issuing the regulation;

c. a summary of the functions sought to be implemented by the regulation; and

d. the place and manner in which interested persons may present their views.131

D. Comment and Hearing

Each proposed regulation must be accompanied by a statement of “the place and manner in which interested persons may present their views” when the proposed rule is published in the Administrative Register.132 The notice must include an agency address to which any interested person may send his request for an informal hearing to comment on the proposed rule.133

The promulgating agency is required to hold a public hearing on its proposed rule if such a request is received by the agency within 30 days following publication of the rule in the Administrative Register.134 Any “person having an interest in the subject matter” of the proposed regulation may make such a request.135 It is not required that the hearing be a formal or trial-type adversary proceeding.136 An informal legislative type hearing is sufficient since the statute requires only that it be conducted in a manner “so as to provide each person who

133 1 Ky. ADMIN. REG. 1:010 (1977). This regulation of the LRC implements its authority to issue rules governing the manner and form in which regulations are prepared. KRS § 13.090 (Supp. 1976).
134 KRS § 13.085(4) (Supp. 1976). This statute requires that the hearing be concluded within 60 days from the date the proposed regulation was first published in the Administrative Register.
135 Id. The Kentucky courts will probably hold that an “interested person” is any person who may in fact be injured by the proposed rule, i.e., persons and businesses regulated, consumers of the product or service regulated, or persons who have aesthetic or environmental interests that are likely to be affected. This “injury in fact” test is similar to that for “standing” to seek judicial review of agency action in Kentucky. See Civil Serv. Comm’n v. Tankersley, 330 S.W.2d 392 (Ky. 1959).
136 See Commonwealth v. Moyers, 272 S.W.2d 670 (Ky. 1954) (an agency is not required to make formal findings of fact when promulgating a regulation unless a statute specifically so requires).
wishes to offer a comment a fair and reasonable opportunity to do so." A transcript of the hearing need not be taken unless a private party requests one. The informal hearing is not designed to produce a record that is required to be the basis of the agency regulation.

However, after the hearing is concluded, the agency is expressly required by statute to give affirmative consideration to all written and oral statements submitted regarding the proposed regulation. This requirement of "affirmative consideration" is defined to mean that "an administrative body must either adopt suggestions or recommendations regarding a regulation or issue a concise statement setting forth the reasons for not adopting suggestions or recommendations regarding a regulation." An agency then resubmits its proposed rule, along with any changes, to the LRC. Resubmission of a proposed rule after a public hearing must be accompanied by a statement summarizing the comments submitted at the hearing and by the required statement of affirmative consideration.

Upon receipt of an agency's proposed rule after a hearing or, if a hearing has not been requested, 30 days following publication of a proposed rule, the LRC must submit the proposed regulation to the Administrative Regulation Review Subcommittee for its review.

E. Legislative Review

KRS § 13.087 created the Administrative Regulation Review Subcommittee as a permanent subcommittee of the LRC. The three members of this subcommittee are appointed by the LRC for terms of two years. Before any regulation becomes

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138 Id.
139 See City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971) (trial-type hearings not required for development of legislative facts).
139 KRS § 12.084(4) (Supp. 1976).
141 KRS § 13.085(4) (Supp. 1976); 1 KY. ADMIN. REG. 1:010 (1977). A proposed regulation amended by an agency after publication and hearing is not subject to further public hearing prior to becoming effective.
142 KRS § 13.085(b) (Supp. 1976).
143 KRS § 13.087(1) (Supp. 1976). The subcommittee members' names can be found at the beginning of each issue of the Administrative Register.
effective, it must be reviewed by the subcommittee to determine if the regulation conforms to, and carries out the intent of, the statutory authority under which it was promulgated.\(^{145}\)

Apparently, the General Assembly intended the subcommittee to serve as a legislative check on agency rule-making. However, the subcommittee has advisory authority only and cannot veto a proposed regulation.\(^{146}\) As a practical matter, however, experience indicates that the subcommittee does exercise considerable influence on promulgating agencies and that subcommittee review may provide a significant avenue for effective input into the final drafting of agency regulations.

If a regulation is not objected to by the subcommittee, it is immediately considered filed and effective.\(^{147}\) If the subcommittee objects to a proposed regulation, the regulation is returned to the promulgating agency and the LRC with a written notation of the objection.\(^{148}\) The promulgating agency may then revise the regulation to comply with the subcommittee's objection and return it to the subcommittee, or it may return the proposed rule, without change, to the LRC.\(^{149}\) When a regulation objected to by the subcommittee is returned to the LRC without change, the director of the LRC is required to forward the proposed rule to the appropriate standing committee of the house of representatives and senate or to the interim committee.\(^{150}\)

Review by the standing committee is limited to a determination of whether a proposed regulation conforms to statutory authority and carries out legislative intent.\(^{151}\) A regulation not objected to by the standing committee is immediately considered filed and effective. If a regulation is objected to by the

\(^{145}\) KRS § 13.087(4) (Supp. 1976). This statute requires that the subcommittee act on a proposed regulation within 30 days after submission to the LRC.

\(^{146}\) Id.


\(^{151}\) Id. The statute requires that the standing committee act on a proposed regulation within 30 days of the date the promulgating agency returns the rule, without change, to the LRC. However, "if there are no authorized meetings of the standing committees or the interim committee within such thirty (30) day period, the legislative research commission shall take action on the returned regulation in the same manner herein described at its next regularly scheduled meeting." Id.
standing committee, it is forwarded with a written notation of
the objection to the director of the LRC who returns the regula-
tion to the promulgating agency. The promulgating agency
may then revise the regulation to comply with the standing
committee's objection and return to the standing committee or
it may return the proposed rule unchanged to the LRC.152 When
the proposed rule is returned, without change, to the LRC, it
is immediately considered filed and effective.153

F. Effective Date

Administrative regulations in Kentucky are effective im-
mediately when "filed" with the LRC after compliance with all
applicable rule-making requirements.154 A new or amended reg-
ulation need not be published in the Administrative Register
to become effective. However, the LRC makes a practice of
publishing new or amended regulations in the Administrative
Register immediately following the effective date of the regula-
tion.155 The date such a regulation was filed and became effec-
tive can be found immediately prior to the text of the regula-
tion. The effective date of regulations published in the annual
Kentucky Administrative Regulations Service can be found
immediately following the text of the regulation.

