Chapter 14

Legal Effect of Rules

1. The Problem

SINCE the bulk of an administrative agency's work is normally carried on within the framework of a more or less elaborate set of agency-created rules and regulations, questions frequently arise (both within the agency itself and in connection with judicial review of the agency's proceedings) as to the significance and legal effect of such rules and regulations. Such issues are raised in a variety of ways. The question may be as to the effect of a party's refusal to comply with a rule. Or it may, conversely, concern the results of voluntary compliance with an invalid rule. The inquiry may be as to the validity of a rule, as to the consequences of disregard of an admittedly valid rule, or as to the right of an agency to change its rules.

The legal effect of such rules and regulations depends on a variety of factors. The purpose of the rule, the authority on which it was issued, the reasonableness of a proposed application or nonapplication of the rule, and other similar factors, are all taken into consideration by the courts. But these factors are seldom isolated in judicial opinions, and many seemingly contradictory dicta may be found. Some care is required to determine what constitute the controlling elements of decision in any particular situation.

2. Status of Substantive Regulations as Laws

Perhaps the most frequently recurring question is whether or not a particular regulation, purporting to lay down a substantive requirement of conduct, has the force of law. In brief, it might be answered that the regulation has such effect

if it is upheld by the courts; but this answer, of course, merely avoids the real question: On what basis will the courts determine whether to uphold the regulation? Is it to be approached with the deference accorded legislation, or is it to be treated merely as a partisan interpretation of the legislature's mandate—an interpretation which the courts, in the exercise of their judicial prerogatives, are free to disregard?

While the cases appear to indicate some conflict of judicial thinking on this problem, most of the seeming inconsistencies of statement can be reconciled by making a distinction between the so-called legislative regulations and what may be termed interpretative regulations.[1] Thus, it is said that a legislative regulation has the force of law, while an interpretative regulation has no such force unless and until it is accepted by the courts as a correct interpretation of the statute.

However, this distinction oversimplifies the problem. It is really true of both types of regulations that they have legal effect in determining the rights of parties, unless they are invalidated by the courts. In the case of legislative regulations, the likelihood that the courts will set them aside is comparatively remote; and on the other hand, the courts not infrequently set aside regulations which are merely interpretative. The difference is based not on any inherent distinction between the two types of regulations, but is rather empiric.

[1] The courts do not often emphasize this distinction. It has been carefully developed, with some variety of phraseology, by several students. E.g., F. P. Lee, "Legislative and Interpretative Regulations," 29 GEO. L. J. 1 (1940); Fred T. Field, "The Legal Force and Effect of Treasury Interpretation," THE FEDERAL INCOME TAX (1921) 91; J. P. Comer, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES, Chs. II, V (1927); Alvord, "Treasury Regulations and the Wilshire Oil Case," 40 COL. L. REV. 252 (1940); Surrey, "The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes," 88 U. PA. L. REV. 556 (1940). For a general discussion of how regulations are interpreted by the Courts, see Newman, "How Courts Interpret Regulations," 35 CAL. L. REV. 509 (1947).

A legislative rule is one promulgated pursuant to a specific delegatory provision in the governing statute. The statute sets the general standard (always necessary in the case of delegation of legislative authority), authorizes the agency to determine the actual content of the law by regulation, and provides the sanctions which will result from nonconformance with the rule—or (what is really the same thing) sets a general rule and authorizes the agency to provide by appropriate regulations for exceptions to the rule.

Where the legislature has clearly delegated such authority, the only issues that can normally be raised as to the validity of the rule concern the questions whether it is *ultra vires* as exceeding the scope of the authority delegated, and whether it is violative of the due process guarantees. These issues are not often presented; and accordingly such regulations are normally treated on the same basis as legislative acts.

