

11-11-11

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

NATIONAL COLLEGE OF BUSINESS )  
AND TECHNOLOGY and REMINGTON )  
COLLEGE – MEMPHIS CAMPUS, )

Petitioners, )

vs. )

TENNESSEE HIGHER EDUCATION )  
COMMISSION, )

Respondent. )

11-11-11  
No: 08-2105-III

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MEMORANDUM AND ORDER

This lawsuit is a petition for declaratory judgment filed pursuant to Tennessee Code Annotated sections 4-5-223 and 225 challenging the validity of rules adopted by Respondent Tennessee Higher Education Commission's ("THEC") amending TENN. COMP. R. & REGS. Chapter 1540-01-02 (the "Rules").<sup>1</sup> The petitioners, National College of Business and Technology and Remington College, seek for the Court to declare the Rules void and of no effect, both procedurally and substantively, because they were not promulgated in compliance with Tennessee's Uniform Administrative Procedures Act.

After considering the evidence, the law and argument of counsel, the Court GRANTS the petition. The Court's reasoning is as follows.

<sup>1</sup> The Rules provide guidelines for oversight by staff and standards for institutions required to be authorized for post secondary school operation.

### **Parties' Position**

The petitioners claim that when conducting its rulemaking amending TENN. COMP. R. & REGS. Chapter 1540-01-02, THEC violated both statutory procedural and substantive requirements in the following ways: (1) THEC violated the public's right to present arguments to the Commission pursuant to Tennessee Code Annotated section 4-5-204(c); (2) the November 2007 rulemaking hearing procedure conducted by THEC was an "ad hoc rescind and readopt" procedure that was not authorized under Tennessee law; (3) many of the amendments at issue were never formally considered and voted upon by THEC during its open meetings; and (4) the revised rules are invalid substantively because they are illegal, arbitrary and beyond THEC's statutory authority.

In response, THEC claims that the Rules are valid for several reasons. THEC's position is that petitioners' first claim is moot because the first adoption of the Rules never became effective as the adoption was not approved by the Attorney General, nor were they ever filed with the Secretary of State. Second, THEC claims that the Rules that were eventually filed with the Secretary of State as a result of a November 2007 rulemaking hearing were promulgated pursuant to the procedures delineated in the Administrative Procedures Act. Third, as to amendments, THEC argues that the Rules at issue were adopted in their entirety. Finally, THEC claims that the challenged Rules are not arbitrary and capricious or beyond its statutory authority.

### The Evidence

Sections 4-5-223 and 225 of the Uniform Administrative Procedures Act (the "UAPA") provide for the filing of a declaratory judgment with the Davidson County Chancery Court for the narrow purpose of determining the "legal validity or applicability" of a "statute, rule or order" of an agency to specified circumstances. TENN. CODE ANN. § 4-5-225(a). In terms of evidence for the trial court, under this statutory cause of action, there is no agency record to review. That is because under section 4-5-223, the agency has the option to "[r]efuse to issue a declaratory order." In that event, there is no contested case hearing and, therefore, no record is developed below: "[B]ecause [the agency] has not convened a contested case hearing so as to generate a record from which the chancery court could simply make findings and draw conclusions, see TENN. CODE ANN. § 4-5-322(g) (Supp. 2003), a timely suit for declaratory judgment will expose [the agency] to a contested case proceeding in court." *Hughley v. State*, 208 S.W.3d 388, 394 (2006).

Thus, this Court's function under 4-5-225, where there has been no contested case hearing and no record developed, is the role provided in Rule 57 of the Tennessee Rules of Civil Procedure and Tennessee Code Annotated sections 29-14-101 *et seq.* for declaratory judgments where the evidentiary record is developed in the trial court. Yet, "[i]deally and ordinarily, a Declaratory Judgment suit does not invoke disputed issues of fact. Although the Court has the authority to settle disputed issues of fact in Declaratory Judgment matters, such settlement is ordinarily left to other forums [citation omitted]." *Goodwin v. Metropolitan Bd. Of Health*, 656 S.W.2d 383, 387 (Tenn. Ct. App. 1983).