G. Emergency Exemption

When an administrative agency determines that an emer-
gency exists, it may issue a regulation without complying with
the rule-making requirements in KRS chapter 13, provided
that the Governor issues an executive order stating that the
regulation will become effective immediately upon being filed
with the LRC.156 A regulation so filed expires after 120 days
unless it has been promulgated in accordance with the rule-
making requirements in KRS chapter 13. The statute declares

153 Id.
155 If a regulation is filed with the LRC after the 15th day of the month, it will be
  published in the next issue after the immediately following issue.
that such emergency exemptions should be "held to a minimum."\footnote{157}

H. Certification and Judicial Notice

The director of the LRC is required to prepare a certificate stating that the text of regulations as printed in the \textit{Kentucky Administrative Regulations Service} is correct.\footnote{158} One copy of that publication with the original certificate therein is maintained in the office of the Secretary of State. All other copies contain a printed copy of the certificate and constitute prima facie evidence of the law in all courts and proceedings.

KRS § 13.105 provides, "The courts shall take judicial notice of any regulation duly filed under the provisions of KRS chapter 13, after the regulation has become effective."\footnote{159} Publication of a regulation in the \textit{Kentucky Administrative Regulations Service} or the LRC's authenticated file stamp on a rule creates a rebuttable presumption that the rule or regulation was adopted and filed in compliance with all the requirements necessary to make it effective.\footnote{160}

V. Validity of Regulation

A. Presumption of Validity

Already noted is KRS § 13.100 which provides that, in most circumstances, there will be a rebuttable presumption that a regulation was promulgated in accordance with all applicable rule-making requirements. Kentucky courts have gone further than this statute and have held that agency regulations will be considered in all aspects to be prima facie or presumptively valid.\footnote{161} The person attacking the validity of a rule must carry the burden of pleading and proving facts showing the invalidity of the regulation. As stated in \textit{Hohnke v. Commonwealth}:

\footnote{157} Id. 
\footnote{158} KRS § 13.097 (Supp. 1976). 
\footnote{159} KRS § 13.105 (Supp. 1976). 
\footnote{160} KRS § 13.100 (1970). 
\footnote{161} E.g., Hohnke v. Commonwealth, 451 S.W.2d 162 (Ky. 1970); Hawkins Appliance Co. v. Goebel, 284 S.W.2d 327 (Ky. 1955); Dicken v. Kentucky State Bd. of Educ., 199 S.W.2d 977 (Ky. 1947).}
The invalidity of an administrative rule or regulation must be made so manifest by the one attacking it that the court has no choice except to hold that the administrative agency has exceeded the authority delegated. Thus he must show that such rule or regulation is clearly inconsistent with the statute, or that it is clearly unreasonable, or that it is clearly inappropriate to carry out the end specified in the statute it is intended to implement.\(^6\)

The cases indicate that this burden of showing the invalidity of a rule is often a question of law.\(^1\) It is only when a regulation is attacked as being arbitrary and not having a rational basis in fact that factual determination need to be made.\(^1\)

B. **Attacking the Validity of Regulations**

Statements which declare that, for a rule to be valid, it must be necessary,\(^1\) appropriate,\(^1\) uniform in application,\(^1\) fair,\(^1\) and consistent with law,\(^1\) are seldom useful in identifying a successful theory for attacking the validity of an agency regulation. More useful are grounds such as: (1) the regulation was not promulgated in accordance with required rule-making procedure; (2) the regulation is outside the delegated scope of agency authority; (3) the regulation does not reasonably secure the statutory purpose; (4) the regulation is unintelligible; and (5) the regulation is unconstitutional.

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\(^1\) 451 S.W.2d 162, 166 (Ky. 1970) (quoting 73 C.J.S. Public Administrative Bodies and Procedures § 104(c) (1951)).

\(^2\) See, e.g., Kentucky Milk Marketing and Anti-Monopoly Comm’n v. Borden Co., 456 S.W.2d 831 (Ky. 1970); Alcoholic Beverage Control Bd. v. Hunter, 331 S.W.2d 280 (Ky. 1960); Henry v. Parrish, 211 S.W.2d 418 (Ky. 1948).

\(^3\) See, e.g., City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971). For a discussion of the nature and scope of judicial review when a regulation is attacked as being arbitrary and without a rational basis in fact, see text accompanying notes 206-25 infra.

\(^4\) Pitts v. Perluss, 377 P.2d 83 (Cal. 1962).


\(^8\) Louisville & Jefferson County Planning & Zoning Comm’n v. Ogden, 210 S.W.2d 771 (Ky. 1948).
1. Improperly Promulgated

For a regulation to be valid it must be promulgated in accordance with required rule-making procedure. However, the Kentucky Court has held that a minor violation of a statutory rule-making requirement would not invalidate a regulation. In Christian Appalachian Project, Inc. v. Berry, the plaintiff in a civil suit alleged violation of a Department of Public Safety boating regulation which required life preservers to be furnished in certain situations. On appeal, the Court refused to take judicial notice of the regulation since the rule cited, as the authority pursuant to which it was adopted, a statute relating to partnerships in the accounting profession. Despite this violation of rule-making procedure, the Court stated that the regulation's "existence and its provisions would have to be properly established at least by pleading or in proper circumstances by evidence." Thus the Court is likely to view a mere technical rule-making requirement as only directive in nature and not mandatory for a regulation to become effective and binding if the defect can be cured through pleading or proof. With respect to important statutory rule-making requirements such as publication of notice, comment and hearing, legislative review, and effectiveness on the date of filing, the Kentucky courts are likely to hold that complete or, at least, substantial compliance is mandatory for a regulation to become effective and binding.

