2000

Tracey J. Florence v. Dept. of Workforce Services : Unknown

Utah Court of Appeals

Lorin R. Blauer; Attorney for Workforce Appeals Board Department of Workforce Services.
Michael E. Bulson; Attorney for Petitioner Utah Legal Services, Inc..

Job Connection

State of Utah

DEPARTMENT OF WORKFORCE SERVICES
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March 26, 2001

PAULETTE STAGG
UTAH COURT OF APPEALS
450 S STATE #500
SALT LAKE CITY UT 84114

Re: Tracey J. Florence v. Dept. of Workforce Services
Case No. 20000700-CA

Dear Ms. Stagg:

Oral argument in the above-referenced case was heard Thursday, March 22, 2001 by a panel consisting of Judges Orme, Jackson, and Greenwood. At the oral argument and in the Petitioner's Reply Brief, the issue was raised concerning the legal authority of a U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) which was part of the original record and the basis for the final agency action of Respondent Workforce Appeals Board.

After receiving the Petitioner's Reply Brief, and prior to the scheduled oral argument, Respondent contacted the U.S. Department of Labor for clarification on the legal authority of it's UIPLs. Their reply was faxed to us on March 21, 2001, the day before oral argument. Respondent attempted to proffer this reply and clarification during oral argument, but was unsure how to proceed. Respondent desires to draw the Court's attention to this authority which appears to dispose of the issue. Please accept this new evidence as part of the record.

Briefly, the reply from the U.S. Department of Labor advises all state employment agencies of its position that UIPLs and other Departmental directives do, in fact, have legal authority.

If you have any questions about these matters, please contact me at 526-9637.

Very truly yours,

Lorin R. Blauer
Legal Counsel
Department of Workforce Services

rs
enclosures
cc: Michael E. Bulson, Attorney for Petitioner

60 FR 55604, 55604 11/1/95

U. S. Department of Labor Employment and Training Administration Washington, D.C. 20210	CLASSIFICATION UI
	CORRESPONDENCE SYMBOL TEURL
	DATE October 5, 1995

DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 1-96

TO: : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : MARY ANN WYRSCH Mary Ann Wyrsch ELJ
Director
Unemployment Insurance Service

SUBJECT : The Legal Authority of Unemployment Insurance Program Letters and Similar Directives

1. Purpose. To advise States of the position of the Department of Labor (Department) regarding the legal authority for Unemployment Insurance Program Letters (UIPLs) and other Departmental directives which affect the Federal-State Unemployment Insurance (UI) Program.

2. References. The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559; the Social Security Act (SSA); and the Federal Unemployment Tax Act (FUTA).

3. Background. Departmental directives for the UI program include UIPLs, General Administration Letters (GALs), Handbooks, the Employment Security Manual (ESM) and various transmittals of model legislation for implementing Federal law requirements. These directives are issued to the States under authority delegated by the Secretary of Labor.

The Department issues directives to set forth official agency policy. These directives state or clarify the Department's position, particularly with respect to the Department's interpretation of the minimum Federal requirements for conformity or compliance, thereby assuring greater uniformity of application of such requirements by the States. Oftentimes these directives provide information in the public interest which is vital to guiding the States' courses of operations.

States have raised questions regarding what weight these directives carry as interpretations of Federal law. These inquiries have come from State legislators, State Attorney General offices, other State officials and attorneys in Legal Services. It has sometimes been argued that, since the

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interpretations in these directives are not found in the Code of Federal Regulations, they have no legal effect. This UIPL is issued to advise States that these directives do, in fact, have legal effect.

4. Discussion. The APA contains requirements to determine which rules are subject to its notice and comment procedures (ultimately leading to publication in the Code of Federal Regulations) to have force and effect as well as provisions for those rules which are not subject to those procedures. The APA, originally enacted on June 11, 1946, and later revised by P.L. 89-554, (5 U.S.C. §§ 551-559) was passed in part to assist the various Federal government agencies in their administration of statutes under their jurisdiction. The APA recognizes that some functions and some operations of Federal agencies do not lend themselves to a formal procedure. For this reason, the APA provides for different types of rules including "substantive" or "legislative" rules and "interpretative" rules. Section 553(b) of the APA, which requires that a general notice of proposed rule making must be published in the Federal Register, makes two exceptions to this requirement, one of which is relevant here as follows:

> Except when notice or hearing is required by statute, this subsection does not apply--
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice;
>
> . . . .

The test for determining if a rule is interpretative, and thus not subject to the requirement of a published notice of proposed rulemaking, is found in Gibson Wine Co., Inc. v. Snyder et. al., 194 F.2d 329 (D.C. Cir. 1952). In Gibson, the court addressed an interpretative ruling transmitted by the Deputy Commissioner of the Internal Revenue Service. The court stated on page 331:

> Administrative officials frequently announce their views as to the meaning of statutes or regulations. Generally speaking, it seems to be established that "regulations," "substantive rules" or "legislative rules" are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means. [Emphasis supplied.]

Under Gibson, an interpretative rule is one which explains or defines particular terms in a statute or is an opinion of an official, having authority on a particular subject, as to the meaning of a statute or regulation. Id. at 331-332.

British Caledonian Airways, Ltd. v. C.A.B., 584 F.2d 982 (D.C. Cir. 1978), is a leading case concerning the use of interpretative rules. The court stated that the agency was "construing the language and intent of the existing statute and

regulations in order to . . . remove uncertainty "which is "a function peculiarly within the ability and expertise of the agency." Id. at 991. The agency's actions were entirely appropriate "to illuminate the meaning" of its regulations. Id. at 993. Another court has stated that, when interpretative rules reiterate or explain an explicit statutory obligation, they can even help "make sense" of inconsistent statutory direction created by acts of Congress as long as they do not impose a new procedure or obligation which is not derived from the language of the statute or regulation. American Hospital Association v. Bowen, 640 F. Supp. 453, 460 (D.D.C. 1986).

In Cabais v. Egger, 690 F.2d 234 (D.C. Cir. 1982), the court held that a UIPL was not subject to the APA notice and comment procedures when it construed the language and intent of a statute and reminded States of existing duties, and where the UIPL did not grant or deny rights nor impose obligations which did not already exist in statute.[1]

Even if an interpretative rule has a wide ranging effect or a "substantial impact" on individuals, this does not mean it is subject to notice and comment procedures. Following the U.S. Supreme Court decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council Inc., 435 U.S. 519, 524 (1978) that courts are generally not free to impose on agencies requirements that exceed those required by the APA, courts have rejected the "substantial impact" test. See Cabais, 690 F.2d at 237-238); Rivera v. Becerra, 714 F.2d 887 (9th Cir. 1983). The Rivera court, which specifically addressed UIPLs, stated that agencies are not required to comply with a notice and comment procedure for interpretative rules which have a substantial effect because Congress considered the matter and explicitly excepted interpretative rules and general statements of policy from this procedure. Id. at 890-891. The court observed that agencies now freely issue interpretative rules as guidance and that unnecessarily restrictive procedures should not be imposed beyond that contemplated by the APA. Id.

5. Action Required. State Administrators are requested to provide the above information to the appropriate staff.

6. Inquiries. Direct questions to the appropriate Regional Office.

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[1]The Cabais court did, however, conclude that, in one area, a UIPL did create a substantive rule since, contrary to the broad latitude granted to the states in the statute, the UIPL imposed "an obligation on the States not found in the statute itself." Id. at 239.