

STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES
FIRST NATIONAL CENTER, SUITE 860
120 NORTH ROBINSON
OKLAHOMA CITY, OKLAHOMA 73102



In the Matter of:

Southmark of Tulsa, Inc.,
Wendell D. Belden, and
Gertrude M. Edwards,

Respondents.

File No. ODS 01-150

**OKLAHOMA DEPARTMENT OF SECURITIES' OBJECTION TO
RESPONDENTS' MOTION FOR STAY**

On November 21, 2001, the Oklahoma Department of Securities (Department) initiated a formal administrative proceeding against Respondents pursuant to Section 406 of the Oklahoma Securities Act (Act), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (1991 & Supp. 2000). The purpose of the proceeding is to deny the effectiveness of Respondents' registrations to conduct investment advisory activities in Oklahoma.

Respondents have filed a Motion for Stay (Motion) indicating their intent to seek some form of unspecified relief in a district court of Oklahoma from the Department's administrative proceeding. The Motion consists of three sentences and contains no citation to legal authority.

On January 11, 2002, Respondents' filed a Petition in the District Court in and for Tulsa County alleging that the Department failed to issue licenses to Respondents, that the Department slandered or libeled Respondents and that the Department violated

Respondents' civil rights. Respondents did not request that the District Court stay this administrative proceeding.

The staying of this proceeding would be contrary to the fundamental principles of administrative law. The Department therefore asks this Hearing Officer to deny the Respondents' Motion for Stay.

The Legislature has clearly delineated the procedure for imposition of administrative sanctions for violations of the Act and for an appeal therefrom. The Department, by initiating the administrative proceeding against Respondents, is merely following those procedures.

Section 406 of the Act provides in part:

"(b)...the sanctions provided in subsection (a) of this section may be imposed only after notice and hearing...[.]"

Subsections (a) and (b) of Section 409 of the Act provide in part:

"(a) Any person aggrieved by a **final** order of the Administrator may obtain review by the Commission...[.]"

* * *

"(b) Any person aggrieved by a **final** order of the Commission..., may obtain review of the order by the Supreme Court of Oklahoma." [emphasis added]

It is a well established principle of administrative law that a respondent must exhaust his administrative remedies before seeking judicial review. *Martin v. Harrah Independent School District*, 543 P.2d 1370 (Okl.1976). The Respondents have not exhausted their administrative remedies.

In *McKart v. United States*, 395 U.S. 185 (1969), the United States Supreme Court addressed the doctrine of “exhaustion of administrative remedies”. The Court stated: “since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise.” *Id.* at 194. This rationale was recognized by the Oklahoma Supreme Court in *Martin*.

In analyzing its decision, the court in *McKart* compiled a list of important functions served by the exhaustion doctrine.

First, and most important, the legislature creates an agency for the purpose of applying a statutory scheme to particular factual situations. The exhaustion doctrine permits the agency to perform this function, including in particular the opportunity for the agency to find facts, to apply its expertise, and to exercise the discretion granted it by the legislature. Second, it is more efficient to permit the administrative process to proceed uninterrupted and to subject the results of the process to judicial review only at the conclusion of the process than to permit judicial intervention at each phase of the process. Third, agencies are not part of the Judicial Branch; they are autonomous entities created by the legislature to perform a particular function. The exhaustion doctrine protects that agency autonomy. Fourth, judicial review of agency action can be hindered by failure to exhaust administrative remedies because the agency may not have an adequate opportunity to assemble and to analyze relevant facts and to explain the basis for its action. Fifth, the exhaustion requirement reduces court appeals by providing the agency additional opportunities to correct its prior errors. Sixth, allowing some parties to obtain court review without first exhausting administrative remedies may reduce the agency’s effectiveness by encouraging others to circumvent its procedures and by rendering the agency’s enforcement efforts more complicated and more expensive.

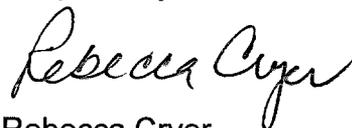
2 Kenneth Culp Davis & Richard J. Pierce, Jr. *Administrative Law Treatise* 309 (3d ed. 1994).

This administrative proceeding is only in its preliminary stages. The Department is attempting to create a record of the alleged violations in accordance with the procedures delineated by the Legislature. The Administrator has yet to issue a final order. This matter is properly before a Hearing Officer and not yet ripe for review by a court.

Conclusion

The Oklahoma Legislature has clearly set forth the procedures to be followed in connection with the imposition of administrative sanctions under the Act. The Oklahoma Legislature has also clearly established the steps to be taken before seeking judicial review. In this proceeding, Respondents are asking that both the process set forth in the Act and the fundamental principles of administrative law be ignored. The Department respectfully requests that the Hearing Officer deny Respondents' Motion.

Respectfully submitted,



Rebecca Cryer,
Enforcement Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on the ___ day of January, 2002, a copy of the foregoing was ^{mailed} delivered to the office of Steve Hunt, attorney for Respondents, at the following address: Southmark of Tulsa, Inc., 5110 S. Yale Ave. Suite 100, Tulsa, OK 74135-7438

Brenda London Smith