IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,566

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STANDFORD P. BIRNHOLZ,
individually and as trustee of the
STANDFORD P. BIRNHOLZ P.A. PENSION PLAN,

Appellant,

vs.

THE 44 WALL STREET FUND, INC.,

Appellee.

CERTIFIED QUESTION FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF APPELLANT

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ARGUMENT

FIRST ISSUE

SHOULD THE FAILURE OF THE FUND TO FILE THE FORMS AND PAY THE FEE REQUIRED TO RENEW THE EXEMPTION FROM REGISTRATION OF SECURITIES BE EXCUSED AS SUBSTANTIAL COMPLIANCE WITH THE EXEMPTION STATUTE, SECTION 517.061(19)(b) (1979)?

1. Because the language of the exemption statute requiring payment of the renewal fee is mandatory, strict compliance is necessary.

The Fund argues that the distinction between mandatory and discretionary statutes is meaningless in this context since the doctrine of substantial compliance applies to all statutes. Answer Brief at 15-16. The cases, on the contrary, show that the distinction is crucial in determining whether arguably trivial violations can be excused.

In S.R. v. State, 346 So.2d 1018 (Fla. 1977), the state attorney filed petitions for delinquency 11 days after the 30-day statutory deadline. The court distinguished the mandatory language of the statute from the discretionary language of directory statutes and held that, because the statute was mandatory, the delay could not be excused.

The decision not to excuse the failure of a deputy sheriff to take an oath of office, even though he had otherwise substantially complied with the statute governing the qualification of deputies by posting a bond and receiving a commission, in Holloway v. State, 342 So.2d 966 (Fla. 1977), turned on the court's analysis of the language of the statute as mandatory rather than directory.

In Gilliam v. Saunders, 200 So.2d 588 (Fla. 1st DCA 1967), the failure of the clerk to file proof of publication of a notice of application for tax deed on or before the date fixed for the sale, another arguably "technical" violation, could

not be excused because the court held that the statute was mandatory rather than directory. ~~See also~~ United Bonding Ins. Co. v. Tuggle, 216 So.2d 80 (Fla. 2d DCA 1968) (delay of two weeks in filing indemnity affidavit precludes recovery from indemnitor of bail bond because the statute is mandatory); Allied Fidelity Ins. Co. v. State, 415 So.2d 109 (Fla. 3d DCA 1982) (giving written notice to surety four to six days after bail bond forfeitures rather than within 72 hours as required by statute excused because statute is directory rather than mandatory).

All of these cases involve the sort of technical noncompliances which the Fund urges should be excused on the basis of substantial compliance regardless of the mandatory or directory nature of the statutes. Instead, the decisions are based on the mandatory/directory analysis, with violations of mandatory statutes uniformly penalized despite what the Fund would consider substantial compliance with the statutes.

The fact that a statute uses the word "shall" is not the sole determinant of whether it is mandatory or not, although the language of the statute is the most important consideration. 2A Sutherland Statutory Construction, § 57.03 (4th Ed. 1984). A statute which uses "shall" may be directory, while a statute which uses "may" may be mandatory, depending on the context and the legislative intent. Allied Fidelity Ins. Co. v. State, 415 So.2d 109, 111 (Fla. 3d DCA 1982). Some of the cases cited by the Fund involve situations where "shall" was deemed to be directory, and substantial compliance was accordingly permitted. See Boardman v. Esteva, 323 So.2d 259, 267 (Fla. 1975) ~~cert. denied~~ 425 U.S. 967 (1976) (minor formal procedures in absentee voting statute held to be directory). These cases, however, do not support the Fund's proposition that mandatory statutes require only substantial compliance.

Whether the "shall" of Section 517.061(19)(b) is mandatory or directory

"will depend, then, upon the context in which it is used and the legislative intent expressed in the statute. Thus, for example, where 'shall' refers to . . . the imposition of a legislatively-intended penalty, or action to be taken for the public benefit, it is held to be mandatory." Allied Fidelity Ins. Co., supra, at 111 (citations omitted).

The failure to comply with the renewal provision is attended by the legislative penalties of Section 517.211 for sales of securities without registration or exemption. Where "deviation from the direction of a statute implies a consequence, the statute is mandatory." 2A Sutherland Statutory Construction, § 57.08 (4th Ed. 1984). See Dept. of Bus. Reg. v. Hyman, 417 So.2d 671, 673 (Fla. 1982) (sanctions provided for violation of time limits makes them mandatory); Ewing v. Kaplan, 474 So.2d 302, 304 (Fla. 3d DCA 1985) (explicitly stated consequence will render statute mandatory). As this court stated in S.R. v. State, 346 So.2d 1018, 1019 (Fla. 1977), where a statute provided the penalty of dismissal for a petition for delinquency filed more than 30 days from the date the complaint was referred to the intake office: "We can think of no better example of a mandatory requirement."