In some cases, it is clear that the legislature has authorized an agency to promulgate legislative rules of this type. Typical examples would be rate orders of the Interstate Commerce Commission, or regulations by the Department of Labor defining certain exemptions under the Fair Labor Standards Act.[2] Occasionally the statute specifically declares that the regulations shall have the force and effect of law.[3] Sometimes, the statute provides penalties that will result from noncompliance with the regulations.[4] Or similarly, the statute may make noncompliance with the regulations a

[2] Sec. 13 (a) provides in part that there shall be exempt from the overtime provisions of the law "any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman *(as such terms are defined and delimited by regulations of the Administrator)*." 29 U.S.C. §§ 201, 213.

[3] E.g., Agricultural Adjustment Act, 7 U.S.C. § 610.

[4] E.g., Naval Stores Act, 7 U.S.C. § 96; Cotton Standards Act of 1923, 7 U.S.C. § 60; Grain Standards Act of 1916, 7 U.S.C. § 85; Bituminous Coal Act, 15 U.S.C. § 830.

ground for revocation of permits or licenses.[5] Conversely, the statute may authorize the making of regulations which will relax a statutory rule otherwise applicable.[6] In all these cases, it is clear that the regulations issued pursuant to such express authority have, unless *ultra vires*, the same status substantially as a statute.

But the legislative intent is not always so clear. For example, in many cases the only express delegation of power to make regulations is the common bestowal of authority to make "such regulations as may be necessary or proper to carry out the provisions of this Act"—to adopt language which is approximated in many statutes. In many instances, regulations issued under such authority are not legislative. Normally, regulations issued under such authority relate merely to procedural details, having no significant substantive effect. If cast in the terms of substantive requirements, they must as a rule stand merely as the agency's interpretation of the meaning of statutory language, and cannot normally be accorded the status of the legislative type of regulation above discussed.[7] In other cases, there is room for argument whether the intent of the statute is that sanctions shall attach only to violation of the statute, or as well to any violation of regulations issued under the statute.

In those cases where it does not clearly appear that power to promulgate a legislative regulation has been delegated, the courts usually treat the regulation on the same basis as in cases where there can be no doubt but that the regulation

[5] E.g., Federal Communications Act of 1934, 47 U.S.C. § 151.

[6] E.g., § 3 (b) of the Securities Act, 15 U.S.C. § 77 (c).

[7] The distinction between legislative and interpretative regulations has not been crystallized in the cases; and the courts sometimes treat as legislative regulations what appear to be merely interpretative regulations—e.g., Helvering, Commissioner of Internal Revenue v. Wilshire Oil Co., Inc., 308 U. S. 90, 60 S. Ct. 18 (1939). See tenBroek, "Interpretative Administrative Action and the Lawmaker's Will," 20 OREGON L. REV. 206 (1941); and comment, 56 HARV. L. REV. 100 (1942).

is merely interpretative. It can therefore fairly be said that unless the governing statute plainly gives legislative effect to the regulations, they shall be treated merely as interpretative.

While the term is somewhat deprecatory in its implications, it should not be taken as an indication that an interpretative regulation is without any significant legal effect. The vast majority of the rules and regulations issued by administrative agencies fall into this category; and their effectiveness is one of the greatest sources of administrative powers.

The principle has been stated frequently that such regulations are entitled to great weight as presumptively correct interpretations of the statute, and the tendency of the courts is to accord them ever-increasing respect. But they are not blindly accepted, and their persuasiveness or putative legal effect varies in accordance with several factors. It is said that such regulations may be considered only where the statute is ambiguous.[8] Granting the ambiguity of the statute, the weight accorded the interpretative regulation depends in part on circumstantial indicia of trustworthiness. If the regulation is new,[9] does not represent long administrative experience,[10] and has not been generally acquiesced in,[11] it is accorded but little more weight than is granted to a well-written brief. On the other hand, where it appears that the agency's construction of a statute as exemplified in an interpretative rule or regulation represents expert knowledge

[8] Biddle v. Commissioner of Internal Revenue, 302 U. S. 573, 58 S. Ct. 379 (1938); Louisville & N. R. Co. v. United States, 282 U. S. 740, 51 S. Ct. 297 (1931); Koshland v. Helvering, Commissioner of Internal Revenue, 298 U. S. 441, 56 S. Ct. 767 (1936).