Consistent with the foregoing, the circumstances of this case are that when the petitioners filed their application for a declaratory order with the agency to declare the Rules invalid, the agency, under section 4-5-223(a)(2), refused to convene a contested case hearing so no evidence was proffered below and no record was developed. A petition for declaratory judgment was then filed with this Court, and an evidentiary record had to be developed. That was done in this forum by agreement of counsel. *Agreed Scheduling Order*, page 1 (Nov. 30, 2010). The evidence agreed upon by counsel consisted of documents which had been attached as exhibits to the Petitioner's Petition for Declaratory Judgment:

- Exhibit 1 – Rulemaking Hearing Rules of the Tennessee Higher Education Commission
- Exhibit 2 – Transcription of Postsecondary Public Hearing, September 14, 2006
- Exhibit 3 – Petition Requesting the Opportunity to Present Arguments Before THEC
- Exhibit 4 – September 27, 2006 letter from W. Brantley Phillips, Jr. to Dr. Stephanie Bellard.
- Exhibit 5 – September 26, 2007 letter from Richard G. Rhoda to Steven S. Cotton
- Exhibit 6 – Minutes from Tennessee Higher Education Commission Meeting on November 15, 2007
- Exhibit 7 – October 23, 2007 letter from Richard G. Rhoda to Steven S. Cotton
- Exhibit 8 – November 1, 2007 letter from Steven S. Cotton to Richard G. Rhoda

- Exhibit 9 – November 2, 2007 letter from Thaddeus E. Watkins, III to Steven S. Cotton
- Exhibit 10 – November 12, 2007 letter from Steven S. Cotton to Thaddeus E. Watkins, III
- Exhibit 11 – February 5, 2007 Memorandum from Richard G. Rhoda to Authorized Postsecondary Institutions
- Exhibit 12 – November 13, 2007 letter from Thaddeus E. Watkins, III to Steven S. Cotton
- Exhibit 13 – Minutes from Tennessee Higher Education Commission Meeting on November 16, 2006

Additionally, there was an Exhibit 14, a Google printout page, whose admission into evidence was contested.

#### Motion to Strike

With respect to Exhibit 14, on May 16, 2011, THEC filed a motion to strike the Exhibit as part of the record for the declaratory judgment action because “it is not part of the record designated for this appeal.” The motion derived from the November 30, 2010 Agreed Scheduling Order, referred to above, which stated the record the Court would consider in this case. The Agreed Scheduling Order says:

The Court’s review is limited to the administrative record, a copy of which Petitioners have submitted as exhibits to their Petition. Any factual supplementation of that record must be limited to documents that existed and were actually created, consulted or relied upon by the Respondent at the time of the challenged rule-making proceedings.

*Agreed Scheduling Order*, page 1 (Nov. 30, 2010).

After reviewing Exhibit 14, the Court grants the motion to strike. The evidence does not fit within the evidence agreed to in the scheduling order, and Exhibit 14 can not be considered by the Court because it is hearsay. Exhibit 14, therefore, is not admitted into evidence and shall not be considered by the Court.

#### **Findings of Fact**

From the foregoing Exhibits 1-13, the Court makes the following findings of fact.

1. On September 15, 2005, the Tennessee Higher Education Commission ("THEC") published in the Tennessee Administrative Register proposed rules it was considering adopting.
2. As permitted by Tennessee Code Annotated section 4-5-202(a)(2), more than 25 persons who would be affected by these rule changes, and several representatives and students from National College of Business and Technology and Remington College filed a timely request for a public rulemaking hearing.
3. On September 14, 2006, THEC granted the request and held a public rulemaking hearing. The September 14, 2006 meeting was conducted by Dr. Stephanie Bellard, THEC's Assistant Executive Director for Postsecondary School Authorization. (Exhibit 2)
4. As acknowledged by THEC and Dr. Bellard herself, she was not an actual Commission member. Her authority as a staff member for THEC extended only to making recommendations to her committee about the proposed rulemaking revisions. Dr. Bellard was not a person with ultimate responsibility for

rulemaking. (Exhibit 2, page 12) Accordingly, the Court finds that the September 14, 2006 hearing was not attended by an "officer or a quorum of the board or commission charged by law with ultimate responsibility for rulemaking." TENN. CODE. ANN. 4-5-204(2)(c)(1) (West 2011).