2. Outside Scope of Delegated Authority

An administrative body, having been created by statute,

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170 KRS § 13.085 (Supp. 1976); Kentucky State Bd. of Business Schools v. Electronic Computer Programming Inst., Inc., 453 S.W.2d 534 (Ky. 1970); Shearer v. Daily, 226 S.W.2d 955 (Ky. 1950). The Kentucky Court of Appeals decision in Commonwealth v. Moyers, 272 S.W.2d 760 (Ky. 1954), is not inconsistent with the above cited proposition. That decision merely holds that a regulation may be effective and valid even though it is not required by statute to be promulgated in accordance with usual rule-making procedures.

171 487 S.W.2d 951 (Ky. 1972).

172 Id. at 953. This approach to technical errors in rule-making procedure appears to be shared by other state courts. See, e.g., Kingery v. Chapple, 504 P.2d 831 (Alas. 1972) (by statute); Standard "Tote" Inc. v. Ohio State Racing Comm'n, 121 N.E.2d 463 (Ohio 1954).

173 See Shearer v. Dailey, 226 S.W.2d 955 (Ky. 1950); Louisville & Jefferson County Planning & Zoning Comm'n v. Ogden, 210 S.W.2d 771 (Ky. 1948).
is authorized to exercise only those powers that have been either expressly or impliedly conferred on it by statute. The Kentucky Court has often held that the validity of a regulation depends on the following two conditions: (1) the regulation must be within the delegated scope of agency authority; and (2) the scope of rule-making authority must not be limitless, but must be fixed by a legislative standard or policy.

a. Scope of Agency Authority

The Kentucky Court has repeatedly held that for an administrative rule to be valid it must be within the scope of authority conferred upon the agency.\(^{114}\) When promulgating regulations, an agency must adhere strictly to statutory standards, policies, and limitations.\(^{115}\) An agency may not substitute its judgment for that of the legislature, but must accept the law as enacted by that body.\(^{116}\) As stated in *Alcoholic Beverage Control Board v. Hunter,*

Inasmuch as the rule-making power of a public administrative body is a delegated legislative power, which it may not use either to abridge the authority given it by the legislature or to enlarge its powers beyond the scope intended by the legislature, statutory provisions control with respect to what rules and regulations may be promulgated by such a body, as well as with respect to what fields are subject to regulation by it.\(^{117}\)

A regulation may not amend, alter, enlarge or limit the terms of a legislative enactment.\(^{118}\)

General statutory language describing the powers and functions of an agency will be construed by the Kentucky courts to be limited by express and specific powers and duties

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\(^{114}\) E.g., Roppel v. Shearer, 321 S.W.2d 36 (Ky. 1959); Oertel Brewing Co. v. Portwood, 320 S.W.2d 317 (Ky. 1959); Portwood v. Falls City Brewing Co., 318 S.W.2d 535 (Ky. 1958).

\(^{115}\) E.g., Henry v. Parrish, 211 S.W.2d 418 (Ky. 1948); Robertson v. Schein, 204 S.W.2d 954 (Ky. 1947).

\(^{116}\) Roppel v. Shearer, 321 S.W.2d 36 (Ky. 1959).

\(^{117}\) 331 S.W.2d 280, 283 (Ky. 1960) (quoting 73 C.J.S. *Public Administrative Bodies and Procedure* § 94 (1951)).

\(^{118}\) E.g., Roppel v. Shearer, 321 S.W.2d 36 (Ky. 1959); Portwood v. Falls City Brewing Co., 318 S.W.2d 535 (Ky. 1958); Bloemer v. Turner, 137 S.W.2d 387 (Ky. 1939).
that are established in the same statute. This rule was applied in Bloemer v. Turner, in which a regulation was held invalid which created a food labeling requirement in addition to the labeling requirements specifically established by statute. The Court ruled that the agency's general grant of rule-making authority was limited by the specific labeling requirements established by the legislature in the delegating statute. The Court stated that if the administrator "may not by regulation subtract, [from specific statutory requirements] then he may not by regulation add" to such requirements. This limitation on an agency's authority to promulgate substantive regulations is also applied by the Kentucky Court to agency procedural rules. For instance, in Heyker v. Herbst a board of education by-law was held invalid — although the board was authorized by statute to adopt by-laws — since the by-law in question was inconsistent with a specific statutory provision.

With regard to agency licensing authority, an agency in Kentucky is not authorized to create a condition for granting or rescinding a license in the absence of express statutory provision. As stated in Robertson v. Shein, when a right to a license is granted by statute,

the officer administering such statute may not by regulation add to the conditions of that right a condition not stated in the statute, nor may he bar from that right a person included within the terms of the statute, even though such inclusion is not express, but only by judicial construction.

b. Legislative Standard for Agency Authority

The Kentucky Court has often held that an agency may

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177 Alcoholic Beverage Control Bd. v. Hunter, 331 S.W.2d 280, 283 (Ky. 1960).
178 Id. at 387 (Ky. 1939).
179 Id. at 392.
180 E.g., Union Light, Heat & Power Co. v. Public Serv. Comm’n, 271 S.W.2d 361 (Ky. 1954); Louisville & Jefferson County Planning & Zoning Comm’n v. Ogden, 210 S.W.2d 771 (Ky. 1948).
181 50 S.W. 859 (Ky. 1899).
182 E.g., Johnson v. Correll, 332 S.W.2d 843 (Ky. 1960); Robertson v. Schein, 204 S.W.2d 954 (Ky. 1947); Goodpaster v. Southern Ins. Agency, Inc., 169 S.W.2d 1 (Ky. 1943).
not legislate under the guise of regulation. An agency may promulgate a subordinate rule giving effect to a statutory purpose or policy but an agency may not promulgate rules without an ascertainable legislative standard or policy. A regulation must be within the framework of a policy that the legislature has adequately defined. “[T]he Legislature may authorize a board or administrative officer . . . in charge of some governmental affairs, to make police regulations, but it cannot abdicate its own police power on any subject and confer such power on an officer or a board to his or its uncontrolled discretion.”

