



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 202

March 25, 1994

Whether reasonable reliance on a rule adopted by the Texas Ethics Commission has the same effect as reliance on an advisory opinion. (AOR-229)

The Texas Ethics Commission has been asked how to interpret rules promulgated by the commission when these rules are "in conflict with Chapter 305 of the Government Code or any other relevant statute." Specifically the requestor asks:

On January 1, 1994, rules published by the Ethics Commission went into effect However, some of these rules are not supported by specific statutory language (eg., the incidental transportation rule, the 5 percent rule regarding compensated time, authorization for prospective reporting of compensation and most, if not all, of the administrative law exceptions, et al.[sic]). This creates the theoretical possibility that a registrant could be prosecuted for violating a statute when he or she was only attempting to comply with the Ethics Commission rules in good faith In view of these facts, I am requesting an Advisory Opinion on the following issue: Will the commission incorporate by reference all of its present and future rules into an Advisory Opinion so that conduct in compliance with those rules is subject to the defense to prosecution which is provided for in Article 6252-9d.1, Sec. 1.30?

Article 6252-9d.1, section 1.30(a) is now Government Code section 571.097 and provides that

[i]t is a defense to prosecution or to imposition of a civil penalty that the person reasonably relied on a written advisory opinion of the commission relating to the provision of the law the person is alleged to have violated or relating to a fact situation that is substantially similar to the fact situation in which the person is involved.

The Texas Ethics Commission has adopted administrative rules to administer and enforce the laws subject to the commission's jurisdiction pursuant to an express statutory grant of authority. Gov't Code § 571.062. The rules have been promulgated in accordance with the Administrative Procedure Act, Government Code, chapter 2001, which provides in part:

In addition to other requirements under law, a state agency shall: (1) adopt rules of practice stating the nature and requirements of all available formal and informal procedures;

Gov't Code § 2001.004.

Valid rules and regulations promulgated by an administrative agency acting within its statutory authority have the force and effect of legislation. *Lewis v. Jacksonville Building and Loan Association*, 540 S.W.2d 307, 310. (Tex. 1976). A properly published and adopted administrative rule is presumed valid, and the burden is on a person challenging the regulation to show the agency did not have the authority to promulgate it. *Hollywood Calling v. Public Utility Commission of Texas*, 805 S.W.2d 618, 620 (Tex. App.--Austin 1991). An agency rule, however, may not be inconsistent with statutory provisions. *Id.* The determinative factor as to whether an administrative agency has exceeded its authority in rulemaking is whether the rule in question is in harmony with the general objectives of the statute. *Id.* In making this determination, courts will look not only to a

particular provision of a statute, but to the legislative intent of the statute as a whole. *Gerst v. Oak Cliff Savings and Loan Association*, 432 S.W.2d 702, 706 (Tex. 1968).

The Ethics Commission rejects the requestor's premise that any of its rules are in conflict with statutory law or not in harmony with the legislative intent of the laws administered and enforced by the commission. Indeed, the commission's adoption of the rules shows that the commission believes the rules further and promote the legislative intent of the laws administered and enforced by the commission.

The requestor asks whether the defense provided by section 571.097 is available to persons reasonably relying on agency rules. The Ethics Commission issues advisory opinions under an express grant of statutory authority. Gov't Code § 571.091. The commission may issue opinions on its own motion. Gov't Code § 571.094. There is no specified form in which an opinion must appear. Adoption of an advisory opinion requires the affirmative vote of five commissioners. Gov't Code § 571.026(c)(2).

Adoption of an administrative rule by the Ethics Commission requires the affirmative vote of six commissioners. Gov't Code § 571.062. As noted above, agency rules are entitled to a presumption of validity; accordingly, a person relying on a commission rule is entitled to the affirmative defense provided by section 8.03 of the Penal Code.¹ Further, we think it would be anomalous if an official expression of Ethics Commission policy requiring six votes were considered less reliable than an expression requiring only five votes. As also noted above, advisory opinions need adhere to no particular format, and a rule may be taken as an expression of the commission's interpretation of the law, that is, as an advisory opinion, issued on the commission's own motion.

Accordingly, we believe the legislature intended reliance upon the rules of the Ethics Commission to provide the same defense as reliance upon opinions. We emphasize, however, that such reliance must be *reasonable*. Rules are in form and content more like statutes than they are like opinions, and, as with statutes, their application to specific fact situations may at times require further clarification.

SUMMARY

A person acting in *reasonable* reliance on a rule adopted by the Ethics Commission may rely upon such a rule as if it were an advisory opinion.

¹ Section 8.03(b) of the Penal Code provides: It is an affirmative defense to prosecution that the actor reasonably believed the conduct charged did not constitute a crime and that he acted in reasonable reliance upon: (1) an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or (2) a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question.