5. Near the end of the September 14, 2006 hearing, Mr. Steve Cotton, Vice President and General Counsel of National College of Business and Technology, requested an opportunity to present their arguments, along with other interested parties, to the full Commission. (Exhibit 2, page 25) Tennessee Code Annotated section 4-5-204(c) provides for such an opportunity:

(c)(1) If the officer or a quorum of the board or commission charged by law with ultimate responsibility for rulemaking is not present at the hearing, a person who appears at the hearing shall be given an opportunity to present the person's arguments to such officer or quorum of such board or commission prior to adoption of the proposed rule if, at the hearing, the person makes a request for such opportunity in writing to the person presiding at the hearing.

(2) Such officer, board or commission may in its discretion require such arguments to be presented in writing.

(3) If a record of the hearing has been made, argument shall be limited to the record.

(4) Where oral argument is accorded, such officer, board or commission may impose reasonable limitations on the length and number of appearances in order to conserve time and preclude undue repetition.

After the meeting, Mr. Cotton collected a signed petition with this request from National College of Business and Technology as well as 13 other attendees at the hearing and presented it to Dr. Bellard. (Exhibit 3)

6. On September 27, 2006, legal counsel for National College of Business and Technology sent a letter to Dr. Bellard reiterating the request Mr. Cotton had made during the September 13, 2006 meeting to present comments to the full Commission, and further asking to be given notice of the second hearing. (Exhibit 4)
7. On September 26, 2006, THEC's Executive Director, Richard Rhoda, wrote a letter to National College of Business and Technology denying its request to present comment on the proposed rules to the Commission, "[W]hile you are welcome to attend, I cannot grant your request to voice your concerns at the Tennessee Higher Education Commission meeting on November 16, 2006." (Exhibit 5)
8. On November 16, 2006, the Commission met and by a unanimous vote of the members present, THEC adopted the proposed rules. (Exhibit 13, pages 6-7) Neither National College of Business and Technology, nor any other interested party that signed the petition for a second hearing attended the November 16, 2006 meeting.
9. On March 28, 2007, counsel for National College of Business and Technology wrote a letter to the Tennessee Attorney General, Robert Cooper, to alert him of its concerns relating "to the process the Commission utilized in adopting new rules governing the authorization and regulation of postsecondary education institutions and their agents at its November 16, 2006, meeting." (Exhibit 6, page 4) In the letter, the National College of Business and Technology "contended that the

institution had requested and should have been given an opportunity to address the Commission prior to the adoption of the rules." (Exhibit 6, page 4)

10. As a result of the March 28, 2007 letter, "[t]he Attorney General's office returned the rules to the Commission to address this issue." (Exhibit 6, page 4)

11. The Commission then placed the rules on its agenda for its November 15, 2007 meeting. Dr. Rhoda wrote a letter to Mr. Cotton on October 23, 2007, inviting National College of Business and Technology "to voice your concerns relative to the proposed revisions of the Rules of the Tennessee Higher Education Commission, Chapter 1540-1-2 Authorization and Regulation of Postsecondary Education Institutions and Their Agents, to the Tennessee Higher Education Commission (THEC) on November 15, 2007." (Exhibit 7) In the letter, Dr. Rhoda requested that National College of Business and Technology respond in writing if it desired to be on THEC's agenda for the rules discussion.

12. Mr. Cotton responded to Dr. Rhoda, in a letter dated November 1, 2007, that National College did not plan to attend THEC's upcoming November 15th meeting. (Exhibit 8)

13. On November 2, 2007, Mr. Thaddeus E. Watkins, III, General Counsel for the Department of General Services who was assigned to assist THEC in connection with the proposed rules, sent a letter to Mr. Cotton explaining the plan for the upcoming meeting on November 15, 2007.

