

1979 S.C. Op. Atty. Gen. 111 (S.C.A.G.), 1979 S.C. Op. Atty. Gen. No. 79-82, 1979 WL 29087

Office of the Attorney General

State of South Carolina

Opinion No. 79-82

June 18, 1979

***1 SUBJECTS: Administrative Procedure, Rules and Regulations**

(1) An agency does have the authority to withdraw from consideration by the General Assembly regulations which the agency has submitted for review, provided such withdrawal is undertaken prior to the expiration of the ninety day review period and/or prior to the time that the General Assembly approves or disapproves the regulations by joint resolution.

(2) Where an agency has received public comment on proposed regulations prior to submitting them to the General Assembly for review, it is unnecessary for the agency to afford additional notice and opportunity for comment prior to withdrawing its regulations from General Assembly review.

TO: Bill Campbell
House Member
District 72-Richland County

QUESTIONS:

(1) Once an agency has submitted its proposed regulations to the General Assembly for review, does the agency still have the authority to withdraw its regulations from consideration by the General Assembly?

(2) Even if the agency has the authority to withdraw its regulations from review by the General Assembly, must the agency afford additional notice and opportunity for comment prior to doing so?

STATUTES & CASES:

[§ 1-23-120 Code of Laws of South Carolina \(1976\)](#), [§ 1-23-170\(a\)\(2\) Code of Laws of South Carolina \(1976\)](#).

[Heyward v. South Carolina Tax Commission](#), 240 S.C. 347, 126 S.E. 2d 15 (1962).

[International Harvester Co. v. Ruckelshaus](#), 478 F. 2d 615 (D.C. Cir., 1973).

[Wuillamey v. Werblin](#), 364 F. Supp. 237 (D. N.J. 1973), 1 Am Jur 2d [Administrative Law](#), § 12 (1970).

DISCUSSION:

You have asked whether an agency which has submitted its proposed regulations to the General Assembly for review retains the authority to withdraw such regulations from consideration by the General Assembly. It is the opinion of this Office that such withdrawal may be undertaken provided it is done prior to the expiration of the ninety day review period and/or prior to the time that the General Assembly approves or disapproves the regulations by joint resolution.

The procedure by which state agencies promulgate regulations having the force and effect of law is set forth in this State Administrative Procedure Act [§§ 1-23-10 et seq. [South Carolina Code \(1976\)](#)]. In addition to providing for notice of proposed regulations and public comment thereon, the Act further requires that any regulations promulgated by a state agency must be submitted to the General Assembly for review. [Section 1-23-120](#) provides that the General Assembly shall have ninety days to review such regulations and that a regulation will not become effective until ninety days after it has been submitted to the General Assembly, unless the General Assembly, prior to the expiration of the ninety day period, approves or disapproves the regulation by joint resolution.

It seems clear that regulations may be withdrawn from review by the General Assembly at any time prior to the expiration of the ninety day review period and/or prior to approval or disapproval by joint resolution. In the first place, a regulation which has not been approved by the General Assembly, either by joint resolution or by being filed for ninety days without General Assembly disapproval, does not have the force and effect of law. [§ 1-23-120](#). A regulation which does not have the force and effect of law, but rather which is only proposed, may be modified or abandoned at any time. [Wuillamey v. Werblin](#), 364 F. Supp. 237 (D.N.J. 1973).

*2 Secondly, basic principles of administrative law indicate that agencies should have the flexibility to reverse prior courses of action when the circumstances so warrant. While the General Assembly has exclusive legislative power in the State Government, it may, in enacting a law complete in itself, authorize an administrative agency or board to fill up the details by prescribing rule and regulations for the complete operation and enforcement of the law. [Heyward v. South Carolina Tax Commission](#), 240 S.C. 347, 126 S.E. 2d 15 (1962). Such authority is granted to administrative agencies because of the necessity to have experts involved in the conduct of specialized and complex governmental functions. 1 Am Jur 2d [Administrative Law](#), § 12 (1962). Because of its knowledge and expertise in those areas with which it is concerned, some deference should be given to an agency decision not to go forward with the establishment of a given regulation. Furthermore, since the impetrate for the regulation comes from the agency in the first place, and since it is the agency which ultimately will have to enforce any regulation which becomes effective, the agency should retain some do of control over whether or not a given regulation becomes law. For all of these reasons, it is the opinion of this Office that an agency should have the authority to withdraw regulations it has submitted to the General Assembly prior to the expiration of the ninety day review period and/or prior to the time that the General Assembly approves or disapproves the regulations by joint resolution.

You have also asked whether the agency must afford additional notice and opportunity for comment prior to withdrawing its regulations from consideration by the General Assembly. It is the opinion of this Office that it does not.

South Carolina Code § 1-23-170 provides in part as follows:

(a) Prior to the adoption, amendment, or repeal of any rule, the agency shall:

. . . (2) Afford all interested persons reasonable opportunity to submit data, views or arguments, orally or in writing. Opportunity for oral hearing must be granted if requested by twenty-five persons, by a governmental subdivision or agency, or by an association having not less than twenty-five members. The agency shall consider fully all written and oral submissions respecting the proposed rule . . .

The foregoing statute makes clear the requirement that a proposed regulation be submitted for public comment. And, as the result of comments received, it seems clear that the agency is completely free to modify its proposed regulations in accordance with the comments or, if comments against a proposed regulation are persuasive enough, to abandon the proposed regulation entirely. As far as notice and comment are concerned, there is no functional distinction between an agency deciding to abandon a proposed regulation immediately after comment is received and deciding to abandon it after submitting the regulation to the General Assembly. An agency can just as easily decide to abandon a proposed regulation immediately after receiving comment thereon as it can after submitting the regulation to the General Assembly. The fact that the decision not to proceed is made later rather than earlier in no way alters the fact that a full

opportunity has been afforded for all interested parties, both in favor of and in opposition to the regulation to come forth and express their views. To require that the agency hold another hearing simply because it decides not to proceed with the regulation would subject the agency to the same arguments all over again.

*3 It was stated in [International Harvester Co. v. Ruckelshaus](#) 478 F. 2d 615 (D.C. Cir. 1973):
The requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions . . . A contrary rule would lead to the absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary . . . If such were the rule the proceedings might never be terminated. [Id.](#), 478 F. 2d at 632.

The foregoing statement is useful in the resolution of the question at hand. Whether a rule is altered as the result of comments received or abandoned as a result of comments received would appear to make very little difference as far as notice and comment are concerned. The agency is completely free to alter or abandon regulations as the result of comments submitted, and as long as the opportunity has been afforded to have such comment, it would appear that further notice and comment would be duplicative and unnecessary.

CONCLUSION:

It is therefore the opinion of this Office that an agency does have the authority to withdraw from consideration by the General Assembly regulations which the agency has submitted for review, provided such withdrawal is undertaken prior to the expiration of the ninety day review period and/or prior to the time that the General Assembly approves or disapproves the regulations by joint resolution. It is further the opinion of this Office that where the agency has received public comment on its regulations prior to submitting them to the General Assembly, it is unnecessary for the agency to afford additional notice and comment prior to its withdrawing the regulations from General Assembly review.

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