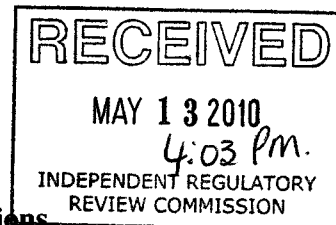


2799



Comments of the Pennsylvania Association for Government Relations

to

The Final-Form of Department of State Regulation #16-50 (IRRC #2799)

Biennial Filing Fee Regulation

The Pennsylvania Association for Government Relations ("PAGR") respectfully submits for your consideration the following comments to the final-form regulation delivered to the Independent Regulatory Review Commission (the "Commission") on April 13, 2010. By way of reference, these comments are a compilation of the comments that PAGR received from its membership. The Mission of PAGR is to promote the purpose and effectiveness of the lobbying profession consistent with the public interest. Further, association members encourage high standards of personal and professional conduct among all lobbyists.

I. Regulatory History of Department of State Regulation #16-50 (IRRC #2799)

In the October 17, 2009 edition of the *Pennsylvania Bulletin*, the Department of State (the "Department") announced its proposed rulemaking to amend 51 Pa. Code §53.1 (relating to biennial filing fee) by increasing the biennial filing fee for individuals and entities required to be registered under Act 134 of 2006 ("Act 134") from \$100 to \$200. Within the announcement, the section entitled "Statutory Authority" stated the following:

Section 13A08(j) of [Act 134] (relating to administration) provides that the Department may by regulation adjust the filing fee established under section 13A10 of [Act 134] (relating to registration fees; fund established; system; regulations) if the Department determines that a higher fee is needed to cover the costs of carrying out the provisions of [Act 134].

Section 1308-A(j) of Act 134, 65 Pa. C.S. §13A08(j), states in pertinent part:

...On a biennial basis commencing in January 2009, the [D]epartment shall review the filing fee established under section 13A10 (relating to registration fees; fund established; system; regulations) and may by regulation adjust this amount if the [D]epartment determines that a higher fee is needed to cover the costs of carrying out the provisions of this chapter. The [D]epartment *shall* publish adjusted amounts in the *Pennsylvania Bulletin* by June 1, 2009, and by June 1 every two years thereafter as necessary. (Emphasis added.)

On October 22, 2009, PAGR submitted the following comments to the Department and the Commission:

Section 13A08(j) of [Act 134] clearly states that if the Department wishes to increase the biennial registration fee for principals, lobbyists and lobbying firms, it “shall” publish the adjusted amounts in the *Pennsylvania Bulletin* by June 1, 2009, and by June 1 every two years thereafter as necessary. Unfortunately, the Department published the adjusted amounts in the *Pennsylvania Bulletin* on October 17, 2009, 139 days after the statutorily-mandated date of June 1, 2009. Because the Department failed to publish the fee increase by June 1, 2009 as required by [Act 134], the Department does not have the statutory authority to promulgate the proposed rulemaking pursuant to Section 5.2(a) of the Regulatory Review Act, and, therefore, we ask that the Department withdraw its proposed rulemaking at this time. In accordance with Section 13A08(j) of [Act 134], the next opportunity the Department has to increase the biennial registration fee is on June 1, 2011.

In its Comment Letter dated December 16, 2009, the Commission reiterated PAGR’s concerns in the following manner:

First, [PAGR] commented that since the Department did not publish the fee prior to June 1, 2009, a new fee cannot be published until the next opportunity, which is by June 1, 2011. Effectively, the issue raised is whether [Act 134] directs the Department to publish an adjusted fee 18 months prior to its effective date. The Department should explain its interpretation of how the October 17, 2009 publication of the adjusted fee to become effective January 1, 2011, is consistent with [Act 134].

In its submission of the final-form regulation, the Department responded to the concerns raised by the Commission and PAGR in the following manner:

[PAGR] commented that section 13A08(j) of [Act 134] requires the Department to publish the adjusted registration fee amounts in the *Pennsylvania Bulletin* by June 1, 2009, and by June 1 every two years thereafter as necessary. PAGR argues that because the Department published the proposed regulations on October 17, 2009 rather than prior to June 1, 2009, the Department is untimely. PAGR found that ‘the next opportunity the Department has to increase the biennial registration fee is on June 1, 2011.’