[9] Walling v. Swift & Co. (C.C.A. 7th 1942), 131 F. (2d) 249; Burnet v. Chicago Portrait Co., 285 U. S. 1, 52 S. Ct. 275 (1932).

[10] United States v. Pleasants, 305 U. S. 357, 59 S. Ct. 281 (1939); Fleming v. A. H. Belo Corp. (C.C.A. 5th 1941), 121 F. (2d) 207.

[11] United States v. Erie R. Co., 236 U. S. 259, 35 S. Ct. 396 (1915).

as to administrative needs and convenience,[12] and where it appears that the rule is of long standing and has received the acquiescence of interested persons,[13] then, so long as the administrative interpretation is reasonable, it is given great and often controlling weight.[14]

There are sometimes found affirmative legislative indications of approval of the administrative construction—and this of course further inclines the courts to accept and enforce the regulation.[15] In come cases, as in those last cited, such indication of legislative approval is realistic. In many other instances, decision is placed on the theory (which however fallacious logically, is a well-established legal fiction) that re-enactment of the statutory provision without change subsequent to the promulgation of the regulation indicates legislative approval of the regulation.[16] But recognizing that legislative re-enactment is often accomplished without the existence of the regulation in question ever having been brought to the attention of the legislature, the courts do not hesitate to set aside an interpretative regulation deemed to be inconsistent with any reasonable interpretation of the statute, despite the re-enactment of the statute without change subsequent to the promulgation of the regulation.[17]

[12] Sanford's Estate v. Commissioner of Internal Revenue, 308 U. S. 39, 60 S. Ct. 51 (1939); United States v. Shreveport Grain & Elevator Co., 287 U. S. 77, 53 S. Ct. 42 (1932).

[13] United States v. Chicago, N. S. & M. R. Co., 288 U. S. 1, 53 S. Ct. 245 (1933); Logan v. Davis, 233 U. S. 613, 34 S. Ct. 685 (1914).

[14] Fawcus Machine Co. v. United States, 282 U. S. 375, 51 S. Ct. 144 (1931); Costanzo v. Tillinghast, 287 U. S. 341, 53 S. Ct. 152 (1932).

[15] Alaska Steamship Co. v. United States, 290 U. S. 256, 54 S. Ct. 159 (1933); McCaughn v. Hershey Chocolate Co., 283 U. S. 488, 51 S. Ct. 510 (1931).

[16] Helvering, Commissioner of Internal Revenue v. Winmill, 305 U. S. 79, 59 S. Ct. 45 (1938); Hartley, Executor v. Commissioner of Internal Revenue, 295 U. S. 216, 55 S. Ct. 756 (1935).

[17] Sanford's Estate v. Commissioner of Internal Revenue, 308 U. S. 39, 60 S. Ct. 51 (1939); compare Helvering, Commissioner of Internal Revenue v. Wilshire Oil Co., 308 U. S. 90, 60 S. Ct. 18 (1939); and Helvering, Commissioner of Internal Revenue v. Hallock, 309 U. S. 106, 60 S. Ct. 444 (1940).

The doctrine is fundamentally one of convenience and must sometimes be disregarded—as where a complaisant legislature had thus "ratified" one interpretation on several occasions, and then without hesitation proceeded to "ratify" similarly a new and different interpretation, by again re-enacting the statute without change after a change in the administrative interpretation.[18]

In the case of interpretative regulations, then (and in this may be included all regulations other than those wherein the legislature has plainly delegated authority to prescribe legislative regulations, subject to a stated standard, and the violation of which is made subject to definite statutory sanctions), the substantive requirements of the regulation are considered as interpretations of the substantive requirements of the statute. So long as they represent an interpretation or construction of the statute which is acceptable to the courts, they have the force of law. But they lose all force and effect, *ab initio*, if held to be an incorrect interpretation, and are subject to judicial scrutiny on more issues than are true legislative regulations. Being vulnerable to attack on more grounds than are legislative regulations, interpretative regulations are more likely to be set aside than are those of the former type. This, essentially, is the difference in legal effect between legislative and interpretative regulations setting forth substantive requirements.