This requirement appears to have been somewhat liberalized by the Kentucky Court’s adoption of the “general safeguards” approach to delegation issues. A statute delegating rule-making authority need no longer establish “adequate standards” by its express terms. A statute is examined “in terms of the practical needs of effective government, and in terms of safeguards against abuse and injustice” and it is struck down if there is “any real danger that it would . . . abuse the responsibilities conferred upon it . . .”

3. Reasonableness

Agencies are allowed a great deal of discretion in formulating regulations but a regulation is invalid if it bears no reasonable relation to the statutory purpose for which agency rule-making is authorized. As stated in Kentucky State Board of

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185 E.g., Kerth v. Hopkins County Bd. of Educ., 346 S.W.2d 737 (Ky. 1961).
186 E.g., Henry v. Parrish, 211 S.W.2d 418 (Ky. 1948).
187 Portwood v. Falls City Brewing Co., 318 S.W.2d 555 (Ky. 1958).
188 Goodpaster v. Southern Ins. Agency, 169 S.W.2d 1, 3 (Ky. 1943).
191 Butler v. United Cerebral Palsy of N. Ky., Inc., 352 S.W.2d 203, 208 (Ky. 1961).
Business Schools v. Electronic Computer Programming Institute, Inc., "delegated authority cannot go beyond what is reasonable in accomplishing the purposes of the Act for the administration of which the agency was given the delegation."\textsuperscript{194} A particular regulation will be considered reasonable if there is a rational factual basis for believing that the regulation may accomplish the end in view.\textsuperscript{195} For example, in \textit{Portwood v. Falls City Brewing Company},\textsuperscript{196} a regulation of the Alcoholic Beverage Control Board was attacked as being arbitrary and unreasonable. The Board was authorized to regulate the sale and advertising of alcoholic beverages. The regulation in question prohibited illuminated advertisements inside a retail store if the illumination was an integral part of the sign. The Kentucky Court affirmed the circuit court's decision that the regulation did not bear a reasonable relation to the statutory purpose. In so ruling, the Court quoted from the circuit court's opinion:

'[T]he illumination of the sign whether inside or outside the advertising device bears little relation to the policing of the sale of malt beverages. By the time the advertising device is in view of a member of the public he has entered the retail premises . . . for the purpose of buying beer . . . it would appear to be of small significance whether the illumination of an inside sign is within or without the advertising device and so much of the regulation . . . would appear to be unreasonable.'\textsuperscript{197}

The Kentucky Court has held that the reasonableness of a rule is not to be judged by the hardship that results when it is applied to a particular person or business.\textsuperscript{198} In \textit{Sanitation District No. 1 v. Campbell},\textsuperscript{199} the regulation in question required all toilet facilities located on property abutting a public sewer system to be connected with the public sewer system. Owners of private septic tank facilities attacked the rule as

\textsuperscript{194} 453 S.W.2d 534, 536 (Ky. 1970).
\textsuperscript{195} Sanitation Dist. No. 1 v. Campbell, 249 S.W.2d 767 (Ky. 1952).
\textsuperscript{196} 318 S.W.2d 535 (Ky. 1958).
\textsuperscript{197} Id. at 536.
\textsuperscript{198} E.g., Lovern v. Brown, 390 S.W.2d 448 (Ky. 1965); Sanitation Dist. No. 1 v. Campbell, 249 S.W.2d 767 (Ky. 1952).
\textsuperscript{199} 249 S.W.2d 535 (Ky. 1952).
being arbitrary on the ground that the existing private facilities were in fact sanitary. The Court held that the regulation was reasonable despite the fact that it clearly imposed a hardship on individuals whose facilities were sanitary. The Court stated that "although properly operated private septic tanks may afford a sanitary disposal system, the publicly maintained sewage system of the whole community is undoubtedly better at doing away with potential as well as actual health menaces." Thus a regulation may be reasonable when applied to prevent a potentially harmful situation even though its application may not be necessary immediately to effectuate the purpose of the authorizing statute.

4. Lack of Intelligibility

The Kentucky Court has used a "lack of intelligibility" rule to hold statutes invalid. If unable, by the application of known and accepted rules of construction, to determine a statute's meaning and intent because of the statute's vagueness, incompleteness or contradictions, the law will be considered inoperative and invalid. This "lack of intelligibility" rule has also been applied to administrative regulations. In Bostic v. East Construction Co., plaintiffs in a civil suit based their claim of negligence per se on alleged violations of fire safety standards that had been promulgated as regulations by the state fire marshall. The Sixth Circuit Court of Appeals held that the regulations in question were unintelligible due to numerous cross-references and ambiguities. Noting a Kentucky case, the court stated:

[W]here the lawmaking body, in framing a law, has not expressed its intent intelligibly, or in language that the people upon whom it is designed to operate or whom it affects can understand, or from which the courts can deduce the legislative will, the statute will be declared to be inoperative and void.

