Washington Law Review

Volume 38
Issue 2 *Washington Case Law—1962*

7-1-1963

Administrative Law—Notice of Unpublished Rules

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the National Labor Relations Act was being violated in order for a district court to acquire jurisdiction. Now, all that the complainant must show is that he is being deprived of a right under the Administrative Procedure Act and that there are no other remedies available to enforce that right.

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Notice of Unpublished Rules. In the recent case of *United States v. Aarons*,[1] the failure of the Coast Guard to publish one of its substantive rules in the Federal Register was held not to bar conviction for violation of the rule where the defendants had actual knowledge of the contents of the rule violated. In so holding the Court of Appeals for the Second Circuit refused to follow the Ninth Circuit decision to the contrary in *Hotch v. United States*.[2]

The defendants in the *Aarons* case were members of a group called the Committee for Non-Violent Action (CNVA), which was conducting demonstrations against the Navy's Polaris program at the Electric Boat Company's plant in New London, Connecticut. In response to a request from the Navy, the Commander of the Third Coast Guard District issued a "Special Notice" by which he closed a section of the Thames River directly in front of the Company's property to all persons and vessels between specified hours. The purpose of the closure was to afford a clear area for the launching of the nuclear submarine Ethan Allen. The "notice" was published in the Local Notice to Mariners, and a copy was sent by registered mail to the CNVA which acknowledged it. It was not, however, published in the Federal Register.[3]

On the date of the launching the defendants attempted to enter the restricted area in two boats and to obstruct the launching. They were intercepted and shown a copy of the order closing the area. Nevertheless they continued into the area and were apprehended and taken into custody by the Coast Guard.

After trial and conviction for violation of the rule,[4] defendants appealed, contending (among other things) that the "Special Notice" was invalid because it had not been published in the Federal Register

[1] 310 F.2d 341 (2d Cir. 1962).
[2] 212 F.2d 280 (9th Cir. 1954).
[3] United States v. Aarons, 310 F.2d 341, 343 (2d Cir. 1962).
[4] Defendants were convicted under 50 U.S.C. § 192 (1958) of a knowing violation of an order issued under 50 U.S.C. § 191 (1958).

as required by the Federal Register Act (FRA)[5] and the Administrative Procedure Act (APA).[6] The court found that both the FRA and the APA required publication.[7] However, it did not agree with appellants' contention that failure to meet the requirements of these acts invalidated the regulation. Instead, the court affirmed the conviction, finding that failure to file or publish as required by the FRA and the APA was of no consequence as against a person having actual knowledge of the contents of the rule.[8]

In the *Hotch* case, which the court in *Aarons* refused to follow, the defendant was convicted of violating a regulation of the Department of the Interior which extended the closed period for commercial fishing. The conviction was affirmed by the Court of Appeals for the Ninth Circuit.[9] Upon petition for rehearing the conviction was reversed and the regulation held invalid because it had not been published in the Federal Register.[10] On a subsequent petition for rehearing by the United States the decision was affirmed,[11] the court saying that the regulation was invalid whether or not Hotch had actual notice of it.

In light of the problem raised by the *Aarons* case the broad language used by the *Hotch* court is unfortunate, but the court's decision itself may be defended. The court in the *Hotch* case purported to find the rule invalid upon the strength of FRA § 5 (a),[12] and APA § 3 (a) (3) & § 4 (a).[13]