3. Status of Procedural Regulations

There is, of course, no question as to the power of an administrative agency to make rules of procedure to govern the normal conduct of the agency's tasks, subject always to

[18] Helvering, Commissioner of Internal Revenue v. R. J. Reynolds Tobacco Co., 306 U. S. 110, 59 S. Ct. 423 (1939).

the condition that such rules cannot limit, extend, or otherwise control the agency's statutory jurisdiction and powers.[19]

The question as to the legal effect of such rules is not often raised. They are designed to control the process of adjudication within the agency; and parties to the proceedings within the agency ordinarily conform to the requirements of such rules for the obvious reason that the prospects of obtaining a desired result within the agency are jeopardized by nonconformance with its procedural rules. The rules are not ordinarily burdensome, but typically are loosely drawn; and substantial conformity therewith is all that is required.

While it is frequently said that rules of practice, pleading, procedure, and evidence promulgated by an administrative agency under proper legal authorization have the force and effect of law,[20] this is true in a limited degree only. Such regulations do not ordinarily affect or attempt to control the substantive rights of the parties; and indeed for this very reason are not ordinarily subject to judicial review.[21] Noncompliance with such procedural regulations does not ordinarily constitute a violation of the controlling statute.[22] While a party might in some cases be denied relief by the agency solely because of his disregard of its procedural rules, ordinarily substantial compliance therewith is all that is insisted upon. It would ill become administrative agencies, created in part for the purpose of avoiding the technicalities

[19] Board of Tax Appeals v. United States *ex rel.* Shults Bread Co. (App. D. C. 1929), 37 F. (2d) 442; Weaver v. Blair (C.C.A. 3d 1927), 19 F. (2d) 16.

[20] See Maryland Casualty Co. v. United States, 251 U. S. 342, 349, 40 S. Ct. 155 (1920); Red River Broadcasting Co. v. Federal Communications Commission (App. D. C. 1938), 98 F. (2d) 282.

[21] Mallory Coal Co. v. National Bituminous Coal Commission (App. D. C. 1938), 99 F. (2d) 399; Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375, 58 S. Ct. 963 (1938).

[22] Chicago, I. & L. Ry. Co. v. International Milling Co. (C.C.A. 8th 1930), 43 F. (2d) 93; United States v. Eaton, 144 U. S. 677, 12 S. Ct. 764 (1892).

of court procedure, to insist on any rigid formalities in their own practice; and it would seem that any overly strict insistence on procedural niceties which operated to deprive a party of a full and fair hearing would not be permitted, but could be corrected by application to the courts.

4. Criminal Penalties for Violation of Rules

The reluctance of the courts to permit the delegation of any extensive responsibilities to administrative agencies in the field of criminal law, has led to the imposition of stringent restrictions on the power of administrative agencies to promulgate regulations whose violation carries criminal sanctions.

While an agency may be empowered, in cases where a plain need for such delegation exists, to prescribe by regulation the particular acts which will constitute violations of a generally phrased statute that creates the crime and fixes the penalty,[23] agencies have not generally been permitted to adopt rules creating crimes or fixing penalties.[24]

The reluctance of the courts to grant legal status to administrative rules carrying criminal sanctions is exemplified by the cases denying legal effect to traffic rules, governing the use of public streets, when prescribed by an administrative agency rather than by a municipal governing body.[25] This extreme view is not universally shared,[26] and it is diffi-

[23] Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660 (1944); United States v. Grimaud, 220 U. S. 506, 31 S. Ct. 480 (1911); *In re* Kollock, 165 U. S. 526, 17 S. Ct. 444 (1897); Musgrove v. Parker, 84 N. H. 550, 153 Atl. 320 (1931); Howard v. State, 154 Ark. 430, 242 S. W. 818 (1922); People v. Soule, 238 Mich. 130, 213 N. W. 195 (1927).

