1 of 11 DOCUMENTS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF WISCONSIN

[NO NUMBER IN ORIGINAL]

1970 Wisc. AG LEXIS 9; 59 Op. Atty Gen. Wis. 31

March 10, 1970

SYLLABUS:
[*1]

Revisor of Statutes--Under sec. 227.025, Stats., consent may not be given to incorporate by reference the United State Code or federal regulations, sec. 21, Art. VII, Wis. Const., requiring publication; therefore, future standards may not be incorporated by reference.

REQUESTBY:

JAMES J. BURKE, Revisor
Statutory Revision Bureau

OPINIONBY:

[NO OPINIONBY IN ORIGINAL]

OPINION:

You have asked for an opinion on the following questions:

"(1) Is it proper to incorporate the United States Code under sec. 227.025, Stats., which authorizes the incorporation of standards of technical societies and organizations of recognized national standing?

"2) Is it proper to incorporate the federal regulations under the above section?

"3) Is the consent procedure under sec. 227.025, Stats., required if either of the above incorporations are proper?

"4) Is the incorporation limited to the language of the standard as of the date of publication of the rule, or does it also include future amendments in the referred to federal regulations?"

In answer to your first and second questions, it is my opinion that it would be improper to incorporate by reference the U. S. Code or federal regulations under the provisions of sec. [*2] 227.025, Stats.

Section 227.025 Stats., provides in part:

"* * * All rules and other materials which agencies are directed or authorized by this chapter to file with the revisor of statutes shall be published in the Wisconsin administrative code or register in the manner prescribed by sec. 35.93. For the purpose of avoiding unwarranted expense, an agency may, with the consent of the revisor and attorney general, utilize standards established by technical societies and organizations of recognized national standing by incorporation of such standards in its rules by reference to the specific issue or issues of books or pamphlets in which they are set forth, without reproductions of the standards in full. * * * Each rule containing such incorporation by reference shall state how the material so incorporated may be obtained and that the books and pamphlets containing the standards are on file at the offices of the agency, the secretary of state and the revisor of statutes. * * *"

It is further improper to incorporate by reference the U. S. Code or federal regulations in our administrative code under our constitutional provision requiring publication.

Section 21, Art. VII, Wis. [*3] Const., provides in part:

"* * * And no general law shall be in force until published."

In *Whitman v. Department of Taxation, (1942) 240 Wis. 564, 577, 4 N.W. 2d 180,* the court held:

"The taxpayer claims, however, that while it has been numerously held the court will take judicial notice of the rules of administrative bodies, no rule of such a body becomes effective against the general public until it is published in such form as to be accessible to the general public and that there was no such publication of the rule of the Tax Commission, the predecessor of Department of Taxation, until 1932. The taxpayer contends that until that time, under our constitutional provision, sec. 21, art. VII, that 'no general law shall be enforced until published,' the rule of the Tax Commission did not become operative until published. Surely if no general law enacted by the legislature becomes effective until published, a rule of an administrative body does not become effective as a general law until published, and if the fact be that there was no publication of the rules of the Tax Commission until 1932 its rules up to that time were not effective as [*4] public laws."

My predecessors in *50 OAG 107* and *10 OAG 648* concluded that publication in full of the federal laws is required in our legislative acts and that incorporation by reference or citation is invalid.

Administrative rules have the force and effect of public law when regularly enacted pursuant to statutory authority.

The rule is stated in *Josam Mfg. Co. v. State Board of Health, (1965) 26 Wis. 2d 587, 596, 133 N.W. 2d 301:*

"'Rules, regulations, and general orders enacted by administrative agencies pursuant to the powers delegated to them have the force and effect of law, . . .' 2 Am. Jur 2d, Administrative Law, p. 119, sec. 292."

In view of the strong language in the *Whitman* case, *supra,* I can only conclude that the reasoning of these prior opinions concerning legislative acts is equally applicable to state administrative rules.

The specific exception to this rule is provided for in sec. 227.025, Stats., and pertains to "standards of technical societies or organizations of recognized national standing." While this exception does not include legislative processes of various [*5] governmental units empowered to make substantive laws, it may apply to physical or objective standards adopted by governmental agencies which are not policy matters.

The term "standard" is defined in the English dictionary as something that is set up and established by authority as a rule for the measure of quantity, weight, value or quality. It is synonymous to criterion, which is any objective measure by which one judges a thing by comparison as authentic, good or adequate. *Webster's Third New International Dictionary,* unabridged. Some examples are standards of measurements adopted by the National Bureau of Standards, cost of living index as ascertained by the Bureau of Labor Standards, and vital statistics as compiled by the United States Bureau of Census. These standards, usually based on scientific findings, statistics or other physical data, have general acceptance because of the department's or agency's reputation for consistent accuracy in matters of a technical or scientific nature. This general acceptance brings the findings and statistics published by these departments and agencies within the purview of sec. 227.025, Stats., as being adopted or promulgated by a "technical [*6] society" or an "organization of recognized national standing."

In view of the negative answers to questions one and two, it follows that in answer to question three, consent cannot be given.

In regard to question four, the reference to future regulations is moot. However, the question is relevant when applied to technical, objective standards which may be properly incorporated by reference. Since the reference material must be readily available and on deposit at the secretary of state's office, the adopting agency's office and the revisor of statute's office, such material must be current or antecedent. The material incorporated by reference cannot, therefore, include future amendments thereto, and it is my opinion that any attempt to incorporate such prospective standards or amendments by reference would be invalid.

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsLegislationTypes of Statutes