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200 Id. at 772.
201 Folks v. Barren County, 232 S.W.2d 1010 (Ky. 1950). Cf. Arlan's Dep't Store v. Commonwealth, 369 S.W.2d 9, 13 (Ky. 1963) (vagueness is proper ground for attacking a statute).
202 497 F.2d 712 (6th Cir. 1974).
203 Id. at 715 (quoting Folks v. Barren County, 232 S.W.2d 1010, 1013 (Ky. 1950)).
The Court concluded that "[t]hose portions of the standards here involved simply do not possess that degree of clarity necessary for validity, and therefore, do not provide a basis for negligence per se."\textsuperscript{204}

5. **Constitutional Grounds**

An administrative regulation is open to attack on constitutional grounds. Challenges may be based on federal\textsuperscript{205} or state\textsuperscript{206} constitutional provisions. The Kentucky Court has made it a practice to consider case law dealing with challenges to statutes when ruling on the constitutionality of regulations.\textsuperscript{207} It should be noted that there is some overlap between constitutional attacks on regulations and the previously discussed grounds of attack.\textsuperscript{208}

\textsuperscript{204} 497 F.2d at 716.
\textsuperscript{206} See, e.g., Commonwealth v. Moyers, 272 S.W.2d 670 (Ky. 1954) (regulation attacked as being in violation of Ky. Const. § 59 which prohibits special legislation).
\textsuperscript{207} See Kentucky Milk Marketing and Anti-Monopoly Comm'n v. Borden Co., 466 S.W.2d 831 (Ky. 1970) (regulation attacked as being unconstitutionally vague and an unconstitutional delegation of legislative power); Southern Displays, Inc. v. Ward, 414 S.W.2d 573 (Ky. 1967) (regulation attacked as being unconstitutionally vague); Commonwealth v. Moyers, 272 S.W.2d 670 (Ky. 1954) (regulation attacked as being in violation of Ky. Const. § 59 prohibiting special legislation). The federal courts also use the same constitutional provisions when examining regulations as they do when examining statutes. See, e.g., Raymond Motor Transp., Inc. v. Rice, 98 S. Ct. 787 (1978).
\textsuperscript{208} The "legislative standards for agency authority" branch of the scope attack, see notes 186-92 supra and accompanying text, is, in effect, a constitutional attack while the "lack of intelligibility" and "reasonableness" grounds of attack are very similar to constitutional grounds sometimes used to challenge statutes.

The "no legislative standard for agency authority" or "lack of safeguards" attack is a claim that the agency is exercising unbridled legislative authority in violation of sections 27, 28 and 29 of the Kentucky Constitution which insure separation of powers.

Challenging a regulation on the ground that it is not reasonably adopted to accomplish the legislative purpose for which it is authorized is conceptually similar to an alleged violation of substantive due process under the fifth and fourteenth amendments to the United States Constitution. A statute does not violate due process if there is an important governmental purpose underlying the statute and that purpose is served well by the statute. See e.g., Moore v. City of East Cleveland, 97 S. Ct. 1932, 1936 (1977) and Williamson v. Lee Optical, 348 U.S. 483, 488 (1955). The difference between the two methods of attack is that the Kentucky reasonableness test assumes the validity of the purpose of the authorizing statute and concentrates on the reasonableness of the regulation to accomplish that purpose. See, e.g., Kentucky State Bd. of Business Schools v. Electronic Computer Programming Inst., Inc., 453 S.W.2d 534, 536 (Ky. 1970); Portwood v. Falls City Brewing Co., 318 S.W.2d 535, 636 (Ky. 1958).
C. Judicial Review

1. Scope of Review

When the validity of an administrative regulation is challenged, only pure questions of law are likely to be at issue. A reviewing judge or court will exercise independent judgment when ruling on these questions of law. Such is the case when a regulation is attacked on the grounds that it was improperly promulgated, outside the scope of delegated authority, unintelligible, or unconstitutional.

When a regulation is attacked on the ground that it is arbitrary and unreasonable, the reviewing judge or court may not exercise its own judgment regarding whether the regulation in question is wise or even necessary under the particular regulatory scheme. When deciding this issue, the reviewing court must defer to agency experience and expertise and apply a much more limited scope of review. The scope of review will depend on whether the procedure required for promulgating the regulation is formal or informal.

a. Informal Rule-Making

When the regulation in question is not required to be promulgated after a trial-type hearing, that is, when only informal notice and comment procedures are required, the scope of judicial review will be limited to the question of whether there is "any rational basis in fact" connecting the substance of the rule with the intent or purpose of the authorizing statute. For the lack of intelligibility challenge is a principle of statutory construction in Kentucky but to the extent the principle requires an enactment to give sufficient notice of prohibitions to private citizens it is identical to attacking an enactment as being unconstitutionally vague in violation of the fifth or fourteenth amendments to the United States Constitution.

See, e.g., Alcoholic Beverage Control Bd. v. Hunter, 331 S.W.2d 280 (Ky. 1960); Henry v. Parrish, 211 S.W.2d 418 (Ky. 1948).


See KRS § 13.085.

E.g., Graybeal v. McNevin, 439 S.W.2d 323 (Ky. 1969). This is also the scope of review generally followed by the federal courts in reviewing informal rule-making. See, e.g., Nat'l Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688 (2d Cir.), cert. denied, 422 U.S. 1008 (1975). However, some federal statutes require that the "substantial evidence" scope of review be applied to informal rule-making. Associated Industries of N.Y. State, Inc. v. United States Dept. of Labor, 487 F.2d 342 (2d Cir.)
example, in *Hohnke v. Commonwealth*, a regulation listing LSD as a narcotic drug was attacked on the ground that LSD did not possess the qualities described by the authorizing statute that were necessary for a substance to be listed as a "narcotic drug." The Court held that a reviewing court could not substitute its judgment for that of the promulgating agency; it must uphold the agency's finding of fact unless the agency finding is "clearly unreasonable." A regulation is clearly unreasonable only when the regulation has "no reasonable basis in fact." In *City of Louisville v. McDonald*, the Court stated that "[an agency's] action is arbitrary if there is no rational connection between that action and the purpose for which the body's power to act exists" and that if "the existence of such a rational connection is 'fairly debatable' the action will not be disturbed by a court." In this case, the Court made it clear that this "rational basis in fact" scope of review is a more limited inquiry than the "substantial evidence" standard of review applicable to formal rule-making where a trial-type hearing is required. That is, after informal rule-making a regulation is valid if there is a rational basis in fact supporting the rule but after formal rule-making a rule is valid only if the rational basis for the rule is supported by "substantial evidence" in the record of the trial-type formal proceeding.