APA § 4(a) sets out the procedure for rule making.[14] Unless an

[5] 44 U.S.C. § 305 (1958).
[6] 5 U.S.C. § 1002(a)(3) (1958).
[7] The court's conclusion in the *Aarons* case that the "Special Notice" issued by the Coast Guard was unquestionably a "rule" as defined by the APA § 2(a), would seem to be subject to some criticism. It is true there is little doubt that the "notice" comes within the literal wording of 5 U.S.C. § 1001(c) (1946) defining a rule as "the whole or any part of any agency statement of general or particular applicability and future effect. . . ." Not so clear however is just how literally these words should be taken. As Professor Davis has noted, the literal meaning of the section would seem to include "almost every process except licensing. . . ." See 1 DAVIS, ADMINISTRATIVE LAW 295 (1958). He suggests that the APA definition has not changed the meaning of the term as it existed prior to the act. *Id.* at 296. To attempt to draw together and analyse the factors which have led the courts to conclude that an agency has promulgated a rule goes beyond the scope of this note. The practitioner should be aware that a definitional problem does exist and can have a significant effect upon the outcome of a particular case. See, *e.g.*, the *Aarons* and *Hotch* cases. See generally DAVIS, *op. cit. supra*, ch. 5 & 6.
[8] United States v. Aarons, 310 F.2d 341, 348 (2d Cir. 1962).
[9] Hotch v. United States, 208 F.2d 244 (9th Cir. 1953).
[10] *Id.* at 249.
[11] Hotch v. United States, 212 F.2d 280 (9th Cir. 1954), Note, 68 HARV. L. REV. 535.
[12] 44 U.S.C. § 305(a) (1958).
[13] 5 U.S.C. §§ 1002(a)(3), 1003(a) (1958).
[14] The title of APA § 4(a) is "Rule making" and the general headings of the subsections include (a) "Notice; publication and contents," (b) "Procedures," (c) "Time of publication or service or rules" and (d) "Petitions."

agency is exempted from this section, it must follow the designated procedure in order to promulgate a valid rule. One of the requirements is that, "general notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) . . . ."[15]

It appears that an agency's failure to meet this provision would result in the invalidity of the rule passed and that notice to the person charged under the rule as finally issued would not meet the requirement of the section. Other interested parties should be allowed the opportunity to present their views in order that the agency be fully informed of the conflicting interests concerned before promulgating a rule. Providing minimum constructive notice to those parties who may be affected under the rule as finally issued is not the purpose of the requirement. Rather, the purpose is to notify the public of the intent to issue a rule so that the participation of interested parties may be better assured. The notification is a step in the rule making process and a prerequisite to the issuance of valid rule.

This line of reasoning is supported by the legislative history noted by the court in the *Hotch* opinion:

> In the "rule making" (that is, "legislative" function) it [the Administrative Procedure Act] provides that with certain exceptions agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration *before the issuance of general regulations* (sec. 4) [italics ours]. U.S. Code Congressional Service, 79th Congress, Second Session, 1946, p. 1195, at 1205.[16]

The foregoing seems to state the position taken by the United States Customs Court in *Elof Hansson, Inc. v. United States,*[17] in which that court cites *Hotch* for the principle that "actual notice of a regulation does not validate it where neither notice nor the proposed regulation itself was published in the Federal Register."[18] The holding in *Elof Hansson* with regard to publication requirements rests solely on APA § 4(a) requiring notice of *proposed* rule making.[19] Thus the court makes no decision with regard to the requirement of publication of the

[15] 5 U.S.C. § 1003(a) (1958).
[16] Hotch v. United States, 212 F.2d 280, 282 (9th Cir. 1954).
[17] 178 F. Supp. 922 (1959).
[18] *Id.* at 929.
[19] *Id.* at 931. The case was later overruled on the grounds that the defendant had waived his right to object to the failure of the agency to comply with the publication requirement of § 4(a). United States v. Elof Hansson Inc., 296 F.2d 779 (1960) *cert. denied.* The court relied on United States v. L. A. Tucker Truck Lines, 344 U.S. 33

rule as finally issued. Had the court in the *Hotch* case rested its decision on APA § 4(a) alone, the confusion generated by the case might have been avoided.

The difficulty with the decision in *Hotch* is that the court also rests its conclusion of invalidity upon APA § 3(a) (3)[20] and FRA § 5.[21] In taking this position, the court appears to be in error. The basis of the court's conclusion can be found in its treatment of the requirement of APA § 3(a) (3) as one more step in the rule making process of APA § 4. But the purpose of APA § 3(a) (3) is not the same as that of the rule making section. Rather its purpose apparently is to afford minimum constructive notice of the rule's contents as *finally* promulgated by the agency.[22] Had the Congress wished to make such publication a further step in the rule making process it would probably have included the requirement under APA § 4. Moreover, the wording of the requirement seems to presuppose a valid rule and to impose the additional requirement that the rule be published to provide the requisite constructive notice.[23]

Nor can the FRA be said to require publication in order that a rule be valid as to one with knowledge of its contents. FRA § 7 provides: "No document required under section 305(a) of this title to be published... shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed...."[24]

The court in the *Hotch* case approaches this section along with FRA

(1952) to find that failure to make timely objection at the administrative level was fatal. Elof Hansson, Inc. v. United States, 368 U.S. 899 (1961).