14. In the letter, Mr. Watkins stated that he intended to ask the Commission to rescind its November 16, 2006 adoption of the rules to allow National College to present

its comments to the Commission. Mr. Watkins' determination of the effect of that rescission was that it did not constitute and/or trigger withdrawal of the previously adopted rules as provided in Tennessee Code Annotated section 4-5-214. Mr. Watkins' determination was that rescission of the adoption merely took back the adoption of the rules. All of the other procedures attendant to the rulemaking such as publication and the prior rulemaking hearing and notice, Mr. Watkins stated in his November 2, 2007 letter, would still be valid and effective:

At the Commission's upcoming meeting of November 15, 2007, I plan to ask the Commission to rescind its previous vote of November 16, 2000 to adopt the above-cited rule revisions in order to give you and your organization an opportunity to present your concerns about those rule revisions directly to the Commission as you requested in writing on September 14, 2006. An hour has been scheduled during the first part of the Commission's November 15, 2007 meeting for you to voice your concerns about the rule revisions. Provided the Commission does rescind its [sic] previous adoption of the rule revisions, you will then have that opportunity to address the full Commission.

Since the Commission would only be considering rescission of its previous adoption, and not its notice of rulemaking and its rulemaking hearing, it is not necessary to give formal notice of withdrawal of the rules under T.C.A. Section 4-5-214, since the Commission would merely begin once again consideration of whether any further changes need to be made after hearing your concerns. The prior rulemaking and notice hearing would remain in place for this rulemaking; formal withdrawal of the rules under the referenced statute would nullify that notice and hearing.

(Exhibit 9, page 1-2)

15. Again, in a letter dated November 12, 2007, National College of Business and Technology declined the invitation to participate at the November 15, 2007 meeting. Mr. Cotton said in the letter that the contemplated rescission was not

authorized by the UAPA except as a withdrawal of the rules under section 4-5-214

and that would result in nullification of all previous procedures undertaken:

As I understand your letter, you intend to ask THEC to rescind its November 2006 adoption of the revisions at issue in order to hear National College's concerns. While that is appreciated, I do not believe any such effort can lead to the promulgation of legally valid rules. Indeed, nothing in the UAPA's rulemaking procedures authorizes the proposed rescission. Rather, under the UAPA, an agency may voluntarily retrieve pending rules for further consideration after they are adopted only by withdrawing them by notice to the secretary of state as described in Tennessee Code Annotated § 4-5-214, which applies for rules pending with either the Attorney General or the Secretary. *See* § 4-5-226(b)(2).

Even if this were not the case, I am hard pressed to understand how your proposal can meaningfully correct for THEC's refusal to afford National College and others the chance to express their concerns about the revisions to THEC in November 2006, when the revisions were initially adopted. As you well know, the very purpose of the UAPA is to provide for public notice and comment on new rules and regulations *before* policymakers take action. To do so after the fact, as you propose here, merely elevates form over substance and does not provide for a genuine opportunity to participate in the rulemaking process. Indeed, once rules are adopted, it is difficult to see how public comment can impact on the rulemaking process, even if the rules in question are temporarily "unadopted" for that purpose.

This last point is particularly important considering that National College was not the only interested party who asked to appear before THEC. A copy of the written request that was presented to Dr. Stephanie Bellard at the September 2006 rulemaking hearing is attached as Exhibit 1. As you can see, it was signed by not only me but also several students, representatives of other institutions and other interested parties. Even if simply rescinding its previous vote allowed THEC to hold a hearing and act on the rule revisions again, any revisions ultimately adopted through such means still would be procedurally invalid unless all parties who had asked to participate have the opportunity to do so.

