STATE OF TENNESSEE
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November 15, 2011

Opinion No. 11-78

Publication of Rule Following Court's Invalidation of Rule Amendments

QUESTION

How does the judicial invalidation of an amendment to an administrative rule affect the manner in which the rule is published by the Tennessee Department of State?

OPINION

When an amendment to an administrative rule is judicially invalidated, then the previously existing rule is reinstated and should be published by the Tennessee Department of State.

ANALYSIS

The Secretary of State is required by statute to compile on its web site "an official compilation of all the effective rules and regulations of each agency." Tenn. Code Ann. § 4-5-220(b). The statute also mandates that the Secretary of State "update agency rules on the effective date of any new amendment to existing rules or of any new rules." *Id.* This opinion addresses the effect of a judicial invalidation of a rule amendment on the Department of State's official compilation of rules.

When a statutory amendment is declared unconstitutional or otherwise invalid, the amendment "does not repeal or change the former valid act but leaves it in full force and effect." *State v. Driver,* 598 S.W.2d 774, 776 (Tenn. 1980). Inasmuch as "a void law has no force and effect," it is ineffective to amend, supersede, or repeal the existing law. *Leech v. American Booksellers Ass'n,* 582 S.W.2d 738, 740 (Tenn. 1979). Instead, the prior law remains in full force and effect. *See In re Swanson,* 2 S.W.3d 180, 189 (Tenn. 1999).

This principle applies whether the law in question is a statute or an administrative rule. *See* Tenn. Code Ann. § 4-5-214(b) (providing that when "a rule amending a previously existing rule" is withdrawn, "then such previously existing rule shall continue in effect until it is later amended, repealed or superseded by law"). *See also Action on Smoking & Health v. Civil Aeronautics Board*, 713 F.2d 795, 797 (D.C. Cir. 1983) (observing that under federal version of Administrative Procedures Act, upon which Tennessee's Uniform Administrative Procedures Act is patterned, court's judgment vacating or rescinding rule amendments "had the effect of

reinstating the rules previously in force"); *Paulsen v. Daniels,* 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force").

In accordance with these principles, when a rule amending a previously existing rule is held invalid, then the Secretary of State should reinstate the previous rule as part of its official compilation of rules and regulations.

In particular your request points out that the Tennessee Higher Education Commission's 2008 amendments to Tenn. Comp. R. & Regs. 1540-01-02 recently were invalidated by the Davidson County Chancery Court. *National College of Business & Technology v. Tennessee Higher Education Commission,* No. 08-2105-III, slip op. at 22 (Davidson County Ch. Ct. Oct. 17, 2011). In accordance with these authorities, the Davidson County Chancery Court's October 17, 2011, order invaliding THEC's 2008 amendments to Tenn. Comp. R. & Regs. 1540-01-02 has the effect of reinstating the previous version of the rules, which became effective in June 2000.[1] Accordingly, the version of the rules that was effective in June 2000 should be published as the current version of the rules. As authority for this version of the rules, the Department of State could cite the Davidson County Chancery Court's October 2011 order, as well as this opinion. Moreover, the published version of Tenn. Comp. R. & Regs. 1540-01-02 should include THEC's 2009 rule amendment. This amendment was not challenged in the Chancery Court action and was not affected by the Chancery Court's order. Substantively, the 2009 rule amendment is not dependent upon any of the changes attempted by the 2008 rule amendments, and, structurally, the 2009 amendment fits into the 2000 rule just as well as into the invalidated 2008 rule.

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[1] This conclusion is supported by the fact that the language repealing the 2000 rule was part of the 2008 rule, which has been declared invalid, thereby rendering the repealing language ineffective.

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Requested by:

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