Unless a statute so requires, an agency in Kentucky need not make formal findings of fact when a regulation is promulgated and the agency does not have the burden of proving that a rational basis exists. The person attacking the validity of the rule must convince the reviewing court that the regula-


213 451 S.W.2d 162 (Ky. 1970).

214 *Id.* at 166 (quoting 73 C.J.S. Public Administrative Bodies and Procedure § 104(c) (1951)).


216 470 S.W.2d 173, 187 (Ky. 1971).

217 *Id.* at 177-78.


219 Commonwealth v. Moyers, 272 S.W.2d 670 (Ky. 1954). But KRS § 13.085(3) (Supp. 1976) does require that a regulation filed with the LRC be accompanied by "a brief statement which sets forth the necessity for issuing the regulation."
tion in question has no rational basis in fact.\textsuperscript{220} To provide the opportunity for doing so, the courts in Kentucky have allowed the party attacking the regulation to call experts to present extensive testimony on the issue.\textsuperscript{221} However, the Kentucky Court has indicated that the reviewing court must not decide the question exclusively on the basis of the evidence in the court record thereby developed.\textsuperscript{222} The reviewing court must give great weight to any facts that were before the agency when it promulgated the rule.\textsuperscript{223} Such facts may be presented by the agency through pleading, affidavits, or, in an unusual case, testimony. In many cases, the reviewing court might properly choose to limit its review to pleadings and the "record" of the informal rule-making. It has been suggested that the "record" in informal rule-making consists of: (1) the notice of proposed rule-making and any documents referred to therein; (2) comments and other documents submitted by interested persons; (3) transcripts, if any, of oral presentations; (4) factual information considered by the agency but not included in the foregoing that is proffered by the agency; and (5) the agency's brief statement regarding the necessity of the rule and any documents referred to therein.\textsuperscript{224} Though a court may choose to review informal rule-making on the rule-making "record" described above, a court is not likely to consider the agency bound to the facts and comments therein if a regulation involving a broad policy determination is involved. In such a case, it may be sufficient that the regulation is supported by agency experience and expertise since the issue is likely to be more a question of subjective judgment than a question of verifiable fact.\textsuperscript{225}

\textsuperscript{220} The Kentucky Court has held that there is a presumption of the existence of facts justifying an administrative regulation. Commonwealth v. Moyers, 272 S.W.2d 670 (Ky. 1954).

\textsuperscript{221} See, e.g., Graybeal v. McNevin, 439 S.W.2d 323 (Ky. 1969); Lovern v. Brown, 390 S.W.2d 448 (Ky. 1965).

\textsuperscript{222} Graybeal v. McNevin, 439 S.W.2d 323, 326 (Ky. 1969) (dictum).

\textsuperscript{223} Id.


\textsuperscript{225} E.g., Industrial Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974).
b. **Formal Rule-Making**

When the regulation in question was required to be promulgated after a formal hearing on the record, the standard for judicial review of facts supporting the rule will usually be "substantial evidence." In such a case the court will limit its review to the record of the formal hearing conducted by the agency. The party attacking the regulation must persuade the reviewing court that there is not substantial evidence in the record to support the alleged factual basis of the regulation in question. The substantial evidence test is met in Kentucky if there is enough legally competent evidence in the agency record to lead a reasonable person to make the agency's factual findings.

2. **Preenforcement Judicial Review**

The Kentucky courts allow preenforcement judicial review of substantive administrative regulations through the remedies of injunction and declaratory judgment. In *Harrison's Sanitarium, Inc. v. Commonwealth*, the Court held that preenforcement judicial review of administrative regulations will generally be allowed except when there are "factual circum-

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226 A formal hearing is usually thought necessary when a statute provides for judicial review based on a "substantial evidence" standard and limited to the record of a required agency hearing. Formal rule-making on the record is not uncommon at the federal level. In Kentucky, formal rule-making is rare, but it is provided for by specific statutory provisions in some instances. For example, KRS § 281.625 (Supp. 1976) requires a formal hearing by the Bureau of Vehicle Regulation prior to the issuance of an order removing a commodity from the Bureau's exempted commodities list. KRS § 281.785 (1972) requires substantial evidence judicial review on the record of the agency hearing. Such an "order" is clearly a "regulation" as that term is defined in Kentucky's general rule-making statute, KRS § 13.085 (Supp. 1976).

Although the traditional phrase "formal hearing" is used here, in recent years many courts have held that the "hearing" required by statute need not always be a trial-type proceeding with cross-examination. This trend is beneficial since trial-type proceedings are designed to resolve a specific issue of fact and are usually not helpful in deciding the broad questions of policy that are sometimes required regarding statutes. See *Industrial Union Dept., AFL-CIO v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974).


229 417 S.W.2d 137 (Ky. 1967).
stances in dispute, or which create uncertainty . . . ." The Court reasoned that once a regulation is promulgated it is final and ripe for review and that exhaustion of prospective administrative remedies is likely to be futile and inadequate.