(Exhibit 10, pages 1-2)

16. In response to National College of Business and Technology's letter, Mr. Watkins sent another letter to Mr. Cotton for further clarification about the agenda for the November 15, 2007 meeting as well as an interpretation of the authority for holding such a meeting:

There is nothing I can find in Tennessee's Uniform Administrative Procedures Act (UAPA) which requires an agency to formerly withdraw its rules and start the entire rulemaking process anew if it wishes to reconsider its adoption of proposed rules. Likewise, there is nothing I can find in the UAPA that prevents an agency from engaging in such reconsideration, rescinding its adoption and undertaking further considerations of the proposed rules. In fact, such reconsiderations are often made by agencies as a result of everything from minor housekeeping to major substantive issues being identified during the Attorney General's Office during its formal review of the rules. The UAPA could hardly be read to require a complete new start of every rulemaking project whenever any correction or revision, however minor, requires a new adoption by an agency.

(Exhibit 12)

17. On November 15, 2007, Mr. Watkins appeared before THEC to assist in addressing the concerns previously raised by National College of Business and Technology to the Attorney General. At the meeting Mr. Watkins recommended that THEC rescind its November 16, 2006 adoption of the rules and provide representatives of National College of Business and Technology up to one hour to present their concerns with the Commission who would then reconsider whether to readopt, amend, or take other action on the rules. After THEC passed a motion to rescind the previously adopted rules, Mr. Watkins called on Mr. Cotton and/or

other representatives of National College of Business and Technology to make a presentation to the Commission. (Exhibit 6, pages 4-5)

18. When no representative of National College of Business and Technology came forward, Mr. Watkins suggested that it would be appropriate for the Commission to consider whether to "readopt, amend, or take other action relative to the rules." (Exhibit 6, page 5)

19. Upon this suggestion, one of the Commissioners made a motion that THEC readopt the rules. The motion was seconded, and it was duly adopted by all of the members of THEC present at the meeting. (Exhibit 6, page 5)

#### Standard of Review

A suit for declaratory judgment brought under the Uniform Administrative Procedures Act as adopted by Tennessee is governed by Tennessee Code Annotated section 4-5-225:

(a) The legal validity or applicability of a statute, rule or order of an agency to specified circumstances may be determined in a suit for a declaratory judgment in the chancery court of Davidson County, unless otherwise specifically provided by statute, if the court finds that the statute, rule or order, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the complainant. The agency shall be made a party to the suit.

(b) A declaratory judgment shall not be rendered concerning the validity or applicability of a statute, rule or order unless the complainant has petitioned the agency for a declaratory order and the agency has refused to issue a declaratory order.

(c) In passing on the legal validity of a rule or order, the court shall declare the rule or order invalid only if it finds that it violates constitutional

provisions, exceeds the statutory authority of the agency, was adopted without compliance with the rulemaking procedures provided for in this chapter or otherwise violates state or federal law.

TENN. CODE ANN. § 4-5-225 (West 2011).

### **Overview of Rulemaking Procedure Under UAPA**

The requirements for agency rulemaking are provided in Tennessee Code Annotated sections 4-5-201, *et seq.* A good overview of these, for the analysis that follows, is found in the Respondent's Brief in Opposition to this Petition for Declaratory Order which is adopted and quoted by the Court:

Administrative rules and regulations have "the force and effect of law in Tennessee." *Swift v. Campbell*, 159 S.W.3d 565, 572 (Tenn. Ct. App. 2004). Rulemaking procedures for agencies of the State of Tennessee are contained in the Uniform Administrative Procedures Act (UAPA), TENN. CODE ANN. § 4-5-201, *et seq.* The particular type of rules at issue in this case began as proposed rules. Proposed rules are first sent to the Attorney General's Office for approval. *See* TENN. CODE ANN. § 4-5-207. If they are approved, the proposed rules are then published in the notice section of the Secretary of State's monthly administrative register. TENN. CODE ANN. § 4-5-202(a)(3). Persons affected by proposed rules may petition for a public hearing. *See* TENN. CODE ANN. § 4-5-202(3). If no hearing is requested, the agency will "adopt" the rules. *See id.* Adoption of a rule does not finalize the process, i.e. agency adoption of a rule does not make the rule "effective." A rule (unless filed as an emergency or public necessity rule) becomes effective seventy-five (75) days after it is filed with the Secretary of State's office. TENN. CODE ANN. § 4-5-207.