First, [Act 134] only requires the Department to publish the adjusted registration fee amounts *by* June 1, 2009, and *by* June 1

every two years after, not *on* June 1. Second, the Department is not raising the fee in 2009. The regulations will not go into effect until January 1, 2011. Therefore, in accordance with [Act 134] the Department must publish the proposed regulations adjusting the registration fee by June 1, 2011. By publishing the regulations on October 17, 2009, the Department has notified the regulated community of the proposed adjusted registration fee far in advance of June 1, 2011, in accordance with [Act 134]. Additionally, the effective date of the regulations is on January 1, 2011, because it is the beginning of another biennial registration period. (Emphasis in original.)

II. Standard of Review

PAGR's comments have been drafted in accordance with the standard of review enumerated in Section 5.2(a) of the Regulatory Review Act (the "RRA"), Act of June 25, 1982, P.L. 1227, No. 148, *as amended*, 71 P.S. §745.5b(a), which states as follows:

(a) In determining whether a...final-form...regulation is in the public interest, the commission shall, first and foremost, determine *whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based.* In making its determination, the commission shall consider written comments submitted by the committees and current members of the General Assembly, pertinent opinions of Pennsylvania's courts and formal opinions of the Attorney General. (Emphasis added.)

The dual questions of whether an agency has the statutory authority to promulgate a regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based are questions of statutory construction. The objective of interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. 1 Pa. C.S. §1921(a); *see also Walker v. Eleby*, 577 Pa. 104, 842 A.2d 389 (2004). Generally, the best indication of legislative intent is the plain language of the statute. *Commonwealth v. Shiffler*, 583 Pa. 478, 879 A.2d 185 (2005). Thus, it is well-settled that when the words of a statute are clear and unambiguous, they are "not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. §1921(b); *Pennsylvania Financial Responsibility Assigned Claims Plan v. English*, 541 Pa. 424, 664 A.2d 84 (1995). Furthermore, the "[w]ords and phrases [of a statute] shall be construed according to rules of grammar and according to their common and approved usage[.]" 1 Pa. C.S. §1903(a); *see also In re Nomination Papers of Lahr*, 577 Pa. 1, 842 A.2d 327 (2004). It is only when the words of the statute are not explicit that the Commission should seek to determine the General Assembly's intent through consideration of statutory construction factors. 1 Pa. C.S. §1921(c).

Having said all this, it is worth mentioning that penal statutes are to be strictly construed. 1 Pa. C.S. §1928(b)(1); *Commonwealth v. Booth*, 564 Pa. 228, 766 A.2d 843 (2001). “[S]trict construction does not require that the words of a penal statute be given their narrowest possible meaning or that legislative intent be disregarded.” *Booth*, 766 A.2d at 846. “It does mean, however, that where ambiguity exists in the language of a penal statute, such language should be interpreted in the light most favorable to the accused.” *Id.* It is also worth noting that the aforementioned rules of statutory construction are equally applicable when construing regulations. *Presock v. Department of Military and Veterans Affairs*, 855 A.2d 928 (Pa. Cmwlth. 2004).

Section 1309-A(e) of Act 134, 65 Pa. C.S. §13A09(e), provides for criminal penalties for intentional violations of Act 134 made by principals, lobbyists and lobbying firms. Accordingly, where there is ambiguity in Act 134’s language, that language is to be interpreted in the light most favorable to the regulated community, namely, principals, lobbyists and lobbying firms.

III. Argument

THE COMMISSION MUST DISAPPROVE FINAL-FORM DEPARTMENT OF STATE REGULATION #16-50 (IRRC #2799) BECAUSE THE DEPARTMENT LACKS THE STATUTORY AUTHORITY TO PROMULGATE THE REGULATION AND THE REGULATION FAILS TO CONFORM TO THE INTENTION OF THE GENERAL ASSEMBLY IN ITS ENACTMENT OF ACT 134 IN VIOLATION OF SECTION 5.2(a) OF THE RRA.

A. The Department’s publication of the proposed regulation on October 17, 2009 increasing the biennial filing fee from \$100 to \$200 for the 2011–12 legislative session was untimely, therefore, the Department lacks the statutory authority to promulgate the regulation in violation of Section 5.2(a) of the RRA.