As for the context of the statute, it is difficult to believe that the payment of the renewal fee was intended by the legislature to be permissive. Furthermore, the statute deals with an exemption from regulation by the state. As the cases cited on page 20 of the Initial Brief show, strict compliance is required with the procedures necessary to obtain an exemption, reflecting a policy in favor of state regulation. In this context, Section 517.061(19) differs from the statutes involved in cases cited by the Fund where, due to different public policy considerations, substantial compliance was permitted. See Boardman v. Esteva, supra (policy of giving effect to votes cast by electors); State v.

Martinez, 536 So.2d 1007 (Fla. 1988) (same); Metropolitan Dade County v. Shelton, 375 So.2d 32 (Fla. 4th DCA 1979) (policy to uphold validity of marriage where entered into in good faith). Similarly, the Fund's reliance on Truth in Lending Act cases is misplaced because the Federal Reserve Board, which adopted Regulation Z, specifically stated its intent that, in order to avoid traps for lenders, the statute and regulation not be applied literally. See Dixey v. Idaho First Nat. Bank, 505 F.Supp. 846, 856-57 (D. Idaho 1981) rev'd 677 F.2d 749 (1982).

If this court decides that the Fund was also required to file the Notice of Intention to Sell documents again upon renewal, then the renewal statute will also provide a public benefit: protection of Florida residents by periodically insuring that issuers continue to comply with S.E.C. requirements. See Initial Brief at 19. "A statutory provision would generally be regarded as mandatory where the power or duty to which it relates is for the public benefit, good, interest or protection; . . ." 2A Sutherland, supra, § 57.02.

2. There can be no "substantial compliance" with a statute requiring only payment of a fee to renew a license or exemption where the fee is not paid.

The Fund stretches imagination beyond the limits of credibility in a vain effort to find something that the Fund did to comply with the renewal provisions of Section 517.061(19)(b). One such effort is its argument that complying with the totally unrelated requirements of Section 517.12 to renew its issuer/dealer license somehow counts toward its compliance with Section 517.061(19)(b). There being nothing in the exemption statute requiring such registration, the Fund should receive no credit for it. See Mark v. McDonnell & Co., Inc., 447 F.2d 847 (7th Cir. 1971) (substantial compliance argument rejected even though

required information provided to division in connection with registration as dealer).

The Fund's other effort is based on the argument that maintaining its S.E.C. registration fulfills a specific requirement of the exemption statute. This argument is based on the introductory sentence of the statute, which states that the exemption is available for "The offer or sale of securities pursuant to a registration statement filed under the Securities Act of 1933, provided that prior to the sale the registration statement has become effective . . . ." § 517.061(19)(a), Fla. Stat. (1979). This language, however, does not tell the issuer to do something to obtain the exemption, but rather defines the securities for which the exemption is available. It limits the general scope of the exemption but it is not a part of the list of specific acts which must be done to obtain it. It is a precondition or assumption; requiring a state of "being" rather than a "doing." For example, could a corporation claim substantial compliance with the statute requiring "corporations" to pay an annual fee to the Secretary of State because it held annual meetings and did the other things required to be a "corporation"? Could the state attorney in S.R. v. State, supra, credit the fact that he maintained his position as "state attorney" as compliance with the statute requiring the "state attorney" to file a delinquency petition against a minor within 30 days?

The only Florida case cited by the Fund is not analagous. In Williams v. State, 324 So.2d 74 (Fla. 1975), the court held that the failure to pay the filing fee at the time a notice of appeal was filed would not defeat the appellate court's jurisdiction. However, the court went on to say that the payment of the fee was mandatory, albeit not jurisdictional, and that the appeal could be dismissed for failure to pay it on time. Id. at 77. Furthermore, unlike the

appellant in Williams, who filed the required document but did not simultaneously pay the fee, the Fund has neither paid the fee nor filed the required documents to renew its exemption. It did nothing, and doing nothing cannot be excused as "substantial compliance".

3. The court erred in finding that the only way the Fund failed to comply with the exemption was in failing to pay a $750 fee in 1982.