[24] United States v. Eaton, 144 U. S. 677, 12 S. Ct. 764 (1892); United States v. Maid (D. C. Cal. 1902), 116 Fed. 650; People v. Grant, 242 App. Div. 310, 275 N. Y. S. 74 (1934).

[25] E.g., City of Shreveport v. Herndon, 159 La. 113, 105 So. 244 (1925); Goodlove v. Logan, 217 Iowa 98, 251 N. W. 39 (1933).

[26] See Smallwood v. District of Columbia (App. D. C. 1927), 17 F. (2d) 210; Hamann v. Lawrence, 354 Ill. 197, 188 N. E. 333 (1933).

cult to explain on logical grounds the reason for denying legal effectiveness to administrative rules carrying criminal penalties, although similar rules carrying civil penalties may be sustained.[27] The explanation must lie in an inherent conviction on the part of the courts that it is unwise to grant broad powers over civil liberties to agency officials who are subject to political pressures and are immune from the direct control of the electorate.

Disregard of an administrative regulation that carries penal sanctions may involve consequences of civil liability.[28] Similarly, a contract made in contravention of such a criminally-sanctioned administrative rule may be unenforceable as against public policy.[29]

5. Effect of Reliance on Regulations and Problems of Retroactive Application

If a person challenges the validity of a regulation—either on the grounds that a legislative regulation is *ultra vires* or that an interpretative regulation is based on an incorrect interpretation of the statute—he is not without remedies to obtain a judicial determination of the correctness of his position. But it is not the ordinary case where a person affected by a regulation will choose to pursue this course. As to the vast majority of persons affected by a regulation, common prudence will require that he conform to the requirements of the regulation. If he does so, and the regulation is later held invalid, or is subsequently changed by the administrative agency, then what is his position?

If the regulation on which he relied is held invalid, it would seem he is in substantially the same position as one

[27] E.g., Southern Ry. Co. v. Melton, 133 Ga. 277, 65 S. E. 665 (1909).

[28] See Clarence Morris, "The Relation of Criminal Statutes to Tort Liability," 46 HARV. L. REV. 453 (1933).

[29] See Walter Gellhorn, "Contracts and Public Policy," 35 COL. L. REV. 679, 696 (1935).

relying on an unconstitutional statute, or an erroneous opinion of counsel.

If the regulation is changed, his position is but little better.

If it is a legislative regulation, it is normally competent for the agency to amend its regulation, just as it is proper for a legislature to amend a statute; and there is normally nothing to prevent the amended regulation being applied in situations where it has retroactive effects. Ordinarily, administrative discretion is exercised in favor of preventing any harsh results from such retroactive application; and sometimes the statute makes particular provisions to this end. Occasionally, an agency is deemed to be estopped from applying retroactively an amended regulation or legislative determination.[30] But unless protection is provided in one of these particular methods, an individual who acted in reliance on the regulation may be substantially prejudiced by an amendment thereto.

When the regulation is interpretative, there is again no particular ground for denying the agency the power to change its interpretation. The doctrine of legislative "ratification" through re-enactment without change is not pressed to the logical extreme of concluding that such re-enactment freezes the interpretation, which becomes thereby a part of the law and incapable of change by the administrative agency. Agencies have on occasion taken the position that a new interpretative regulation, rather than the superseded one on which the individual relied, should be applied retroactively to a closed transaction.[31]

[30] Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U. S. 370, 52 S. Ct. 183 (1932).

[31] *Cf.*, Lang v. Commissioner of Internal Revenue, 304 U. S. 264, 58 S. Ct. 880 (1938); Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U. S. 129, 56 S. Ct. 397 (1936).