The Department asserts that Section 1308-A(j) of Act 134 only requires the Department to publish the adjusted registration fee amounts *by* June 1, 2009, and *by* June 1 every two years subsequent, not *on* June 1. Section 1308-A(j) of Act 134 states that the “[D]epartment *shall* publish adjusted amounts in the Pennsylvania Bulletin *by* June 1, 2009, and *by* June 1 every two years thereafter as necessary.” (Emphasis added.) Contrary to the Department’s assertion, the General Assembly’s use of the word “shall,” not the word “by,” in Section 1308-A(j) of Act 134 is crucial. Our Supreme Court has emphasized that, while “some contexts may leave the precise meaning of the word ‘shall’ in doubt...this Court has repeatedly recognized the unambiguous meaning of the word in most contexts.” *In re Canvass of Absentee Ballots of November 4, 2003 General Election*, 577 Pa. 231, 843 A.2d 1223, 1231 (2004). *Accord Zane v. Friend Hospital*, 575 Pa. 236, 836 A.2d 25, 32 (2003) (“the verbiage that the documents ‘shall be kept confidential’ is plainly not discretionary but mandatory”); *Oberneder v. Link Computer Corporation*, 548 Pa. 201, 696 A.2d 148, 150 (1997) (“By definition, ‘shall’ is mandatory.”); *Coretsky v. Board of Commissioners of Butler Township*, 520 Pa. 513, 555 A.2d 72, 74 (1989) (“[T]here is no latitude for overlooking the plain meaning” because by definition, “shall” is mandatory.). Moreover, our Supreme Court has recognized that the term “shall” is “mandatory

for purposes of statutory construction when a statute is unambiguous.” *Commonwealth Department of Transportation v. McCafferty*, 563 Pa. 146, 758 A.2d 1155, 1165 n.13 (2000).

Applying the foregoing, the final sentence of Section 1308-A(j) of Act 134 is unambiguous; therefore, the use of the word “shall” is mandatory. Thus, the Department is required to publish the adjusted biennial filing fee at least 18 months prior to its effective date, meaning that if the Department wanted to increase the biennial filing fee for the 2011-12 legislative session beginning on January 1, 2011, it was required to publish the biennial filing fee increase in the *Pennsylvania Bulletin* on or before June 1, 2009. The Department failed to do so, publishing the proposed regulation on October 17, 2009. Accordingly, the Commission must disapprove this final-form regulation because the Department lacks the statutory authority to increase the biennial filing fee for the 2011-12 legislative session in contravention of Section 5.2(a) of the RRA.

B. The Department’s interpretation of Section 1308-A(j) of Act 134, whereby the provision is applied retroactively to the regulated community, is both absurd and unconstitutional; thus, the regulation fails to conform to the intention of the General Assembly in its enactment of Act 134 in violation of Section 5.2(a) of the RRA.

The Department also asserted that pursuant to the plain meaning of Section 1308-A(j) of Act 134, the deadline for the Department to publish the proposed regulation for the 2011-12 legislative session (which begins on January 1, 2011) is June 1, 2011, not June 1, 2009. When ascertaining the intent of the General Assembly in the enactment of a statute, the following presumptions may be used: (1) that the General Assembly did not intend a result that is absurd, impossible of execution or unreasonable; (2) that the General Assembly intends the entire statute to be effective and certain; and (3) that the General Assembly did not intend to violate the Constitution of the United States or the Constitution of Pennsylvania. 1 Pa. C.S. §1922(1)–(3); *see also Street Road Bar & Grille, Inc. v. Pennsylvania Liquor Control Board*, 583 Pa. 72, 876 A.2d 346 (2005); *Commonwealth v. Chase*, 599 Pa. 80, 960 A.2d 108 (2008).

Act 134 was signed into law on November 1, 2006 and its effective date was January 1, 2007. Pursuant to Section 1310-A(a) of Act 134, 65 Pa. C.S. §13A10(a), the amount of the biennial filing fee was \$100 and was to be imposed upon the regulated community for the 2007-08 and 2009-10 legislative sessions. Section 1308-A(j) of Act 134 states in relevant part:

...On a *biennial basis* commencing in January 2009, the [D]epartment shall review the filing fee established under section 13A10...and may by regulation adjust this amount if the [D]epartment determines that a higher fee is needed to cover the costs of carrying out the provisions of this chapter. The [D]epartment shall publish adjusted amounts in the *Pennsylvania Bulletin* by June 1, 2009, and by June 1 *every two years thereafter as necessary*. (Emphasis added.)