If a hearing is requested after the proposed rules are published, the agency must provide notice of the hearing as described in TENN. CODE ANN. § 4-5-203. Of relevance to this case are subsections (a)(3), (b)(1), and (c)(1), which set forth the requirements that the agency shall afford interested persons an opportunity to present their views and that the agency may designate a presiding officer.

If the agency “adopts” the rules after the hearing, the rules then go back to the Office of Attorney General and Reporter for approval as to legality. See TENN. CODE ANN. § 4-5-211. After such approval, the rules are filed with the Secretary of State’s office and become effective after seventy-five (75) days. See TENN. CODE ANN. §§ 4-5-206 & 4-5-207.

*Brief Opposing Petition For Declaratory Order*, pages 2-3 (May 16, 2011).

### Conclusions of Law

The Court begins with petitioner’s claim that THEC’s adoption of the Rules at the November 15, 2007 meeting was void because the Commission failed to provide the petitioners an opportunity to be heard by those ultimately responsible for the rulemaking as required by TENN. CODE ANN. section 4-5-204(c). The respondent’s defense is that it did comply with section 4-5-204(c) by its procedure of rescinding its previous adoption, providing an opportunity for National College to present comment to the Commission, and then voting to adopt the Rules (hereinafter referred to as “rescind and readopt”).

Tennessee Code Annotated expressly provides that “[a]ny agency rule not adopted in compliance with the provision of this chapter shall be void and of no effect and shall not be effective against any person or party nor shall it be invoked by the agency for any purpose.” TENN. CODE ANN. 4-5-216 (West 2011); see also *Mandela v. Campbell*, 978 S.W.2d 531, 533 (Tenn. 1998); *Heritage Early Childhood Dev. Ctr., Inc. v. Tennessee Dept. Of Human Services*, M200802134COAR3CV, 2009 WL 3029595, at \*6 (Tenn. Ct. App. Sept. 22, 2009); and *Cosby v. State Dept. of Human Services*, M2003-02696-COA-R3CV, 2005 WL 2217072, at \*3 (Tenn. Ct. App. Sept. 12, 2005). Thus, a determinative issue in this case is whether THEC’s “rescind and readopt” procedure in November 15,

2007 was a valid or invalid procedure under Tennessee Code Annotated §§ 4-5-201, *et seq.*

As stated above in the Court's Findings of Fact 14, 15 and 16, THEC's purpose in conducting the November 15, 2007 meeting was to give National College of Business and Technology an opportunity to present its concerns about the Rules which it had previously requested and been denied in September of 2006. In the letter by Mr. Thaddeus E. Watkins, III, in Finding of Fact 14, he described the contemplated procedure that THEC intended to employ at the November 15, 2007 meeting. Specifically, Mr. Watkins explained that THEC "would only be considering rescission of its previous adoption, and not its notice of rulemaking and its rulemaking hearing, it is not necessary to give formal notice of withdrawal for the rules under T.C.A. Section 4-5-214, since the Commission would merely begin once again consideration of whether any further changes need to be made after hearing your concerns."

This procedure by THEC of rescinding its previously adopted rules while asserting that previous procedures of publication, notice and public hearing are preserved, is not explicitly provided for in the Uniform Administrative Procedures Act. The only section in the UAPA which addresses rescinding proposed rules that are not yet effective pursuant to 4-5-207,<sup>2</sup> is the withdrawal section of the statute at Tennessee Code Annotated section 4-5-214. It authorizes an agency to withdraw rules at any point prior to

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<sup>2</sup> Rules that have been adopted become "effective" after their legality has been approved by the Attorney General and 75 days after the rules have been filed with the Secretary of State.

the effective date of the rule, but significantly that withdrawal results in nullification of all procedures (notice and rulemaking hearing) undertaken to promulgate the rule:

(a) A rule may be withdrawn by the agency proposing such rule at any point prior to the effective date of the rule. Such withdrawal shall become effective upon delivery of written notification of such withdrawal to the office of the secretary of state and shall result in the nullification of all procedures undertaken or performed in order to promulgate such rule.