If a person immediately affected by a regulation must either comply with it or violate it and await the consequences he simply does not have a reasonable, and therefore adequate, alternative to initiating a challenge in court. Especially is this so when . . . a violation subjects him to criminal sanctions as well as forfeitures of his license . . . . He cannot reasonably be expected to live indefinitely under a sword of Damocles. In such a situation, irreparable injury need not be shown for temporary injunctive relief to be granted, at least if no emergency exists and the public interest is not "likely to suffer from a stay of enforcement pending disposition of [the merits]."

It should be noted that in Harrison's Sanitarium, the Court did state that actions to review regulations should not be entertained by courts when taken to "precipitate a resolution of the controversy through administrative proceedings" or when the agency involved has initiated administrative proceedings "to penalize or revoke the license of" the plaintiff for violating the regulation in question.

D. Collateral Attack In Judicial Proceedings

The Kentucky Court ordinarily allows administrative regulations to be collaterally attacked in a civil suit if negligence per se is an issue and in a criminal enforcement proceeding.

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230 Id. at 139. For a case in which the Kentucky Court refused to review a complicated factual question in a preenforcement action, see Kentucky Milk Marketing and Anti-Monopoly Comm'n v. Borden Co., 456 S.W.2d 831 (Ky. 1970).
231 417 S.W.2d at 139. The leading federal case discussing this issue is Abbot Laboratories v. Gardner, 387 U.S. 136 (1967).
232 Harrison's Sanitarium, Inc. v. Commonwealth, 417 S.W.2d 137, 139 (Ky. 1967). For considerations generally applicable to the granting of temporary injunctive relief in Kentucky, see Oscar Ewing, Inc. v. Melton, 309 S.W.2d 760 (Ky. 1958).
233 417 S.W.2d at 139. See also Pritchett v. Marshall, 375 S.W.2d 253 (Ky. 1963); Kendall v. Beiling, 175 S.W.2d 489 (Ky. 1943).
234 417 S.W.2d at 139. Cf. Heyser v. Brown, 184 S.W.2d 893 (Ky. 1945).
if a fine or jail term is sought to be imposed for violation of a regulation.\(^2\) The question of validity is a preliminary defense presented by motion.\(^3\) An evidentiary hearing on the motion is permitted if the issue is not a pure question of the law.\(^4\)

In *Hohnke v. Commonwealth*,\(^5\) the Kentucky Court, in allowing the invalidity of a regulation to be raised as a defense in a criminal proceeding, held: "It may not be doubted that a judicial review to test the validity of an administrative regulation must be afforded to satisfy the demands of due process."\(^6\)

If an express statutory provision provides for judicial review of the regulation at an earlier proceeding,\(^7\) and if that earlier proceeding is intended by the legislature to be the exclusive method for review of the regulation, the Kentucky Court might well hold that due process does not require a second opportunity to challenge the validity of the rule.\(^8\) The U.S. Supreme Court expressly held in *Yakus v. United States*\(^9\) that a defendant in a criminal case has no due process right to attack the validity of the rule he is charged with violating if an earlier and separate procedure for judicial review of the rule was provided for by statute and such procedure was intended to be the exclusive method of review. In so holding, the Court stated: "We are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity . . . ."\(^10\) The U.S. Supreme Court has never repudiated the fundamental principle of *Yakus*, and that deci-

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\(^{238}\) *Hohnke v. Commonwealth*, 451 S.W.2d 162 (Ky. 1970); *Commonwealth v. Moyer*, 272 S.W.2d 670 (Ky. 1954).

\(^{237}\) See cases cited in note 234 *supra*. The motion in a civil case is pursuant to Ky. R. Civ. P. 12.02 and in a criminal case pursuant to Ky. R. Crim. P. 8.12, 8.14.

\(^{236}\) See *Graybeal v. McNevin*, 439 S.W.2d 323 (Ky. 1969); *Lovern v. Brown*, 390 S.W.2d 448 (Ky. 1965).

\(^{235}\) 451 S.W.2d 162 (Ky. 1970).

\(^{234}\) *Id.* at 166.

\(^{242}\) An example of such a provision in Kentucky is KRS § 281.785 (1972), which provides for judicial review of a Bureau of Vehicle Regulation order removing an item from the Bureau's exempted commodities list.

\(^{241}\) The Kentucky Court in *Hohnke* expressly noted the absence of any separate review proceeding for attacking the regulation in question.

\(^{240}\) 321 U.S. 414 (1944).

\(^{239}\) *Id.* at 444.
sion, though criticised in a few lower court opinions, is still generally followed as the governing law on the issue.

VI. AGENCY DISCRETION: REQUIRING REGULATIONS

For many years, it was a well-settled administrative law principle that the choice of whether to implement a statutory policy by rule-making or by case-by-case adjudication was a decision within the discretion of the agency. While the principle is still applicable in many cases, on an increasing number of occasions the courts have required agencies to promulgate rules to limit and guide the agency in the exercise of its delegated responsibilities. These judicial efforts have been an attempt to ensure that a framework for principled decision-making exists as a safeguard against the arbitrariness likely to result when agency discretion is exercised on an apparently standardless ad hoc basis.

