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IN THE SUPREME COURT
FOR THE STATE OF FLORIDA

R. TIMOTHY CARTER, O.D.,

Petitioner/Appellant,

v. CASE NO. 81,249

DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF OPTOMETRY,

Respondent/Appellee.

# PETITIONER'S REPLY BRIEF

**ON APPEAL FROM THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT, STATE OF FLORIDA**

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## ARGUMENT

**I. JURISDICTIONAL STATEMENT**

In its Amended Answer Brief, the Department of Professional Regulation ("Department") states that this Court has already spoken on the very issue now on appeal and that re-examination of the issue is unnecessary. The First District Court of Appeal in Carter v. Department of Professional Regulation, 18 Fla. L. Weekly D409 (Fla. 1st DCA Jan. 23, 1993), obviously disagreed and instead certified, as a matter of great public importance, the following question:

> Whether the decision in Department of Business Regulation v. Hyman, 417 So. 2d 671 (Fla. 1982), should be applied when a licensee moves to dismiss an administrative complaint because the department or board has failed to comply with the time limitations of section 455.225, Florida Statutes.

Despite the Department's contention, it fails to cite any case decided by this Court which addresses the legal question presented by the Carter court below. The Department does in fact acknowledge that section 455.225, Fla. Stat., at issue in the instant action, is distinguishable from 120.59, Fla. Stat., at issue in Hyman. See, Amended Answer Brief at page 8.

This Court has jurisdiction. See, Article V, § 3(b)(4), Florida Constitution. It should exercise its discretion and accept jurisdiction to resolve the question certified by the District Court of Appeal. See, Rule 9.030(2)(A)(v), Fla.R.App.P..

## II. IF THE DEPARTMENT FINDS THAT SECTION 455.225 FAILS TO PROVIDE ADEQUATE TIME FOR BRINGING DISCIPLINARY ACTIONS, IT MUST SEEK RELIEF FROM THE LEGISLATURE, NOT THE COURTS.

The Department argues that the time limits set forth in section 455.225, Fla. Stat., despite their specificity, cannot be intended as jurisdictional because of the various obstacles it faces in trying to meet these deadlines. In great detail, the Department explains in its Amended Answer Brief that delay may result because it must sometimes rely on volunteer consultants, its experts face other professional demands, it must rely on the participation and availability of complaintants and other witnesses who have other responsibilities, etc. However, if the Department or the Board finds it difficult, or sometimes impossible, to act within the time frames in which the legislature has authorized them to act, they have two options.

First, with regard to the 15 and 30 day periods within which the Panel must request additional information and make a finding as to probable cause (respectively), section 455.225 authorizes the Secretary to grant extensions. This option may be utilized to prevent loss of jurisdiction, e.g., when the Panel is unable, within 15 days of receiving the Department's original report, to request further investigation or to determine with certainty whether further investigation is required. The Department ignores the possibility of seeking extensions to avoid the "draconian" results which it warns will occur if the courts apply the statute as written.

Second, if the Department believes that the ability to request extensions of the time periods fails to provide a satisfactory solution, the proper place to appeal for relief from these statutory restrictions is the legislature, not the courts. The Department may not ignore the mandate of the legislature and then expect this Court to excuse the violation because the agency complains that compliance is too difficult. Instead, where, as here, the words of a statute are clear and unambiguous, judicial interpreta-tion is not appropriate to displace the expressed intent of the legislature. Citizens of the State of Florida v. Public Service Commission, 435 So. 2d 784, 786 (Fla. 1983).

**III. THE FACT THAT THE LEGISLATURE AUTHORIZES THE DEPARTMENT'S SECRETARY TO GRANT EXTENSIONS TO THE TIME LIMITS IN SECTION 455.225 DOES NOT DESTROY THE JURISDICTIONAL NATURE OF THESE RESTRICTIONS ON AGENCY ACTION.**

The Department also argues that the time limits of section 455.225 cannot be jurisdictional because the Secretary is authorized to grant extensions. However, the fact that a time limit may be extended does not automatically destroy its jurisdictional nature. For example, the time for filing a notice of appeal under Rule 9.110, Fla.R.App.P., is jurisdictional. Blount v. Hansen, 133 So. 2d 73 (Fla. 1961); Ramagli Realty Co. v. Craver, 121 So. 2d 648 (Fla. 1960) (The Supreme Court is "without jurisdiction to entertain or decide a case brought to it more than sixty days after the rendition of the judgment appeal from".) Despite its jurisdictional nature, under certain circumstances, the time for filing a notice of appeal may be extended, e.g., if a

timely motion to vacate pursuant to Rules 1.540(a) or (b), Fla.R.Civ.P., has been filed. See Hartford Acc. & Indemnity Co. Bosworth, 382 So. 2d 1345 (Fla. 5th DCA 1980) and cases cited therein; Woldarsky v. Woldarsky, 243 So. 2d 629 (Fla. 1st DCA 1971).[1]