While the courts have indicated disapproval of the retroactive application of regulations,[32] there is but scant authority for denying the agency power to insist on a retroactive application. In *Helvering v. R. J. Reynolds Tobacco Co.*[33] it was held that after an interpretative regulation had been "ratified" by legislative re-enactment, and was otherwise valid, a new and different interpretative regulation could not be retroactively applied to the prejudice of an individual who had relied on the former interpretation. Broad extension of this principle would seem desirable.

The legislatures have in some measure met the situation. In several federal statutes, for example, protection is specifically provided for persons relying on the regulations of an agency, even though such regulations be later superseded or invalidated.[34]

6. Agency Disregard for or Suspension of Rules

Questions arising in connection with the disregard by administrative agencies of their self-imposed rules[35] are no more than another manifestation of the ever-present problem of reaching a fair and workable compromise between the administrator's demand for extreme fluidity (permitting expeditious disposal of the agency's business) and the respondent's demand for static regularity (permitting him to ascertain in advance of administrative determination what his rights are and how they can be asserted). The administrator would be glad to have the privilege of refusing to follow a rule whenever, in the interest of achieving a particular result, it would be convenient to disregard it. Opposing counsel

[32] Miller v. United States, 294 U. S. 435, 55 S. Ct. 440 (1935); United States v. Davis, 132 U. S. 334, 10 S. Ct. 105 (1889).

[33] 306 U. S. 110, 59 S. Ct. 423 (1939).

[34] E.g., Emergency Price Control Act of 1942, 56 Stat. 23; 50 U.S.C. App. § 901; Securities and Exchange Act of 1934, 48 Stat. 908; 15 U.S.C. § 78; Portal-to-Portal Act of 1947, 61 Stat. 84, Ch. 52; 29 U.S.C. Supp. I, § 251.

[35] Related questions are discussed *supra*, Ch. 8, p. 167, in connection with the procedural requirements of a fair trial.

would be equally delighted with a rule that any disregard by an agency of any of its rules, at any time and under any circumstances, would be a basis for invalidating the agency's determination.

The problem arises chiefly in connection with procedural rules. Rules of substance—whether legislative or interpretative—are either followed or changed. They cannot very well be simply disregarded or overlooked. But in the case of procedural rules, it is often expeditious for an agency simply to ignore a certain rule in some particular case and adopt therein a different procedure than that contemplated by the agency's rules.

The parties may waive compliance with the rules, and if the waiver is made voluntarily, with full knowledge of the situation, no difficulty arises.[36] Similarly, there can be no doubt as to the right to disregard minutiae of procedure in a particular case where to do so is necessary to reach a just result.[37] While not quite so clear, it seems that if it can be shown that a particular rule was established solely for the agency's own convenience, it may be waived by the agency.[38]

At the opposite extreme, it is clear that an agency will not be permitted to adopt a special rule of procedure for the sole purpose of affecting the outcome of a particular case, or (with a conscious desire toward this end) willfully to ignore a rule in some particular case.[39]

[36] *Cf.*, Zigelhofer v. Reynolds, 52 L. D. 38 (1927), where the Department of the Interior gave relief to a party who had been misled by a representative of the Department as to its rules of practice.

[37] Board of Tax Appeals v. United States *ex rel.* Shults Bread Co. (App. D. C. 1929), 37 F. (2d) 442; Gillis v. Public Service Commission, 105 Pa. Super. 389, 161 Atl. 563 (1932).

[38] System Federation No. 6, *et al.* v. Chicago, R. I. & P. Ry. Co., 2 N. R. A. B. 178 (1937); In the Matter of Emil Denemark, Inc., 2 F. C. C. 474 (1936); *cf.*, Consumers Power Co. v. National Labor Relations Board (C.C.A. 6th 1940), 133 F. (2d) 38.

