

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 25th day of November, 2009, the following order was made and entered:

RE: Declining to Issue Rules Governing Statewide Licenses to Engage in the Business of Issuing Surety Bonds in Criminal Cases

This matter is before the Court pursuant to House Bill 4148, which passed on March 13, 2004, and amended W.Va. Code §51-10-8, relating to the qualifications of bondsmen. In principle part, the amended statute directed the Court to promulgate rules to govern the authority of persons to engage in the bonding business in West Virginia: “The Supreme Court of Appeals shall under reasonable rules, specify the qualifications of persons and corporations applying for authority to engage in the bonding business in criminal cases in the State of West Virginia and the terms and conditions upon which the business may be carried on.” W.Va. Code §51-10-8(a). The amended statute requires the Court “to take into consideration both the financial responsibility and the moral qualities of the person so applying” and imposes other specific requirements that must be satisfied before any person “may be permitted to engage, either as principle or agent, in the business of becoming surety upon bonds for compensation in criminal cases.” *Id.*

On June 30, 2004, the Court provisionally approved amendments to Rule 31.01 of the West Virginia Trial Court Rules, governing Bonding Agents and Bail Bonds. The provisional amendments provide that persons authorized to engage in the bonding business in criminal cases in the State of West Virginia on the effective date of House Bill 4148 shall continue to engage in the business under the local rules and orders under which such person

qualified pursuant to the existing provisions of W.Va. Code §51-10-8. W.Va. Trial Court Rule 31.01(e). The provisional rule also provides that persons intending to make a new application for such qualification are entitled to do so under rules and orders promulgated prior to September 1, 2004. The provisionally approved amendments were published for comment. The period of public comment concluded August 15, 2004. No comments were filed.

By administrative order of July 13, 2004, the Court established an ad hoc committee to study House Bill 4148. The ad hoc committee has now provided its recommendation, together with proposed rules specifying the qualifications of persons and corporations applying for authority to engage in the bonding business in criminal cases in the State of West Virginia and the terms and conditions upon which the business may be conducted.

We have carefully reviewed the recommendation of the ad hoc committee, and we are appreciative of the work undertaken by the committee. In considering the recommendation, we recognize the rule-making authority granted to this Court pursuant to Article VIII section 3 of the West Virginia Constitution, which provides: “The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law.” We are also mindful of the important principle of separation of powers set forth in Article V section 1 of the West Virginia Constitution:

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.

As we held in syllabus point 1 of *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981): “Article V, section 1 of the Constitution of West Virginia, which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion, it is part of the fundamental law of our state and, as such, it must be strictly construed and closely followed.” It is has long been the law in this State “that the plain language of [Article V] calls, not for construction, but for obedience.” *Hodges v. Public Service Commission*, 110 W. Va. 649, 655, 159 S.E. 834, 836 (1931). With these principles in mind, and also mindful of the need to proceed with great caution and delicacy in the act of balancing constitutional provisions, *Bridges v. Shallcross*, 6 W. Va. 562 (1873), we turn now to consideration of whether it is appropriate for the judicial branch to exercise its constitutional rule-making authority to issue statewide licenses to engage in the business of issuing surety bonds in criminal cases. For the reasons set forth herein, we conclude that it is not appropriate, and therefore respectfully decline to exercise our constitutional rule-making authority in the manner directed by House Bill 4148.

The legislative, executive and judicial branches, under the Constitution, are charged with operating their own sphere of duty, independent of and exclusive of the other; so that whenever a subject is committed to the discretion of the legislative or executive department, the lawful exercise of that discretion cannot be controlled by the judiciary, nor can a responsibility clearly within the sphere of the executive or legislative branches be reasonably transferred to the judiciary. Apart from constitutional authority to regulate the practice of law, *Lane v. WV Bd. of Law Examiners*, 170 W.Va. 583, 295 S.E.2d 670 (1982), the licensing of professions and businesses is a matter firmly committed to the legislative and executive branches of government. It is abundantly plain from a review of the West Virginia Code that regulation of

insurance and issuance of licenses to engage in business is not a function that is committed to the judicial branch of government. *See, e.g.* W.Va. Code §33-11A-1 to 33-11A-16 (setting forth the authority of the State Insurance Commissioner); W.Va. Code §31A-2-5 (banking licenses issued by Commissioner of Banking); W.Va. Code §30-9-1 (certified public accountants licensed by Board of Accountancy).

We have not previously had the opportunity to consider whether delegation of authority as contained in House Bill 4148 is constitutionally appropriate. We have previously held, under the prior statutory scheme, that a circuit court's grant of authority to a person to act as a bail bondsman sufficiently resembles a license that it must be treated as a license for purposes of the procedural requirements attendant upon its termination. *State ex rel. Weaver v. Dostert*, 171 W.Va. 461, 300 S.E.2d 102 (1983). The *Weaver* case is not applicable in the current circumstances because it was decided under the prior legislative scheme, and was concerned only with the due process implications of local rules in a particular circuit court. In contrast, House Bill 4148 seeks to delegate to the judicial branch the function of issuing licenses to engage in the business of issuing surety bonds on a statewide basis. Licensing of this nature is clearly not a judicial function. Because, "[t]he Legislature cannot commit to the judiciary powers which are primarily legislative," Syllabus, *Hodges*, 110 W.Va. 649, 159 S.E. 834, we must decline to exercise our rule-making authority in this circumstance.

In so concluding, we do not dilute the constitutional authority to administer the court system through promulgation of court rules that is contained in Article VIII section 3. Indeed, West Virginia Trial Court Rule 31.01 governs matters such as the circumstances and methods for defendants in criminal cases to be admitted to bail, and grants the circuit court

discretion regarding the methods for posting bail. Such matters are appropriately connected to the judicial function and are therefore proper topics to be contained in court rules under our constitutional separation of powers. Furthermore, the circuit courts of this State have inherent authority to conduct a determination as to whether the security for a posted bond is adequate.

For the foregoing reasons, we conclude that the directives of House Bill 4148 would require this Court to exercise a non-judicial function in a manner that is not permitted by the constitution. As Judge Hatcher stated in his opinion in *Hodges*:

This attempt of the legislature to commit one of its great responsibilities to the judiciary is a flattering display of confidence in our department. But we must reject this expansion of our power just as firmly as we should resist a reduction in our rightful authority.

Hodges, 110 W.Va. at 657, 159 S.E. at 837 (1931). This Court's order of June 30, 2004, amending Trial Court Rule 31 to provide extended authority of existing bondsmen to continue conducting bonding business, shall continue until such time as the legislature amends W. Va. Code 51-10-8, as a result of the findings set forth herein.

A True Copy

Attest: //s// Rory L. Perry II, Clerk of Court