[20] This provision requires that, "except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—(a) Every agency shall separately state and currently publish in the Federal Register . . . (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public. . . ." 5 U.S.C. § 1002(a) (3) (1958).

[21] "There shall be published in the Federal Register . . . (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect. . . ." 44 U.S.C. § 305 (1958).

[22] The legislative history concerning this section seems to indicate that this interpretation is correct. "Section 3(a) provides that there shall be publication in the Federal Register of the rules of the various agencies of the government. . . . If a person has actual notice of a rule, he is bound by it. The only purpose of the requirement for publication in the Federal Register is to make sure that persons may find the necessary rules as to organization and procedure if they seek them. It goes without saying that actual notice is the best of all notices." See S. Doc. No. 248, 79th Cong., 2d Sess. 415 (1945).

[23] The section requires publication of substantive rules *"adopted as authorized by law. . . ."* (Emphasis added.) For the complete content of the section see note 20 *supra.*

[24] 44 U.S.C. § 307 (1958).

§ 2[25] in a highly artificial manner, finding independent requirements of filing and publication, and stating that FRA § 7 applies only to the requirement of filing.[26] An examination of the sections with a view to their practical effect shows that FRA § 2 sets out the procedure by which an agency files and publishes a rule while FRA § 7 establishes the point in time at which the constructive notice becomes effective.[27] Until the constructive notice becomes effective, one without actual knowledge cannot be bound. Since the express purpose is to protect only those without actual knowledge and then only until the constructive notice becomes operative, it follows that only those without actual knowledge should be protected if the document is never filed or published.

The court in the *Aarons* case takes the position here outlined. With reference to the FRA, the court notes that its purpose is to "mitigate the hardship of the principal *ignorantia legis neminim excusat*. . . ."[28] Failure to meet the publication requirements of the Act is held to have no consequence with respect to one with knowledge of the contents of a regulation.

The requirements of APA § 4(a) were not applicable to the Coast Guard under the facts of the *Aarons* case.[29] Thus the court does not purport to come to any conclusion as to the effect of failure to meet the required notice of proposed rule making under that section. The court notes the absence of any sanction in the APA itself for failure to meet the requirements of APA § 3(a) (3). The final sentence of APA § 3 (a) stating that "no person shall in any manner be required to resort to organization or procedure not so published," clearly does not reach the requirement of publication under APA § 3(a) (3). APA § 3(a) (3) requires the publication of substantive rules and makes no mention of "organization or procedure." The court concludes that FRA §§ 5 & 7 already provide a sanction for failure to comply with APA § 3(a) (3) and that its decision with regard to those sections controls.[30]

The problems which have plagued the courts in their interpretation of the federal APA are potentially present in state administrative pro-

[25] 44 U.S.C. § 302 (1958).
[26] Hotch v. United States, 212 F.2d 280, 283 (1954).
[27] Notice becomes effective upon the filing of the document. 44 U.S.C. § 307 (1958).
[28] United States v. Aarons, 310 F.2d 341, 346 (2d Cir. 1962).
[29] The court stated in a footnote: "We are not here dealing with a case where the rule-making procedures prescribed by § 4 of the APA have not been followed, as to which, in some instances, different considerations may apply; the Special Notice was within the exception to § 4 for any military, naval, or foreign affairs function of the United States." 310 F.2d at 348, n. 4.
[30] *Id.* at 348.

cedure acts. The Model APA[31] requires that an agency, before engaging in any rule making function must, "so far as practical, publish or otherwise circulate notice of its intended action and afford interested persons opportunity to submit data or views orally or in writing."[32] This statement is evidently less definite than its federal counterpart, but the general intent seems to be the same. The purpose of this section has been described as follows: "first, to give the agency the enlightenment that interested persons may be able to furnish; and, second, to give the interested persons the satisfaction of participation in the rule making process."[33]

The Washington Act[34] requires notice to be filed with the Code Revisor. Further publication is also required.[35] The content of the notice requirement is taken from its federal counterpart.[36] The purpose attributable to the Model Act provisions, requiring notice of proposed rule making, seems to apply equally to the provisions of the Washington Act.

