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NOTES AND COMMENTS

ADMINISTRATIVE LAW: EFFECT OF FAILURE TO FILE RULES UNDER THE OKLAHOMA ADMINISTRATIVE PROCEDURE ACT

"To cover with the veil of secrecy the common routine of government business, is an abomination in the eyes of every intelligent man and every friend of his country."

Patrick Henry

During the 1961 session, the Oklahoma Legislature enacted a filing requirement directing each administrative agency to file its rules and regulations with the Secretary of State.[1] As of the effective date of the 1961 Act, January 2, 1962, only 14 of the 193 state agencies had filed their rules and regulations.[2] Latest reports indicate the total number of agencies complying is 32;[3] thus, only 18% of the regulatory bodies in Oklahoma have given credence to the legislature's commands.

What is the effect of such non-compliance with the 1961 Act? With a literal reading of the statute rendering non-filed rules "void and of no effect",[4] non-complying agencies have been operating without any legal basis to support their decisions or orders.

To be more specific, the act provides that every agency possessing rule making power shall file a certified original and duplicate copy of all its rules and regulations in force and effect with the Secretary of State and the State Librarian on or before the effective date of the act. Thereafter, the agency is to file similar copies of all new rules and regulations and amendments, revisions and revocations of existing rules.[5] The act then provides that "Any rule or regulation, . . . shall be void and of no effect unless filed as required by . . . this act."[6]

To insure public notice of these rules and regulations, a provision was adopted requiring the State Librarian to publish them in the Oklahoma Gazette.[7] Recognizing the need for emergency rules, the Legislature provided that such are to be effective immediately upon certification by the Governor.[8]

1 75 OKLA. STAT. §§ 251-257 (1961).
2 The Oklahoma Gazette, Jan. 2, 1962, vol. 1, no. 1.
3 *Id.* Jan. 16, 1962, vol. 1, no. 2—Feb. 1, 1964, vol. 3, no. 3.
4 75 OKLA. STAT. § 252 (1961).
5 75 OKLA. STAT. § 251 (1961).
6 75 OKLA. STAT. § 252 (1961).
7 75 OKLA. STAT. § 255 (1961).
8 75 OKLA. STAT. § 253 (1961).

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The validity of the 1961 Act was determined in *State ex rel. Villines v. Freeman*,[9] where an opinion was sought whether the multitudinous "orders" of the Oklahoma Corporation Commission fell within the purview of the provisions; also, the constitutionality of the legislation was questioned. The main proposition challenging the validity of the statute was whether the phrase "rules and regulations" was so broad and general as to be ambiguous, indefinite and without meaning. After discussing the public policy behind the filing requirement,[10] the court upheld the constitutionality of the act stating: "Since such phrase has a definite and unambiguous meaning, and does not apply to *all* rules and regulations, or *any* orders, of the Corporation Commission, these propositions are without merit."[11]

During the 1963 legislative session, the Oklahoma Administrative Procedure Act[12] was passed and included by reference the 1961 filing requirement provisions.[13] Since its constitutionality had been resolved in the *Freeman* case, it was not felt advisable to reword the section because of the possibility of fermenting litigation.[14]

Why have 82% of the administrative agencies in Oklahoma[15] failed to comply with the filing requirements of the Oklahoma Administrative Procedure Act? Perhaps it is felt the requirements are too expensive and burdensome and as a result would hamper the efficiency and flexibility of administrative agencies. Perhaps the agencies have not been adequately educated as to the applicability of the requirements. Whatever the reasons advanced, there is no valid excuse for evasion of the filing requirement provisions.

To date, only one case has come before the Oklahoma judiciary regarding non-compliance with the filing requirements.[16] The State Banking Department had failed to file its rules and regulations with the Secretary of State and during this period of non-compliance it granted a bank charter to a group of private individuals. An opponent of the charter then challenged the Banking Department's power to act due to its failure to file. District Judge Clarence Mills of Oklahoma City, apparently agreeing that the Department was acting without legal authority, issued a temporary order

[9] 370 P.2d 307 (Okla. 1962).

[10] *Id.* at 310.

[11] *Id.* at 311. The statute does not apply to rules regarding internal operation of agencies.

[12] 75 OKLA. STAT. §§ 301-325 (Supp. 1963).

[13] 75 OKLA. STAT. § 304(a) (1961).

[14] Interview with Rep. John McCune, Tulsa, Okla., co-sponsor of the Oklahoma Administrative Procedure Act, February 26, 1964.

[15] Delinquent agencies who did not file their rules and regulations by January 2, 1962 have been able to circumvent the technical effect of the 1961 Act which invalidates all non-filed rules. The agency merely declares that all its rules have been newly revised or enacted and then is able to file them under § 251 of the 1961 Act.

