

M-79-060

# Memorandum

To : Ted  
File

Date : May 29, 1979

From : FAIR POLITICAL PRACTICES COMMISSION  
Dwight Dickerson

Subject: Incorporation by Reference - Future Amendments in Regulations of the Political Reform Act

The question presented for consideration is whether a provision in a conflict of interest code that incorporates by reference future regulations and amendments to the Political Reform Act is valid. I have concluded that such a provision is legally permissible.

The strongest support for the validity of the provision is an Attorney General's opinion. When asked the question whether the State Board of Public Health could adopt a regulation incorporating by reference future rules, regulations and standards of the Food and Drug Administration, the Attorney General's office concluded that such a regulation could be adopted. See Opinion requested by Director of Public Health, 43 Cal. Atty. Gen. Ops. 275 (June, 1964).

Court decisions are divided with respect to incorporation by reference of future regulations, rules or amendments. The court in several decisions has upheld legislation that adopts prospective standards set and established by private organizations. One such law upheld by the court provides that doctors will only be licensed to practice in the state provided they hold degrees from medical schools certified to be in good standing by the Association of Medical Schools. See Ex. Parte Gerino, 143 Cal. 412 (1904); Arwine v. Board of Medical Examiners, 151 Cal. 499 (1907).

In addition, the court has upheld legislation which incorporated future acts of the federal government. In Matzoros v. State Board of Equalization, 87 C.A.2d 140 (1948), petitioner's liquor license was suspended for selling liquor after hours. The question presented to the court was whether

Ted, File  
May 29, 1979  
Page Two

the section of law relied upon by the Board for suspension of the license was still in effect at the time of the alleged violation. The provision was designed to become inoperative within six months after a declaration by the federal government that a cessation of hostilities during World War II had occurred. It was argued by the petitioner that to rely upon the federal government to make such a determination was an unlawful delegation of legislative authority by the California government. The court dismissed this claim by saying there is "nothing to the argument that so to construe this statute is to delegate state legislative power... (cites omitted)." Mantzoros v. State Board of Equalization, 87 CA. 2d 140, 144 (1948). Also see Moore V. State Board of Equalization, 76 C.A.2d 758 (1946).

In In re Laswell 2 C.A.2d 183 (1934), the court maintained that once the general law has been established an incorporation by reference standard may be adopted to fill in the details of the basic law. Petitioner was charged with violating the California Industrial Recovery Act which was patterned after the national act. The state statute provided in part that when the federal government had fixed codes pursuant to the National Industrial Recovery Act for competition within various industries, the codes automatically became part of the state Act. Petitioner argued that the state statute was an unlawful delegation of power to another jurisdiction. The court, nevertheless, upheld the statute stating that once the legislature has set the basic law, it enjoys a great amount of flexibility in establishing rules and regulations in order to effectively administrate the law. In re Laswell 2 C.A.2d 183, 197-203 (1934).

There have been several cases rendered by the court which in their dicta seriously questions whether a legislative body may incorporate by reference future amendments. One such case was In re Burke, 190 Cal. 326 (1923). Petitioner asked for a writ of habeas corpus after being charged with violating a state statute that incorporated by reference certain provisions of its federal counterpart. The petitioner argued that the Act was void because it adopted by reference future amendments to the federal provision. The court sustained the conviction saying it was permissible for the state to incorporate present acts of the federal government. With respect to future amendments, the court said in dicta that, "it may be conceded that this provision of the (state law) is not valid although we do not decide it since it is

Ted, File  
May 29, 1979  
Page Three

not involved." In re Burke 190 Cal. 326, 328-9 [parenthesis added.]

Burke may be distinguishable in that the incorporation by reference provision which troubled the court was a reference to future acts of another jurisdiction. It could be argued that the incorporation by reference provision in a conflict of interest code is not a reference to future acts of another jurisdiction. What is being incorporated are actions by an agency which has jurisdiction over the code and the legal authority to make amendments to the code.

In Palermo v. Stockton Theaters, Inc., 32 Cal. 2d 53 (1867), the court expressed grave doubts whether the legislature could delegate to the federal government the right and power to control local legislation with respect to future acts. However, the court did recognize the principle of incorporation of future acts by stating that where the reference is to a "system or body of laws or to the general law relating to the subject at hand" the referring statute takes the law referred to not only in its contemporary form but also as the law may be changed from time to time. Id at p. 59.

The Attorney General's office believes that the court declares statutory reference to prospective rules and regulation references illegal for one of two reasons. The provision constitutes an unlawful delegation of authority; or, where criminal sanctions are involved, the rule is held void for vagueness. Opinion requested by Director of Public Health, 43 Atty. Gen. Ops. 275, 277.

The provision placed in conflict of interest codes by the Commission does not run afoul of such a test. The Fair Political Practices Commission has the authority through the Act to make amendments to conflict of interest codes. Given this authority vested in the Commission, it is questionable whether agencies, by adopting an incorporation by reference provision in their conflict of interest codes, is "delegating" their authority to our office.

In conclusion, it should be noted that the issue of incorporation by reference of future amendments, rules and regulations has never been dealt with directly by the courts. Nevertheless, I believe that the provisions set forth in conflict of interest codes adopted by the Commission would satisfy the court. My belief is based on the fact that the Fair Political Practices Commission is responsible for

Ted, File  
May 29, 1979  
Page Four

adopting rules and regulations to effectively administer the Political Reform Act. Such rules and regulations are applicable to agencies for which we are the code reviewing body even if such rules and regulations are not directly put into their conflict of interest codes. In addition, there exists no policy reasons why the adoption of an incorporation by reference statute would violate the rights of those individuals who are subject to the conflict of interest codes because the Commission is bound by the Administrative Procedure Act and cannot act arbitrarily.

DED:mfa