Neither the Model provision nor its Washington counterpart seems to have received any judical interpretation, but with respect to their publication provisions, it appears that each requires a fullfilment of the notice requirement as a prerequisite to the issuance of a valid rule.[37]

Publication of the rule as finally promulgated by the agency is required by both the Model Act and the Washington Act. The Model Act provides that rules shall become "effective" upon filing.[38] A later section provides for publication.[39] The Washington Act is similar but contains the additional provision that the rule does not become effective until 30 days after filing.[40] Neither act makes any provision concerning the effect of actual knowledge of the contents of a rule before it be-

[31] The Model State Administrative Procedure Act, 9C Uniform Laws Annot. 174. The act has apparently been adopted with only minor changes in Maryland, Michigan, Missouri, Oregon, Washington and Wisconsin. See 9C Uniform Laws Annot. (Supp. 1960 at 69).

[32] Model State APA § 2(3).

[33] Stason, *The Model State Administrative Procedure Act,* 33 IOWA L. REV. 196, 202 (1947-48).

[34] Washington Administrative Procedure Act, Wash. Sess. Laws 1959, ch. 234. See Trautman & Peck, *Administrative Procedure Act,* 34 WASH. L. REV. 281 (1959).

[35] Washington Administrative Procedure Act, Wash. Sess. Laws, 1959, ch. 234 § 2(3). The act provides that "the adopting agency shall file notice thereof with the office of the Code Revisor. So far as practical, the adopting agency shall also publish or otherwise circulate notice. . . ."

[36] 5 U.S.C. § 1003(a) (1958).

[37] This view is in accord with what seems to be the best interpretation of the similar provisions of the Federal APA.

[38] Model State APA § 3(2).

[39] Model State APA § 4.

[40] Wash. Sess. Laws 1959, ch. 234, § 4.

limitations suggested by the Department in both its regulation and its arguments. It has established a policy of flexibility (possessing the earmarks of durability—all nine judges concurred in the opinion), which will permit the true sufferer to receive remuneration, but still it specifically refrained from opening the door to undeserving claimants:

> This decision is not to be construed as standing for the proposition that all persons who are laid off, and who are relatively unsuccessful in their self-employment endeavors, are considered to be unemployed, or partially unemployed, and entitled to receive the difference between the amount they make and the benefits to which they otherwise would have been entitled.[17]

This decision might be criticized for "opening the floodgates of litigation" as each farmer-laborer seeks to discover whether his particular circumstances will find favor with the supreme court, but this is why we have courts. Surely this decision will produce more litigation, but as each case is decided the boundaries will become more certain and fixed, and in the end we will have a rule that is the product of reason and policy, and not one that is closely circumscribed by the shortcomings of semantic definitions.

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WILLS

Testamentary Capacity—Insane Delusions. *In re Meagher's Estate*[1] apparently establishes a new rule requiring that the contestant of a will on the ground of insane delusions must show that the delusion,

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to produce goods, to make them and to sell at profit sufficient to attract to that industry the capital of the country. Without purchasers with money in their pockets, the wheel of that industry cannot keep going. . . . We must anticipate in the future the building up . . . of a large and steady purchasing power for a large number of people." Hearings on S. 1130 Before the Senate Committee on Finance, 74th Cong., 1st Sess. (1935). William Green, then president of the CIO, testified to the same effect. Evaluating the Federal Social Security Act in a speech (An appraisal of the Federal Social Security Act, Delivered before the Institute of Public Affairs, University of Virginia, Charlottesville, Virginia, evening of July 10, 1936) Winthrop W. Aldrich, Board Chairman of the Chase National Bank of the City of New York, commented as follows: "The gains through unemployment insurance are numerous. Its first effect is to diminish in the mind of the worker the fear of insecurity. He knows that if he should lose his job he would not immediately face a total loss of income. There will be at least some income during a few weeks or months while he is looking for new work. This relief . . . will be an amount that he can count on. There will be no humiliation in accepting it. . . . It will be an earned right. . . .

"There is something to be said, also, for the effect of unemployment insurance on business. It helps to stabilize the buying power of the workers. . . . [it] helps . . . to keep buying in its accustomed channels."

[17] 160 Wash. Dec. at 719, 375 P.2d at 161 (1962).

[1] 160 Wash. Dec. 691, 375 P.2d 148 (1962).