TENN. CODE ANN. § 4-5-214 (West 2011). Thus, a significant aspect of section 4-5-214 is that once an agency invokes that section, then the agency must start the process of promulgating the proposed rules again. Therefore, the agency would need to “hold a public hearing at the time and place designated in the notice of hearing, and shall afford all interested person or their representatives and opportunity to present facts, views or arguments relative to the *proposal under consideration*.” TENN. CODE ANN. § 4-5-204(a)(1) (emphasis added).

It is apparent from Mr. Watkins letter (Finding of Fact 14) that he was trying to avoid having to repeat notice and a public hearing yet sought to cure National College’s complaint that it had been deprived of its section 4-5-204(c) presentation of comments to the Commission. Hence he created the practical solution of “rescind and readopt” that he determined did not constitute a section 4-5-214 withdrawal.

The Court appreciates the practicality of this rescind and readopt solution. The Court also has considered Mr. Watkins’ determination that there is nothing in the UAPA that expressly prohibits the practice. Yet, the Court comes to a different conclusion.

The Court concludes that the Commission’s rescind and readopt process does not comply with the statute. The Commission’s attempt to merely rescind its previous

adoption of the Rules but keep intact the previous publication, notice and public hearing procedures is not authorized by the statute. The Court's conclusion is based upon two aspects of the UAPA rulemaking statutes.

First, a prominent aspect rulemaking under the UAPA is notice to the public and interested parties of rule changes being considered and comment so as to obtain their input on how the changes will impact them and the industry being regulated. This comment period with public hearings helps to inform the Commission in deciding whether to make the changes. It is not a *pro forma* process, but one that is contemplated to meaningfully inform the adoption of rules. The importance of an opportunity for fulsome public and industry comment is evidenced by the numerous provisions in the statute devoted to notice and public hearings. An additional point is that to be meaningful, notice and an opportunity to comment must be provided prior to adoption. In light of the importance the statute places on providing notice and comment, the Court concludes that the statute must be construed to advance and support such notice and comment, and should not be construed so as to curtail these important requirements.

With this construction in place, the Court turns to the rescind and readopt process used by the Commission. The Court sees from the statute that the only provision which authorizes or refers to conduct akin to the rescission of the previously adopted rules that occurred in this case is section 4-5-214. That is the section described above that allows rules to be withdrawn but not with the prior procedures of publication, notice and hearings intact. Those procedures have to be started over under section 4-5-214 in keeping with the statute's policy of providing a fulsome opportunity for comment.

Consistent, then, with construing the statute in favor of notice and comment, the Court concludes that when the Commission "rescinded" its November 16, 2006 adoption of the rules at the November 15, 2007 meeting it, in fact and effectively, withdrew the rules. The only provision in the statute which authorizes that conduct is section 4-5-214, which triggers the provision under that section of nullification of the previous proceedings. The Court concludes that the Commission was not permitted under 4-5-214 to simply readopt. It had to begin the rulemaking process over, with publication, notice and a public hearing, and it did not do so. Under these circumstances, the Court concludes that the Rules were not adopted in compliance with the statutory requirements. Under section 4-5-216, this noncompliance renders the Rules void and of no effect.

The final step of the analysis of the rescind and readopt procedure employed by the Commission relates to *Tenn. Envtl. Council v. Solid Waste Disposal Control Bd.*, 852 S.W.2d 893 (Tenn. Ct. App. 1992). This case is cited by the respondent as analogous precedent authorizing its rescind and readopt procedure.

Although primarily the decision hinges on lack of standing, the case does state that courts are not required to rigidly adhere to "formalistic rules" when faced with a challenge to rulemaking. It is this principle which the respondent asserts as authority for the rescind and readopt procedure. On several fronts, the Court concludes that the case is distinguishable.

First is that in *Solid Waste Disposal* seven public meetings were held. These facts of numerous public meetings (in contrast to the one meeting in this case with a representative of the Commission) caused the *Solid Waste Disposal* Court to conclude

that all were well informed of alterations to the proposed rules that followed original publication and republishing due to alterations was not required. The *Solid Waste Disposal* Court concluded that the finished product was within the bounds of the original publication, 852 S.W.2d at 898, so new publication was not required, and that the purpose of the procedural requirements had been met, *id.* at 896.