One available remedy when a state agency is adjudicating with respect to a protected property interest and there are no established standards controlling its discretion is a section 1983 action. In the landmark decision of Hornsby v. Allen, the Fifth Circuit, relying on section 1983, enjoined the denial of liquor license application by officials in the city of Atlanta because of the absence of standards controlling their licensing decisions. In Hornsby, the plaintiff, who was an unsuccessful applicant for a retail liquor license, charged that a system of ward courtesy controlled licensing decisions. The circuit court held that "the public has the right to expect its officers to observe prescribed standards and to make adjudication on the basis of merit." Due process required that an applicant be

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245 See K. Davis, ADMINISTRATIVE LAW OF THE SEVENTIES, § 6.13 (1976) for important federal cases on this subject.
247 326 F.2d 605 (5th Cir. 1964).
248 Id. at 610.
"afforded an opportunity to know, through reasonable regulations promulgated by the board, of the objective standards which had to be met to obtain a license." 253

The Hornsby rationale has been followed by other federal courts; 254 the decisions have required agency rule-making in such areas as student discipline, 255 prisoners' rights, 256 and applications for public housing. 257 Indicative of this developing view is the statement by one federal court that "[o]ne essential element of a properly made decision is that it accords with previously stated, clearly articulate rules and standards. This is so because there is a tendency for regulatory systems which operate without clearly enunciated standards to be inherently irrational and arbitrary." 258

Compared to this rather recent development in other states and in the federal courts, the Kentucky Court adopted the notion quite early that agencies might be required to articulate and to establish definite standards instead of implementing a regulatory scheme on a case-by-case basis. 259

Perhaps the most important Kentucky case on point is Deckert v. Levy. 260 In Deckert, the Court, in a well-reasoned opinion, held that the Alcoholic Beverage Control Board was without authority to issue a retail beer license which exceeded a local quota fixed by a city in the absence of a Board regulation specifying a larger quota. The Court stated:

Without promulgation of rules and conditions there is no guidance either for the officers or the public, particularly for those who come or desire to come within the operation of the statute. Without such standards, there is a departure from the basic principle of a government "of laws and not of men."

... It is going too far to say that such an administrative

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253 Id.
254 E.g., White v. Roughton, 530 F.2d 750 (7th Cir. 1976); United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971).
255 Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969).
259 See, e.g., Matthews v. Murphy, 63 S.W. 785 (Ky. 1901).
260 213 S.W.2d 431 (Ky. 1948).
board or individual officer may act in contravention of local legislation, without having laid down any standard, established any rule or adopted any stable regulation. They may not act in a given case according to caprice or the whim of the moment, giving a right to one and denying the same to another.\textsuperscript{281}

Two 1973 Kentucky cases evidence the same judicial dissatisfaction shown in \textit{Deckert} for ad hoc agency decisionmaking. In \textit{Dolan v. Shoppers Village Liquors No. 2, Inc.},\textsuperscript{282} the Court held that the Alcoholic Beverage Control Board could not refuse to grant a license on the ground that it was authorized by statute to limit the number of licenses since the board had not implemented the authority granted by promulgating regulations. Similarly, in \textit{Big Sandy Community Action Program v. Chaffins},\textsuperscript{283} discussing the admissibility of evidence before the Workmen's Compensation Board, the Court stated that lawyers are entitled to know the rules under which they are expected to practice and that "the board should specify in the form of a standing regulation whether the same rules of evidence will apply in compensation hearings as in judicial proceedings, and, if not, just what it will hear and consider that is not admissible in court."\textsuperscript{284}

There are three grounds that Kentucky courts might rely upon to require that standards be articulated for the guidance of both the agency and the public: (1) section 2 of the Kentucky Constitution, which prohibits the existence of arbitrary power within the Commonwealth;\textsuperscript{285} (2) the "general safeguards" delegation test recently adopted by the Kentucky Court which might well require that regulations establish standards when meaningful standards are not contained in a delegating statute;\textsuperscript{286} and (3) the existing common law in Kentucky.\textsuperscript{287}

\begin{footnotes}
\item[281] Id. at 433.
\item[282] 492 S.W.2d 201 (Ky. 1973).
\item[283] 502 S.W.2d 526 (Ky. 1973).
\item[284] Id. at 531.
\item[285] Ky. Const. § 2 states: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."
\end{footnotes}
CONCLUSION

The foregoing has been an attempt to set out the basic statutory and case law in Kentucky regarding administrative rules and rule-making. As indicated in section IV of this article, Kentucky has enacted a comprehensive procedure for agency rule-making process that does not interfere with effective agency implementation of delegated responsibilities. However, in order more fully to achieve agency responsiveness in rule-making and fairness to persons affected by agency regulations, further legislation should be enacted to incorporate the following three provisions into the statutory scheme: 1) a procedure should be provided whereby interested persons could formally petition agencies for enactment, amendment or repeal of a regulation and agencies should be required to give affirmative consideration to such petitions and respond in writing within a reasonable time;266 2) a procedure should be provided whereby interested persons could formally petition agencies for issuance of a declaratory order affording advance determination of the applicability of a statute or regulation to a particular factual situation and agencies should be required to give affirmative consideration to such petitions and respond in writing within a reasonable time;267 and 3) agency regulations should not become effective until they are published in The Administrative Register.268

Also, Kentucky's simplification of rule-making procedure should be extended to all phases of state administrative law. In 1972, the General Assembly considered an exhaustive senate bill269 that would have adopted, for the most part, the Uniform State Administrative Procedure Act.270 While analysis of the merits of particular provisions of this senate bill or of the Uniform State Act is beyond the scope of this article, the value of comprehensive legislation governing agency investigations, adjudicatory hearings, and judicial review of agency decisions is obvious to attorneys who practice before different state agencies. Although many of the procedural details involved in any

270 Uniform Law Commissioners' Revised Model State Administrative Procedure Act (1970).
administrative action are wisely left to agency discretion, there are certain basic principles of common sense, justice, and fairness that can and should be required of all agencies.\textsuperscript{271} The enactment of a comprehensive administrative procedure act would surely be a step toward assuring that the development of administrative government in Kentucky does not result in the rule of law being replaced by “the breadth of the chancellor’s foot.”

\textsuperscript{271} For a statement by the U.S. Supreme Court of the procedures ordinarily required by due process in adjudicatory hearings, see \textit{Goldberg v. Kelly}, 397 U.S. 254 (1970).