Based on the plain meaning of Section 1308-A(j)’s language above, the General Assembly authorized the Department to act in the following ways: (1) beginning in January 2009, to review

whether the biennial filing fee should be increased for the 2011-12 legislative session, and if so, (2) to increase the biennial filing fee by publishing the adjusted amounts via proposed regulation in the *Pennsylvania Bulletin* on or before June 1, 2009. Naturally, if the Department did not publish the proposed regulation in the *Pennsylvania Bulletin* on or before June 1, 2009, then the biennial filing fee would remain unchanged for the 2011-12 legislative session and the deadline for the Department to increase the biennial filing fee for the 2013-14 legislative session would be June 1, 2011. Likewise, if the Department wanted to increase the biennial filing fee for the 2015-16 legislative session, then the deadline for the Department to publish the proposed regulation in the *Pennsylvania Bulletin* would be June 1, 2013 and so on. Based on the plain meaning of Section 1308-A(j)'s language, it is clear that the General Assembly intended this provision to apply prospectively, not retroactively, in order to provide the regulated community 18 months notice that the biennial filing fee would be increased in the next legislative session and to provide the Department, and indirectly the Commission, with enough time to enact the regulation prior to the commencement of the succeeding legislative session. This interpretation of Section 1308-A(j) of Act 134 is consistent with Section 1922(1)–(3) of the Statutory Construction Act, 1 Pa. C.S. §1922(1)–(3), insofar as it is not absurd or unreasonable, it gives effect to Act 134 in its entirety and it does not violate the U.S. or Pennsylvania Constitutions.

Conversely, the Department's interpretation of Section 1308-A(j) of Act 134 mentioned above is violative of Section 1922(1)&(3) of the Statutory Construction Act insofar as such an interpretation is not only absurd, but is also unconstitutional. To restate, the Department asserts that pursuant to the plain meaning of Section 1308-A(j) of Act 134, the deadline to publish the proposed regulation for the 2011-12 legislative session is June 1, 2011, not June 1, 2009. That means that if the proposed regulation increasing the biennial filing fee were published in the *Pennsylvania Bulletin* on June 1, 2011 and the regulation was enacted on December 31, 2012, then the increase in the biennial filing fee could be retroactively imposed upon the regulated community to January 1, 2011, which is when the 2011-12 legislative session began. Such an interpretation of Section 1308-A(j) of Act 134 is absurd and clearly contrary to the plain meaning of the provision, which is prospective, not retroactive, in nature. Moreover, the Department's interpretation of Section 1308-A(j) of Act 134 is unconstitutional insofar as the retroactive application of this provision would deprive the regulated community of a property right without due process of law¹ and would also violate the Contracts Clauses of the U.S.² and Pennsylvania³ Constitutions by impairing pre-existing retainer agreements between lobbyists, lobbying firms and their principals. In light of the foregoing, the Commission must disapprove this final-form regulation because it fails to conform to the clear intent of the General Assembly

¹ The Fourteenth Amendment to the U.S. Constitution states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law..." U.S. CONST. amend. XIV, §1.

² Article I, Section 10, clause 1 of the U.S. Constitution states that "[n]o State shall...pass any...Law impairing the Obligation of Contracts..." U.S. CONST. art. I, §10, cl. 1.

³ Article I, Section 17 of the Pennsylvania Constitution states that "No...law impairing the obligation of contracts...shall be passed." PA CONST. art. I, §17.

in its enactment of Act 134, which was to enact a prospective statute that does not violate the U.S. and/or Pennsylvania Constitutions.

2799

From: Christine Corrigan [familycorrigan@verizon.net]
Sent: Thursday, May 13, 2010 3:53 PM
To: IRRC
Cc: cmcilhinney@pasen.gov; williams@pasenate.com; RepJosephs@pahouse.net; kbenning@pahousegop.com; Smith, James M.; rmulle@attorneygeneral.gov; anclark@state.pa.us
Subject: PAGR Public Comments
Attachments: Microsoft Word - PAGR PUBLIC COMMENTS TO FINAL BIENNIAL FILING FEE REGS _L0406430_.pdf

Mr. Arthur Coccodrilli
Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Dear Mr. Coccodrilli:

Attached please find comments our organization would like to submit re: The Final-form Regulations of Department of State Regulation #16-50 (IRRC #2799). If you have any questions, please feel free to contact me at anytime. Thank you.

Christine Corrigan
Executive Director



Post Office Box 116
Harrisburg, PA 17108-0116
717.540.4391
717.657.9709 fax
info@pagr.org

