

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THOMAS JAMES ASSOCIATES, INC.;)
BRIAN S. THOMAS; JAMES ALAN VILLA;)
ROBERT JOSEPH SETTEDUCATI; KARL)
RONALD FOUST; MICHAEL JOHN BERGIN;)
LEE BLACKWELL; THOMAS HINKEL;)
GEORGE SALLOUM; JOHN MCAULIFFE;)
KEVIN O'HARE; DAVID ROCCO; and)
CRISTANTO DELGADO,)
)
Petitioners,)
)
vs.) CASE NO. 90-3928RX
)
DEPARTMENT OF BANKING AND FINANCE,)
DIVISION OF SECURITIES AND)
INVESTOR PROTECTION,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Claude B. Arrington, held a formal hearing in the above-styled case on July 16, 1990, in Tallahassee, Florida.

APPEARANCES

For Petitioners: R. Michael Underwood, Esquire
Katz, Kutter, Haigler, Alderman,
Davis, Marks & Rutledge, P.A.
First Florida Bank Building
215 South Monroe Street, Suite 400
Post Office Box 1877
Tallahassee, Florida 32301

For Respondent: Margaret S. Karniewicz, Esquire
Anthony F. DiMarco, Esquire
Assistants General Counsel
Department of Banking and Finance
The Capitol, Suite 1302
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

Whether Rules 3E-600.013(1)(f), 3E-(300.013(1)(p) and 3E-600.013(2)(g), Florida Administrative Code are invalid exercises of delegated legislative authority.

PRELIMINARY STATEMENT

Petitioners contest the validity of certain rules adopted and administered by the Department of Banking and Finance on the grounds that those rules are invalid exercises of delegated legislative authority.

Prior to the beginning of the formal hearing, arguments were heard on Respondent's Motion to Strike and/or Dismiss Petition. This motion was denied and the case was heard on the merits. At the formal hearing, the parties' Prehearing Stipulation and Joint Exhibits 1 through 4 were received into evidence. Neither party called any witnesses or presented any other documentary evidence. The record of the proceedings was held open until July 23, 1990, to permit the original, signed and corrected deposition of Tamara Cain to be substituted for the copy of the deposition admitted as Joint Exhibit 4.

No transcript of the proceedings has been filed. Rulings on proposed findings of fact may be found in the Appendix to this Final Order.

FINDINGS OF FACT

1. Respondent is the state agency charged with the administration and enforcement of Chapter 517 Florida Statutes, which is referred to as the Florida Securities and Investor Protection Act. Rulemaking authority is conferred on Respondent by the provisions of Section 517.03, Florida Statutes.

2. Pursuant to its rulemaking authority, Respondent filed documents on November 15, 1979, with the Florida Secretary of State to adopt the challenged paragraphs as part of Rule 3E- 600.13, Florida Administrative Code. This rule became effective on December 5, 1979, and was subsequently renumbered as 3E-600.013, Florida Administrative Code. The summary of the public hearing held by the Respondent on November 7, 1979, as part of the rulemaking process makes no mention of the specific provisions at issue here.

3. Section 517.161(1)(h), Florida Statutes, provides, in pertinent part, as follows:

(1) Registration under S. 517.12 may be denied or any registration granted may be revoked, restricted, or suspended by the department if the department determines that such applicant or registrant:

* * *

(h) Has demonstrated his unworthiness to transact the business of dealer, investment adviser, or associated person;

4. Rule 3E-600.013, Florida Administrative Code, provides, in pertinent part, as follows:

(1) The following are deemed demonstrations of unworthiness by a dealer under Section 517.161(1)(h), Florida Statutes, without limiting that term to the practices specified herein:

* * *

(f) Extending, arranging for, or participating in arranging for credit to a customer in violation of the Securities Exchange Act of 1934 or the regulations of the Federal Reserve Board;

* * *

(p) Violating any rule of a national securities exchange or national securities association of which it is a member with respect to any customer, transaction or business in this state:

* * *

(2) The following are deemed demonstrations of unworthiness by an agent under Section 517.161(1)(h), Florida Statutes, without limiting that term to the practices specified herein:

* * *

(q) Engaging in any of the practices specified in subsections (1) ... (f)...
(p) ...