[39] Colyer v. Skeffington (D. C. Mass. 1920), 265 Fed. 17, 47, rev'd on other points in Skeffington v. Katzeff (C.C.A. 1st 1922), 277 Fed. 129; People *ex rel.* Cotton v. Leo, 110 Misc. 519, 180 N. Y. S. 554 (1920), aff'd

Between these two extremes is a broad field where there is room to debate the wisdom and fairness of a disregard of procedural rules in a particular case, and where it is somewhat a matter of conjecture whether such disregard has affected private rights.

If it fairly appears that some prejudice might likely have resulted from such disregard of established rules, or that the departure caused great inconvenience to the parties or took them unfairly by surprise, the courts quite readily set aside the administrative determination. Particularly is this true where the rule was established to protect the interests of the parties appearing before the agency.[40]

In many cases there appears a strong tendency to set aside administrative determinations because of a disregard of the agency's established procedural rules, even though there is no showing as to the likelihood that prejudice or serious inconvenience resulted. The dictum in *Bilokumsky v. Tod*[41] that "one under investigation . . . is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law" has been applied quite literally. For example, in *Sibray v. United States*[42] in releasing an alien detained in connection with deportation proceedings because of the Department's nonobservance of its procedural rule, the court declared "It is not within our province to speculate in any particular case what effect the disregard of those rules might or might not have."[43]

194 App. Div. 921, 184 N. Y. S. 943 (1920). For an interesting example of an agency's voluntary adherence to this principle, see In the Matter of Consumers Power Co., 6 S. E. C. 444 (1939).

[40] United States *ex rel.* Ohm v. Perkins (C.C.A. 2d 1935), 79 F. (2d) 533; Erie R. Co. v. City of Paterson, 79 N. J. L. 512, 76 Atl. 1065 (1910); Mah Shee v. White (C.C.A. 9th 1917), 242 Fed. 868; *Ex parte* Radivoeff (D. C. Mont. 1922), 278 Fed. 227.

[41] 263 U. S. 149, 155, 44 S. Ct. 54 (1923).

[42] (C.C.A. 3d 1922), 282 Fed. 795, 798.

[43] And see United States *ex rel.* Chin Fook Wah v. Dunton (D. C. N. Y. 1923), 288 Fed. 959.

But if it can be fairly shown that the failure to follow the agency's rules did not affect the result of the case, the failure may be excused. Thus, the same court which in *United States ex rel. Ohm v. Perkins*[44] set aside a deportation order because, in violation of departmental rules, one examiner had heard the testimony and another had submitted findings thereon, held in another alienage case that receipt of a doctor's report not prepared in conformity with the departmental rules was not fatal to the validity of the proceeding, where there was other evidence in the record which would justify the order.[45] In other cases, a plainly immaterial disregard of procedural rules or practices has been permitted.[46]

The general approach of the courts to the problem, then, is that an agency desiring to change its procedural rules should do so in advance of the institution of proceedings in any case where the changed rules are to be followed. Disregard of established rules is ordinarily fatal, unless the agency can show a voluntary waiver of the rule, or can show that the disregard was necessary in order to reach a fair result and did not prejudice the rights of private parties, or that the rule was one adopted solely for the convenience of the agency and which the respondent had no right to rely on, or that the disregard did not affect the outcome of the case.

In deciding whether an agency has sustained this burden, courts are not unmindful that too rigid an application of the doctrine prohibiting disregard of procedural rules would encourage the tendency of some agencies to proceed almost

[44] (C.C.A. 2d 1935), 79 F. (2d) 533.

[45] United States *ex rel.* Minuto v. Reimer (C.C.A. 2d 1936), 83 F. (2d) 166.

[46] E.g., Baitinger Elec. Co. v. Forbes, 170 Misc. 589, 10 N. Y. S. (2d) 924 (1939).

without rules. The doctrine should not be pressed so far as to induce agencies to adopt the protective device of promulgating procedural rules so vague in nature as to make it impossible to show a violation of the rules. Such application of the doctrine would defeat its purpose, which is to guarantee that standards of administrative procedure should be equally as fair as those of court procedure.