## IV. THE REMEDY OF DISMISSAL IS IMPLICIT IN SECTION 455.225.

The Department correctly points out that section 455.225, like section 120.59, does not expressly state that the failure to follow the statutory time frames results in automatic dismissal of the complaint. Section 455.225, does however, provide for loss of jurisdiction, by stating, e.g., that "[i]f the probable cause panel does not find probable case within the 30-day time limit, as may be extended, or if the probable cause panel finds no probable cause, the department may determine, within 10 days after the panel fails to determine probable cause or 10 days after the time limit has elapsed, that probable cause exists", and that the Department "shall refer to the board any investigation or disciplinary proceeding not before the Division of Administrative Hearings ... or otherwise completed by the department within one year" (emphasis added).

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[1] However, neither the time limit in Rule 9.110, nor the limits in section 455.225, may be amended by consent of the parties. Ramagli, 121 So. 2d at 651; Section 455.225(4)(only provides for extensions by the secretary). In contrast, section 120.59, at issue in Hyman, expressly states that the 90-day period for filing final orders may be waived or extended with the consent of all parties.

Pursuant to the above language, section 455.225 sets forth the time periods within which the Department, the Board and the Panel must exercise their respective powers, i.e., their statutory scope of authority with regard to disciplinary actions. Consequently, although section 455.225 does not expressly provide for "dismissal" per se, the statute removes and re-delegates the power to act within specified time frames. It is well-settled that administrative agencies have only those powers delegated by statute. See e.g., Lewis Oil Co., Inc. v. Alachua County, 496 So. 2d 184 (Fla. 1st DCA 1986). In addition, an agency's authority to impose sanctions must be expressly delegated to the agency. State Dept. of Env. Reg. v. Puckett Oil, 577 So. 2d 988 (Fla. 1st DCA 1991). Thus, dismissal is required, not by express statutory directive, but because the Department's issuance of the complaint against Dr. Carter constituted an invalid exercise of delegated statutory authority.

## V. THE DEPARTMENT'S RELIANCE ON HOWELL V. STATE IS MISPLACED.

In its Amended Answer Brief, the Department relies heavily on Howell v. State, 418 So. 2d 1164 (Fla. 1st DCA 1982), in support of its position that, following a violation of the time restrictions in section 455.225, the burden of proving prejudice should rest with the licensee. See, Amended Answer Brief at pages 17-18.

In Howell, the court held that, in the absence of a showing of actual prejudice, constitutional due process is not offended by delays in criminal arrests and subsequent indictments. Howell, 418 So. 2d at 1167-68, 1170. The Howell courts clearly stated that the

case did not involve, nor did the court address, the applicability of Rule 3.191(a)(1), Fla.R.Crim.P.,[2] since Howell only alleged a violation of his constitutional rights to a speedy trial. Id. at 1167. The court also noted that a due process deprivation cannot be quantified into a specific number of days. In contrast, the issue currently before this Court is not an alleged violation of due process; it is a known violation of a statutory provision which "quantifiably" limits the time period for bringing disciplinary actions.[3] These distinctions render Howell inapplicable to the case at bar.

**CONCLUSION**

As it did below, the Department ignores its responsibilities under section 455.225, Fla. Stat.. The Department again seeks to shirk its legislatively mandated duties with impunity. It further attempts to shift the blame and consequences of its own conduct to licensees. The Department concedes that it failed to meet section 455.225's statutory deadlines and nothing in the record explains this failure. See, Amended Answer Brief at page 15.

The Department now seeks this Court's approval of its blatant disregard of legislative directives, complaining that the legislatively imposed burden is too great. Its plea is misdirected to this Court. Until the law is changed, the Department is

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[2] This rule sets forth the specific number of days within which persons charged with criminal violations must be brought to trial.

[3] Although Dr. Carter did originally assert both types of violations, the question presented by the District Court, and the issue which is currently before this Court, rests on a violation of a statutory provision, not on an alleged violation of due process.

required to comply with it. The Department failed to do so in the instant case, and, consequently, the administrative complaint was issued without jurisdiction. Therefore, the decision of the District Court should be reversed with instructions to dismiss the administrative complaint against Dr. Carter.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 22nd day of April, 1993, to the following:

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