5. Thomas James Associates, Inc. is a securities dealer as defined in Section 517.021(9)(a)1., Florida Statutes, and is registered with Respondent. Section 517.12(16), Florida Statutes, requires securities dealers to be registered as a broker or dealer with the Securities and Exchange Commission. The other Petitioners are or were associated persons of Thomas James Associates, Inc. within the meaning of Section 517.021(4), Florida Statutes. Each Petitioner has been charged in a pending disciplinary proceeding with having demonstrated his unworthiness to transact business in the State of Florida by having committed one or more violations of the foregoing rules either as a dealer or as an agent. More specifically, Respondent's charge of unworthiness to transact business in the State of Florida is based on the allegations that Petitioners have violated certain Rules of Fair Practice of the National Association of Securities Dealers (NASD), the rules of the Securities and Exchange Commission (SEC), the Securities and Exchange Act of 1934, and the rules of the Federal Reserve Board. Section 517.161(6), Florida Statutes, gives the Respondent the authority to deny an application for registration or to suspend or restrict any registration granted pursuant to Section 517.12, Florida Statutes, if the applicant or registrant is charged in a pending enforcement action, including any proceeding brought by the SEC or NASD, with any conduct that would authorize denial or revocation under Section 517.161(1), Florida Statutes.

6. None of the challenged provisions of Rule 3E-600.013, Florida Administrative Code, have been amended since originally adopted in 1979. None of the statutes, regulations or rules referred to in Rules 3E-600.013(1)(f),(p), Florida Administrative Code, have been filed with the Department of State, with the following exception. On August 30, 1982, Respondent filed with the Department of State certain rules of the Securities and Exchange Commission and of the Municipal Securities Rulemaking Board. Respondent has not prepared or filed with the Department of State any other certification describing this referenced material and specifying other rules to which the referenced material applies.

7. Some of the rules which are incorporated by reference by Rule 3E-600.013(1)(p), Florida Administrative Code, have been changed since its adoption in 1979 by Respondent. Respondent does not maintain a copy of all rules that are incorporated by reference either in the form as they existed in 1979 or as subsequently amended. Respondent has taken no action to amend its rules to reflect changes that may be made from time to time in rules that have been incorporated by reference.

8. Petitioners are members of NASD who have voluntarily agreed to comply with the rules of NASD as they are or may from time to time be adopted, changed, or amended by NASD. Petitioners are likewise required to comply with the rules of the SEC, the Securities and Exchange Act of 1934, and the rules of the Federal Reserve Board as those rules or laws are or may from time to time be adopted, changed or amended.

9. Respondent makes its own factual determination as to whether an applicant or registrant has demonstrated its unworthiness by violating rules proscribed by Rules 3E-600.013(1)(f) and (p) and 3E600.013(2)(q), Florida Administrative Code. Respondent does not wait to bring disciplinary action against a registrant or applicant until there has been a formal and final determination by a national securities exchange or by a national securities association that a violation of its rules has occurred. For example, Respondent does not wait for NASD to bring disciplinary action against an applicant or a registrant if Respondent has determined on its own that the applicant or registrant has violated NASD rules.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.56, Florida Statutes. Petitioners have the requisite standing to bring this rules challenge.

11. Section 120.52(8), Florida Statutes, provides the following definition that is pertinent to these proceedings:

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:

- (a) The agency has materially failed to follow the applicable rulemaking procedures set forth in S. 120.54;
- (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by S. 120.54(7);
- (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by S. 120.54(7);

- (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency,; or
- (e) The rule is arbitrary or capricious.

12. The burden is on the Petitioners to establish by a preponderance of the evidence that the challenged rules are an invalid exercise of delegated legislative authority. *Agrico Chemical Co. v. State, Department of Environmental Regulation*, 365 So.2d 759 (Fla. 1st DCA 1978), cert. denied, 376 So.2d 74 (Fla. 1979). Great deference is given to an agency's interpretation of its rules and governing statutes. Such an interpretation will not be overturned even if such interpretation is not the sole possible interpretation, the most logical interpretation, or the most desirable interpretation. An agency's interpretation of its rules and governing statutes will not be overturned unless the interpretation is clearly erroneous. *General Telephone Company of Florida v. Florida Public Service Commission*, 446 So.2d 1063 (Fla. 1984); *Department of Professional Regulation, Board of Medical Examiners v. Durrani*, 455 So.2d 515 (Fla. 1st DCA 1984).