The Fund argues that the language of the exemption statute clearly shows that no "notice of intention to sell" was required in order to renew the exemption. It is, on the contrary, plain from the order of the last two sentences of subsection (b) that the notice of intention to sell forms were to be filed for each renewal. The second-to-last sentence states: "The fee required by this paragraph shall be paid to the department for each 36-consecutive-month period in which the securities are offered and sold." § 517.061(19)(b) (1979) (emphasis supplied). The last sentence provides: "The 36-consecutive-month period shall commence upon receipt by the department of the notice of intention to sell." Id. The "the" of the last sentence thus refers to and reincorporates the preceding "each" of the second-to-last sentence, thus mandating the filing of the notice of intention to sell forms for "each" 36-month period. For the Fund's conclusion on the meaning of the statute to be valid, the sentences would have to be reversed.

Nor is the administrative rule, Rule 3E-500.09, Fla. Admin. Code (1979), ambiguous in requiring new documents for each renewal. The only mention of the $750 fee is as a part of the notice of intention to sell package of subsection (1). Subsection (2) clearly anticipates the renewal situation when it states that the required documents may not be incorporated by reference to previous filings. And the evidence in this case shows, contrary to the Fund's argument, that when the

Fund renewed its exemption in 1985, it was required to and did file new notice of intention to sell documents along with payment of the fee. See Pl's Ex. 8.

The Fund relies heavily on the unsupported testimony of its expert to support its interpretation of the statute and rule. As the Eleventh Circuit noted, Florida law prohibits the use of expert testimony to determine the meaning of a statute. See Devin v. City of Hollywood, 351 So.2d 1022, 1026 (Fla. 4th DCA 1976).

The Fund has not cited any authority to contradict the effect of law to which the administrative rule is entitled. The rule was within the department's scope of authority pursuant to Section 517.03, and, absent a showing that it is arbitrary or capricious, it should have binding effect on issuers like the Fund.

Furthermore, the rule may not be ignored even if it is considered merely as an aid to construction of the statute. A court must defer to an agency's construction of an operable statute as long as that interpretation is consistent with the legislative intent. See Pub. Employees Rel. Comm'n v. Dade Cty. Police Benevolent Ass'n, 467 So.2d 987, 989 (Fla. 1985). The Eleventh Circuit violated this sound principle of Florida law by ignoring the department's construction of the statute.

4. The Florida securities act should be strictly applied in order to achieve **its** protective purposes.

The Fund has made no attempt to distinguish the Florida cases cited on page 20 of the Initial Brief which enforce strict compliance with statutes granting exemptions. The context of the renewal requirements in such a statute is important because, as the cases show, strict compliance is required with statutes granting exemptions from regulation.

The Fund attempts to distinguish the cases cited from other jurisdictions on

the ground that they involve situations of total noncompliance with Blue Sky filing requirements. This attempt is akin to the proverbial kettle calling the pot black. These cases are perfectly appropriate because the Fund also did nothing required by the statute to renew the exemption.

In its effort to distinguish the remarkably similar cases from Illinois cited in the Initial Brief at pages 22-23, the Fund erroneously implies that the doctrine of substantial compliance is "disavowed" entirely by Illinois courts. To the contrary, the Illinois cases acknowledge the doctrine of substantial compliance, but hold that it does not apply to excuse a mandatory reporting requirement for an exemption from registration, using precisely the analysis urged by Birnholz. In Gowdy v. Richter, 20 Ill.App.3d 514, 314 N.E.2d 549 (1974), the issuer argued that strict compliance with the exemption statute's requirement of filing a report of sale within 30 days should not be required where the sale otherwise qualified for the exemption. 'In short, he maintains that the requirement of the statute dictating the filing of a report of sale should be read in a directory and not mandatory fashion." Id. at 557. Instead of rejecting the doctrine of substantial compliance, the court followed the same mandatory/directory analysis employed by Florida courts in similar situations, holding that substantial compliance would not be permitted because "[t]he language of the statute is specific in mandating the filing of the report and absent total compliance with its directives precludes one from claiming the exemption." Id.

SECOND ISSUE

IS AN AMENDMENT REQUIRING RENEWAL OF AN EXEMPTION EVERY 36 MONTHS A PROCEDURAL AMENDMENT TO A STATUTE, WHICH WAS FORMERLY SILENT AS TO THE DURATION OF THE EXEMPTION, WHICH APPLIES RETROACTIVELY TO EXEMPTIONS OBTAINED PRIOR TO ITS ENACTMENT?