*Solid Waste Disposal* is additionally distinguishable for the reasons set forth in the Petitioner's Reply Brief at pages 5-7 which the Court adopts and quotes as follows:

The most the Commission has put forward is a single court opinion noting the general principle that the UAPA does not require "rigid adherence to formalistic rules." *See Tenn. Envtl. Council v. Solid Waste Disposal Control Bd.*, 852 S.W.2d 893, 896 (Tenn. Ct. App. 1992). Importantly, however, that same opinion makes clear that agencies may avoid such "rigid adherence" only "[w]hen the purposes of procedural requirements have been met." *Id.* For example, in that case the Court of Appeals held that the agency had met the purposes of notice and opportunity to be heard when it published and held public hearing on a set of proposed rules and then ultimately promulgated a final set of rules that were within the scope of the initial publication. Although no public hearing was held on the final draft of the rules, the Court of Appeals held that the purpose of the UAPA had been served:

Administrative rule making does not require that the specific terms of a rule be determined in advance and be finally adopted without modification. It is sufficient if the statutory publication is adequate to inform the public of the subject matter of the rule to be considered and that the public have adequate opportunity to present and support its views as to what rule should be made regarding that subject matter.

*Id.* at 898.

That reasoning clearly does not apply here, however, where the interested public was deprived from the very beginning of its statutory right "to present and support its views" to the Commission. Unlike the facts of *Tennessee Environmental Council*, this is not a case where the Commission fully complied with the requirements of the UAPA with respect to an

original draft of its rules and then promulgated a revised draft. In this case, the Commission *never provided the interested public with the opportunity to be heard by the final decision-makers* as expressly required by Tenn. Code Ann. § 4-5-204(c). And unlike the Facts of *Tennessee Environmental Council*, this is not a case where the Commission has or could assert any lack of standing for Petitioners to raise this challenge. *See id.* at 896-97. (finding Plaintiff lacked standing to challenge procedure that had allowed it to participate in hearings to which public was not invited). Even if the Commission's invitation to National College to participate in the "rescind and readopt" procedure had been sufficient to comply with the UAPA (which, as discussed above, it clearly was not), the Commission has acknowledged that that invitation was issued only to National College and not to any other party. *See Respondent's Brief*, p. 8.

*Reply In Support Of Petition For Declaratory Judgment*, pages 6-8, (Sept. 13, 2011).

The Court therefore concludes that *Solid Waste Disposal* does not provide authority for the rescind and readopt procedure the Commission used. Accordingly, the Court maintains its conclusion stated above that the rescind and readopt procedure did not comply with the statute. Under section 4-5-216, the rules are void and of no effect.

To this point in its analysis, the Court has addressed the petitioner's first two arguments (*see supra* at 2, "Parties' Positions"), and the analysis is dispositive. It is, therefore, unnecessary for the Court to address the petitioner's third and fourth arguments regarding unpublished amendments, and that the rules are invalid as arbitrary and capricious and beyond the Commission's authority. The Court's ruling on the procedural deficiencies of the rulemaking process, standing alone, renders the proposed rules invalid as a matter of law.

It is therefore ORDERED that the petition for Declaratory Judgment is GRANTED. The Court declares that the Tennessee Higher Education Commission's Rules, amending TENN. COMP. R. & REGS. Chapter 1540-01-02, are void and of no effect and shall not be effective against any person or party nor shall they be invoked by the agency for any purpose. Court costs are taxed to the respondent.

  
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ELLEN HOBBS LYLE  
CHANCELLOR

cc: W. Brantley Phillips, Jr.  
Russell Baldwin  
Melissa Brodhag

**RULE 58 CERTIFICATION**

A Copy of this order has been served by U. S. Mail upon all parties or their counsel named above.

  
\_\_\_\_\_  
Deputy Clerk and Master  
Chancery Court

10-17-11  
Date