13. Petitioners' contention that the challenged rules are arbitrary and capricious is rejected. Petitioners' contention is based on its conclusion that the rules attempt to expand the jurisdiction of Respondent indefinitely and are therefore irrational, not supported by facts or logic, or are despotic. This conclusion is likewise rejected as being contrary to the record in this proceeding. The failure of an applicant or registrant to adhere to the rules of a national securities exchange or association of which he is a member is reasonably related to his lack of worthiness to transact business in Florida and forms a reasonable basis for Respondent to exercise the disciplinary powers conferred upon it by Chapter 517, Florida Statutes.

14. The challenged rules are clear and unambiguous. Petitioners' argument that the rules are impermissibly vague is not supported by the record in this proceeding and is, therefore, rejected.

15. Petitioners' final contention is that the rules are invalid because Respondent has materially failed to follow the rulemaking procedures set forth in Section 120.54, Florida Statutes.

16. Section 120.54(8), Florida Statutes, provides, in pertinent part, as follows:

- (8) Each rule adopted shall contain only one subject and shall be preceded by a concise statement of the purpose of the rule and reference to the rules repealed or amended, which statement need not be printed in the Florida Administrative Code. Pursuant to rule of the Department of State, a rule may incorporate material by reference but only as such material exists on the date the rule is adopted. For purposes of such rule, changes in such material

shall have no effect with respect to the rule unless the rule is amended to incorporate such material as changed.

17. The rule adopted by the Department of State to implement Section 120.54(8), Florida Statutes, is Rule 1S-1.005, Florida Administrative Code, which provides, in pertinent part, as follows:

(1) Any ordinance, standard, specification or similar material may be published by reference in a rule subject to the following conditions:

(a) The material shall be generally available to the affected persons.

(b) The material shall be published by a governmental agency or a generally recognized professional organization.

(2) The agency publishing material by reference shall file with the Department of State a correct and complete copy of the referenced material with an attached certification page which shall state a description of the referenced material and specify the rule to which the referenced material relates.

(3) Any amendments to material published by reference must be promulgated under the rulemaking provisions of Section 120.54, Florida Statutes, in order for the amended portions to be validly incorporated.

18. Respondent has complied with the provisions of Section 120.54(8), Florida Statutes, and of Rule 1S-1.005, Florida Administrative Code, by its filing on August 30, 1982, with the Department of State of the rules of the Securities and Exchange Commission and the Municipal Securities Rulemaking Board. The challenged rules are valid, at least to the extent that Respondent has complied with the procedures of Section 120.54(8), Florida Statutes, and of Rule 1S-1.005, Florida Administrative Code.

19. Petitioners' challenge to these rules is based on their contention that Respondent failed to properly incorporate in these rules the provisions of the Securities Exchange Act of 1934, the regulations of the Federal Reserve Board, and the rules of any national securities exchange or national securities association. This is a challenge to the scope of the challenged rules and to the manner in which Respondent is attempting to apply these rules in the administrative complaint that it has filed against the Petitioners. The scope of these challenged rules and the extent to which they apply to Petitioners should be determined in the formal proceedings brought pursuant to Section 120.57(1), Florida Statutes, to contest the administrative complaint that Respondent has filed against Petitioners.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is ordered that Petitioners challenges to Rules 3E-600.013(1)(f), 3E-600.013(1)(p) and 3E-600.013(2)(g), Florida Administrative Code be, and the same hereby are, DENIED.

DONE AND ENTERED this 21st day of August, 1990, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Hearing Officer
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
904/488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of August, 1990.

APPENDIX TO FINAL ORDER, CASE NO. 90-3928RX

The following rulings are made on the proposed findings of fact submitted on behalf of Petitioners:

1. The proposed findings of fact in paragraphs 1-3 are adopted in material part by the Recommended Order.
2. The proposed findings of fact in paragraph 4 are adopted in part by the Recommended Order, and are rejected in part as being subordinate to the findings made.
3. The proposed findings of fact in paragraph 5 are adopted in part by the Recommended Order, but the last sentence is rejected as being a conclusion of law.
4. The proposed findings of fact in paragraph 6 are rejected as being argument or as being subordinate to the findings made.
5. The proposed findings of fact in paragraphs 7-8 are rejected as being argument.

The following rulings are made on the proposed findings of fact submitted on behalf of Respondent.

1. The proposed findings of fact in paragraphs 1-16 are adopted in material part by the Recommended Order.
2. The proposed findings of fact in paragraph 17 are rejected as being argument.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.