There is no inconsistency in the propostion that the exemption renewal provisions are procedural and mandate strict compliance. The Fund erroneously equates the substantive/procedural dichotomy with the strict/substantial compliance one. Indeed, most of the cases cited by Birnholz in support of the strict compliance standard involve procedural requirements which the courts held to be mandatory. See, e.g. S.R. v. State, 346 So.2d 1018 (Fla. 1977), Holloway v. State, 342 So.2d 966 (Fla. 1977).

In arguing whether the renewal provisions affect substantive rather than procedural rights, both the Fund and the Eleventh Circuit overlook the fact that the entire exemption statute itself grants no rights of any kind, merely a privilege to sell securities without registration. Where there are no rights affected by an amendement to a statute, Florida courts have held that the amendment applies retrospectively. In Tel Service Company, Inc. v. General Capital Corporation, 227 So.2d 667 (Fla. 1969), for instance, the usury statute was amended during the appeal of a case seeking penalties for usury to remove as a penalty the forfeiture of the principal of the loan from a statute previously providing for the forfeiture of both interest and principal. The court held that the amended statute applied since the remedies provided by the usury statutes created no substantive right, only an enforceable penalty. Id. at 671. "Accordingly, such penalty or forfeiture possesses no immunity against statutory repeal or modification

and the enactment of legislation to this effect abates such penalty or forfeiture pro tanto . . . ." Id. Likewise, in Fogg v. Southeast Bank, N.A., 473 So.2d 1352 (Fla. 4th DCA 1985), the balloon mortgage statute was amended to exempt from its operation the mortgage previously entered into by the parties. The mortgagee, adversely affected by this amendment since he would otherwise have benefited by the forfeiture provided in the statute, argued that the statute affected his pre-existing substantive rights. The court disagreed, analogizing the forfeiture to the penalty in Tel Service, supra, and held that there was no substantive right granted by the forfeiture provision. Id. at 1354.

Like the penalty and forfeiture provisions involved in these cases, an exemption from regulation is merely a privilege, creating neither a vested nor a substantive right, and can be altered or eliminated at the will of the legislature. A license to do business is not a property right in the constitutional sense, and because it "confers no right or estate or vested interest it would seem to follow that it is at all times revocable at the pleasure of the authority from which it emanates." State v. Fuller, 136 Fla. 788, 187 So. 148, 150 (1939).

Like a license, an exemption from regulation is treated as a privilege, not a right. State v. White, 194 So.2d 601 (Fla. 1967), involved a situation practically identical to the one which occurred in this case. A 1935 statute had exempted certain motor carriers from the requirement to obtain a certificate of public convenience or a permit from the Public Service Commission. Id. at 602. The 1963 legislature amended the statute so as to eliminate this exemption. Id. After the amendment, White was charged with carrying goods without such a permit, though he had previously qualified for and had operated under the old exemption. In rejecting his challenge to the constitutionality of this statute based upon its interference with his vested right, the court held:

> It is in accord with well recognized law and principle that Appellee White did not receive by virtue of any law or circumstance an absolute vested right to continue the operation in question without limitation or the legal possibility of subsequent abrogation. Operations such as that conducted by the Appellee are clearly subject to regulation under the general police power of the state.

Id. at 603.

In Alterman Transport Lines, Inc. v. State, 405 So.2d 456 (Fla. 1st DCA 1981), motor carriers protested the repeal of statutes regulating motor carriers, which had in effect given them a statutory license through certificates of public necessity to enjoy a protected public monopoly in their routes, on the ground that the repeal impaired valuable contract rights. The court held that the certificates of public necessity did not constitute property or contractual rights or vested interests. Id. at 460.

> Since a certificate is not property in any constitutional sense and conveys no vested interest, it is at all times revocable at the will of the people of Florida, as expressed by and through their elected representatives. . . . To paraphrase a biblical quotation, that which the legislature giveth, so may it taketh away.

Id.

The exemption statute thus granted no right (vested, substantive, procedural or otherwise) and its amendment or complete revocation could therefore impair no right. The amendment automatically and properly applies to all exemptions existing prior to its enactment.

The Fund cites authority that a statute will not be applied retroactively where a new obligation or duty is imposed. Answer Brief at 38. The Fund's statement of this rule is incomplete: the "new obligation or duty" must be

imposed "in connection with transactions or considerations previously had or expiated." McCord v. Smith, 43 So.2d 704, 709 (Fla. 1949); see Young v. Altenhaus, 472 So.2d 1152, 1154 (Fla. 1985). The amendment to the exemption statute in no way affects prior sales made pursuant to the exemption. It merely requires that the Fund renew its exemption every 36 months in order to maintain the exemption for future sales.

Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So.2d 695 (Fla. 1978), cited by the Fund is distinguishable because the plain language of the statute relating to cemetary licenses required the agency to investigate certain matters upon receipt of the application, thus confining the agency to matters enumerated in the statute as it existed when the application was filed and not as it was subsequently amended. 361 So.2d at 700. There being no similar restriction in Chapter 517, the rule of Davidson v. City of Coral Gables, 119 So.2d 704 (Fla. 3d DCA 1960), applies here.

The Fund cites Section 517.03(2), Florida Statutes (1979), as a legislative expression that the amendment was to be applied prospectively only. However, this section has nothing to do with the amendment since the exemption statute is not a provision "imposing liability". Section 517.03(2) merely provides that no provision imposing liability shall apply to acts which, at the time they were taken, conformed to existing rules, even though the rules were later changed or declared to be invalid. The statute does not, as the Fund would interpret it, prohibit the legislature from requiring renewal of previously issued exemptions. Birnholz does not seek to impose liability for sales which may have been properly exempted under the 1978 statute and rules, but only for the failure of the Fund to conform to the statute and rules as they existed after 1979.

THIRD ISSUE

WAS THE NONRULE POLICY OF THE DIVISION OF SECURITIES TO GRANT EXEMPTIONS FOR ONE YEAR ON PERMITS ISSUED PURSUANT TO THE 1978 VERSION OF § 517.061(19) A VALID AGENCY ACTION WITH THE EFFECT OF LAW ON AN ISSUER WHICH SOLD ITS SHARES AFTER EXPIRATION OF ITS PERMIT?

The Fund characterizes the Division's permit as a nonbinding, invalid, and irrelevant "comfort letter". The issue is not, however, whether the certificate or "Notice of Exemption" issued by the Division had any independent validity or legal effect. The certificate is simply the embodiment of the policy and served to communicate the agency's action to the Fund. The testimony shows without conflict the main point: that the Division in fact adopted the one-year limit as its policy. R4 85, 95-96, 102, 129-30; R5 198, 207-09.

Nor is the agency's action "non-final" merely because it was embodied in such a certificate. The certificate represents a final agency action because the termination date of the certificate is unambiguously set forth and because there was no further action to be taken by the agency with respect to the exemption. The certificate of the Division constituted sufficient notice of the finality of its action, and cases have held that similar informal communications, such as letters or forms, comprise final agency actions. See General Dev. Utilities, Inc. v. Fla. Dept. of Envir. Reg., 417 So.2d 1068 (Fla. 1st DCA 1982) (letter imposing stricter standards upon expiration of current permit is a final order); Graham Contracting, Inc. v. Dept. of General Services, 363 So.2d 810 (Fla. 1st DCA 1978) (letters denying contract claims are final orders); and Harris v. Fla. Real Est. Com'n, 358 So.2d 1123 (Fla. 1st DCA 1978) (letter denying name change registration is final action).

The fact that the agency's policy was not embodied in a formal rule is irre-

levant to its validity. That is the point of McDonald v. Department of Banking, 346 So.2d 569 (Fla. 1st DCA 1977), cert. denied 368 So.2d 1370 (Fla. 1979) and the line of cases following McDonald. The Fund's attempt to distinguish these administrative cases is based on the peculiar logic that, since the rule/nonrule issue arises only in appeals from 120.57 proceedings, such a proceeding is necessary before the agency action becomes binding. Answer Brief at 46-47. Under the Fund's rule, agencies would have to seek out challengers in order to give legal effect to their nonrule actions. There is no case which so holds. McDonald and its progeny clearly envision 120.57 challenges as the price agencies may have to pay if they proceed without rulemaking. See Dept. of Admin. v. Harvey, 356 So.2d 323, 326 (Fla. 4th DCA 1978) (agency may be required to defend nonrule actions in 120.57 proceedings); Hill v. School Board of Leon County, 351 So.2d 732 (Fla. 1st DCA 1977) (same). The Fund did not challenge the policy in an administrative hearing, and the Division's policy was therefore binding on it.

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was mailed to Barry D. Hunter, Attorney for Appellee, Paul, Landy, Beiley & Harper P.A., 200 S.E. 1st Street, Penthouse, Miami, Florida 33131 this 30 day of October, 1989.

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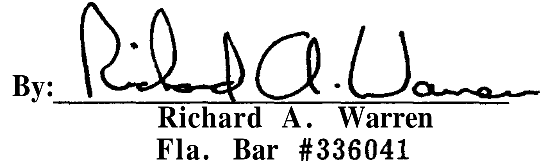
By: 

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