[16] Prichard v. Bank Commissioner, Civil No. 162,214, D. Ct. Okla. Co., Dec. 5, 1963.

enjoining all proceedings of the Banking Department. He later amended the order restraining the Department only in the three Oklahoma towns affected in the original dispute.[17]

The Banking Department incident, no doubt, will instigate further complaints by individuals adversely affected by a non-complying agency order or ruling. Quite likely, the issue of the validity of these non-filed rules will soon reach the Oklahoma Supreme Court. What construction and interpretation this tribunal will give to them is pure conjecture. As a guide, however, decisions of other state courts construing similar filing requirements can be examined.

New York is far advanced in the field of administrative rule publication and its constitutional requirement for filing is closely analagous to the Oklahoma statute.[18] The primary purpose of the New York constitutional requirement is to insure public knowledge of regulations having the force and effect of law.[19] A leading New York case is *People v. Cull*[20] in which a speeding motorist, aware of the posted speed limit, was acquitted. The court stated:

> "As is apparent, therefore, notice was not the only purpose of the constitutional provision. Because of the ever-increasing body of administrative law, with constantly new and changing regulations, it was equally important that a 'common' and 'definite place' be provided where the exact content of such rules and regulations, including any changes, might be found."[21]

The doctrine of the *Cull* case has been cited and approved in a more recent New York case.[22]

Other states have reiterated New York's position regarding the validity of non-filed rules. In a district court case, *Commonwealth v. Case*,[22a] a Pennsylvanian, indicted on a charge of reckless operation of a motorboat, was acquitted since the speeding regulation had not been filed. Arizona required strict compliance with filing requirements in *State v. Wacker*.[22b] A farmer had failed to comply with an agricultural regulation but escaped prosecution since the rule had not been certified with the Secretary of State.[23]

[17] Tulsa Daily World, Dec. 10, 1963, p. 1, col. 5. See also an editorial on p. 18 in which the editors appear to sympathize with the agencies in the dispute stating, "The law must be complied with. But it would be ridiculous for any court to knock out all the work of so many agencies of Government because of an administrative filing failure. The *oversight* should be corrected, but common sense insists that it hardly warrants stopping the State Government in its tracks." (Italics added). Apparently the usually avid proponents of the public right to know do not feel the same principle should be followed in the administrative law field.

[18] N.Y. CONST. art. 4, § 8.

[19] People v. Calabro, 7 Misc.2d 732, 170 N.Y.S.2d 876 (1957).

[20] 10 N.Y.2d 123, 218 N.Y.S.2d 38 (1961).

[21] *Id.* at 126, 218 N.Y.S.2d at 41.

[22] Weisz v. Oswald, 39 Misc.2d 816, 242 N.Y.S.2d 290 (1963).

[22a] 21 Pa. Dist. R.2d 34 (1959).

[22b] 86 Ariz. 247, 344 P.2d 1004 (1959).

The above cases lead to the conclusion that under filing statutes similar to those in effect in Oklahoma, actual notice would not be sufficient to validate an unfiled rule. The courts imply that filing is but a step in the rule making procedure and strict compliance with the statute is necessary to give legal effect to any rule or regulation.

Following the above reasoning of other state courts, the situation in Oklahoma at the present would be that rules and regulations of any non-complying agency are void and without legal effect. As a result, one who has been granted a license, based on a non-filed rule or regulation and issued after January 2, 1962, has been conducting his affairs without a valid permit and thus, unlawfully. Conversely, if one has been denied a license under the same circumstances, he may have been deprived of a valuable property right without due process of law.

Public policy dictates the necessity for adequate filing requirements. Since the advent of administrative agencies, their rules and regulations have been deemed by the courts to be equivalent to law[24] and to have the force and effect of law.[25]

Traditionally, an essential element in the legislative process has been the promulgation to the public of legislation enacted or proposed;[26] however, administrative rules have not been extended the necessary concomitant of adequate publicity. As a result, the effect of the maxim, ignorance of the law is no excuse, has been harsh on individuals who not only were without notice of a rule affecting them, but also had no means to ascertain the content or existence of such rule. A committee studying administrative procedure in state government noted:

> "Basic principles of fairness require that before individuals are required to comply with administrative rules a reasonable attempt should be made to give them notice and opportunity to become familiar with their contents."[27]

Dean Erwin N. Griswold described this lack of adequate public information machinery as "government in ignorance of the law."[28] To Dean Griswold, the state of administrative law was reminiscent of the Roman Emperor Caligula who wrote his laws in very small characters and hung them upon high pillars "the more effectively to ensnare the people."[29] Rules and regulations,

[23] Todd v. State, 205 Ga. 363, 53 S.E.2d 906 (1949); Mondovi Cooperative Equity Ass'n v. State, 258 Wis. 505, 46 N.W.2d 825 (1951).
[24] J. W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).
[25] Maryland Cas. Co. v. United States, 251 U.S. 342, 349 (1920).
[26] Londoner v. City of Denver, 210 U.S. 373 (1908).
[27] National Conference of Commissioners on Uniform State Laws (1946).
[28] Griswold, *Government in Ignorance of the Law-A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198 (1934).
[29] SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW, 71 (2d ed. 1962).