From: INAHARA Jill
To: VANDEHEY Maggie; GARTENBAUM Andrea
Subject: FW: RM-AQPerm: Prospective rulemaking
Date: Thursday, September 18, 2014 5:22:36 PM
Attachments: image001.png

FYI

From: Garrahan Paul [mailto:paul.garrahan@state.or.us]
Sent: Thursday, September 18, 2014 4:42 PM
To: INAHARA Jill
Subject: RE: RM-AQPerm: Prospective rulemaking

Jill: It is not a statute or rule that establishes the prohibition. It is constitutional, and partly a matter of separate of powers principles. And it has been established in court decisions. Here is quote from the case generally cited as establishing this interpretation:

"The validity of Oregon Laws 1921, ch. 217, as a proper grant of authority to an administrative agency is not challenged. The challenge is directed to PSC order No. 922. There can be no doubt that the Public Service Commission had the right after a hearing and the proper exercise of its administrative discretion to adopt a particular edition of the national electrical safety code as the standard applicable to construction and maintenance of electrical utility installations in Oregon. But neither the Public Service Commission nor its successor, the Public Utility Commissioner, had the right to adopt prospectively without hearing or further consideration subsequent changes, modifications or alterations in such code issued or adopted by the Bureau of Standard or such other national agency as might take over the work of providing electrical standards." *Hillman v. N. Wasco Co. People's Utility Dist.*, 213 Or 264 (1958) (subsequently overruled on other grounds not relevant to this issue).

Here is a discussion in a more recent case:

"Petitioner's arguments require that we determine what the reference to the "current" DSM in OAR 859-10-005(5) and (6) (1987) means and whether the PSRB improperly delegated its authority to the American Psychiatric Association by defining mental disease and mental defect in part by reference to the DSM. Petitioner argues that the PSRB should have referred to the DSM-III, rather than the DSM-III-R, because the DSM-III was the "current" edition in effect in 1985 when OAR 859-10-005 was adopted. He asserts that he would be entitled to be discharged had the PSRB applied the DSM-III. In the alternative, petitioner argues that the rule is not valid if "current" means the latest edition of the DSM in effect at the time of the hearing. Relying on *Hillman v. North. Wasco Co. PUD*, 213 Or. 264, 323 P.2d 664 (1958), overruled on other grounds by *Mauldinq v. Clackamas County*, 278 Or. 359, 365, 563 P.2d 731 (1977), petitioner argues that the PSRB could not lawfully adopt subsequent changes to a privately compiled manual without holding a new hearing.

* * *

We conclude that the PSRB did not unlawfully delegate its power to the American Psychiatric Association when it adopted a rule defining a mental disease or defect in part by reference to the

"current" DSM. The "current" DSM under OAR 859-10-005(5) and (6) (1987) is the DSM-III, because that is the edition that was in effect at the time that the PSRB adopted the rule." *Osborn v. Psychiatric Sec. Review Bd.*, 325 OR 135 (1997).

These are the constitutional provisions on which this concept is based:

Oregon Constitution Art. I, Section 21. Ex-post facto laws; laws impairing contracts; laws depending on authorization in order to take effect; laws submitted to electors. No ex-post facto law, or law impairing the obligation of contracts shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution; provided, that laws locating the Capitol of the State, locating County Seats, and submitting town, and corporate acts, and other local, and Special laws may take effect, or not, upon a vote of the electors interested.—

Oregon Constitution Art. III, Section 1. Separation of powers. The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided. [Constitution of 1859; Amendment proposed by H.J.R. 44, 2011, and adopted by the people Nov. 6, 2012]

Oregon Constitution Art. IV, Section 1. Legislative power; initiative and referendum. (1) The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.

Please let me know if you would like to discuss this further.

Paul Garrahan
Acting Attorney-in-Charge, Natural Resources Section
Oregon Department of Justice
Portland 971-673-1943 (Tu, Th, F)
Salem 503-947-4593 (M, W)
Mobile 503-929-7553

Please consider the environment before printing this email

From: INAHARA Jill [mailto:jill.inahara@state.or.us]
Sent: Thursday, September 18, 2014 3:08 PM
To: GARRAHAN Paul
Subject: RM-AQPerm: Prospective rulemaking

Hi Paul,
Can you please remind me where it says we cannot do prospective rulemaking? Have you explained it to me before? I searched all my emails from you but I can't find it. Is it ORS 183.335 that says we have to have public notice for rulemaking?

Thank you,
Jill

*****CONFIDENTIALITY NOTICE*****

This e-mail may contain information that is privileged, confidential, or otherwise exempt from disclosure under applicable law. If you are not the addressee or it appears from the context or otherwise that you have received this e-mail in error, please advise me immediately by reply e-mail, keep the contents confidential, and immediately delete the message and any attachments from your system.

****