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CHALLENGES TO AGENCY RULES

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I.
Introduction

This paper endeavors to discuss briefly some of the interesting developments that have occurred over time with regard to agency rules and challenges to them.

Agencies promulgated or issued rules before The Administrative Procedure and Texas Register Act (APTRA) was passed in 1975 and became effective January 1, 1976, as art. 6252-13a. Rules were challenged by parties affected by them under statutes authorizing lawsuits challenging agency rules, regulations or orders. Early statutes often provided that the burden of proof was on the party challenging an agency rule and the rule was to be deemed prima facie valid.

> Any interested person affected by …any rule, regulation or order made or promulgated by the Commission…shall have the right to file a suit in…Travis County…to test the validity of said rules, regulations or orders. … The burden of proof shall be upon the party complaining of such laws…rule, regulation or order; and such laws…rule, regulation or order…shall be deemed prima facie valid. VERNON'S ANN. CIV. STAT. art. 6049c § 8.

Similar statements are found in recent cases. "An agency rule is presumed valid, and the challenging party bears the burden to demonstrate its invalidity." *TXU Generation Company, L.P. v. Public Utility Commission of Texas*, 165 S.W.3d 821, (Tex. App. – Austin, 2005); *Office of Public Utility Counsel v. Public Utility Commission of Texas*, 104 S.W.3d 225, 232 (Tex. App. – Austin 2003).

II.
Initial Challenges

Early cases set out basic standards by which rules were tested. In one case, the Supreme Court held rules valid because they were constitutional, reasonable, and not inconsistent with or

contrary to the governing statute. *Kee v. Baber*, 303 S.W.2d 376 (Tex. 1957). This case also upheld the authority of the legislature or agencies with rule-making authority to create rebuttable presumptions unless it appears clearly that the rebuttable presumption bears no logical relationship to the ultimate fact or conclusion sought to be established. 303 S.W.2nd at 380. *Texas State Board of Examiners in Optometry v. Carp*, 388 S.W.2d 409 (Tex. 1965) held that judicial review of agency rules "is constitutionally limited to questions of law, i.e., whether the action is within the powers delegated to the agency and, if so, whether the action is arbitrary, capricious or unreasonable because not reasonably supported by substantial evidence." 388 S.W.2d at 414-415.

Helle v. Hightower, 735 S.W.2d 650 (Tex. App. Austin 1987, writ denied) spoke to this statement by holding "[t]he validity of a rule does not depend upon whether or not it is supported by substantial evidence…"

Other cases held facts to support the agency rule would be presumed. *Bullock v. Hewlett-Packard Co*., 628 S.W.2d 754, 756 (Tex. 1982). The legislature has made it clear that was no longer the case after 1981 by requiring that the agency order finally adopting a rule include a restatement of the rule's factual bases. "We review a challenge to the reasoned justification requirement using an arbitrary and capricious standard not presuming that facts exist to support the agency's order adopting the rule." *Lambright v. Texas Parks & Wildlife*, 157 S.W.3d at 499, 505 (Tex. App.–Austin 2005).

Numerous court decisions set out basic and oft-stated reasons agency rules might be held invalid and those reasons remain applicable today.

"To establish a rule's facial invalidity, a challenger must show that the rule: (1) contravenes specific statutory language; (2) runs counter to the general objectives of the

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