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DEPARTMENT OF JUSTICE
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#90030

STATE OF NEBRASKA
OFFICE OF
MAY 21 1990
DEPT. OF JUSTICE

DATE: May 16, 1990

SUBJECT: Promulgation of Rules and Regulations to be Effective Contemporaneous with Effective Date of Legislative Act.

REQUESTED BY: William H. McCartney, Director
Nebraska Department of Insurance

WRITTEN BY: Robert M. Spire, Attorney General
Fredrick F. Neid, Assistant Attorney General

Through counsel, you have requested our opinion concerning the timeliness of publication of Notice of Public Hearing and conducting the hearing for adoption or amendment of department rules and regulations.

You indicated that the Department of Insurance wishes to amend certain regulations to address substantive statutory changes provided in Legislative Bill (LB) 983. LB 983 was passed by the legislature without the emergency clause and takes effect on July 10, 1990, three calendar months after adjournment of the session. While the legislative act is not effective until July 10, 1990, it has been enacted and is in existence. The bill was passed by the legislature and approved by the Governor on March 13, 1990. The Department wishes to have the amended rules and regulations become effective as soon as possible due to the nature of the amendments.

The first question you have asked is whether the Department could publish notice of the hearing and have the hearing prior to the effective date of LB 983. The related inquiry you have made is whether the Department could publish the notice of hearing prior to July 10, 1990, and have the public hearing after that date. Your concern is that commencement of the hearing process prior to

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the effective date of LB 983 may jeopardize or otherwise invalidate the amendments of the rules and regulations to be adopted.

It is our opinion that commencement of the hearing process, including conducting the hearing, prior to the effective date of the statute would not impair or otherwise jeopardize the validity of the rules and regulations.

To be valid, an administrative rule or regulation must be properly promulgated, approved, and filed. Haven Home, Inc. v. Dept. of Pub. Welfare, 216 Neb. 731, 346 N.W.2d 225 (1984). The Administrative Procedures Act, Neb.Rev.Stat. §§ 84-901 to 84-920, provides for the requirements for promulgation of rules and regulations which include notice, public hearing and filing with the Secretary of State. We have found no specific statutory requirement which requires that the public hearing be conducted subsequent to the effective date of the statute under which the rule or regulation is derived. Further, Neb.Rev.Stat. § 84-906 (Reissue 1987) creates a rebuttable presumption that the rule or regulation was duly and legally adopted upon filing of a certified copy of the rule or regulation in the prescribed form with the Secretary of State.

We find no other Nebraska case authority which addresses the specific questions you have raised. However, other jurisdictions have considered related issues. The United States Supreme Court discussed a similar question involving the retroactive application of regulations in Helvering v. Reynolds, 313 U.S. 428, 85 L.Ed. 1438, 61 S.Ct. 971 (1937). In this case, the Court observed that regulations are not enacted until after a statute has been enacted and undoubtedly, regulations may at least have their effect from the time the statute takes effect.

Further, it is generally recognized that a public administrative body may promulgate regulations in light of present and future requirements. 73 C.J.S. Statutory Basis and Limitation, § 89. It also has been held that the fact rules and regulations were adopted prior to the effective date of a statute but after passage of the statute, does not prevent them from going into effect contemporaneously with the act. State v. Friedkin, 244 Ala. 494, 14 So. 2d 363 (1943).

Based on this authority, it is our view that rules and regulations would not be invalidated for commencing the hearing process prior to the effective date of the statute. Publication of notice of hearing and conducting the hearing prior to the effective date of the statutes accomplishes a desireable purpose, that is, to facilitate the promulgation of rules and regulation contemporaneous with the underlying act.

Sincerely yours,

ROBERT M. SPIRE
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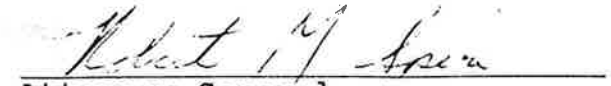
Approved By:



Attorney General

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