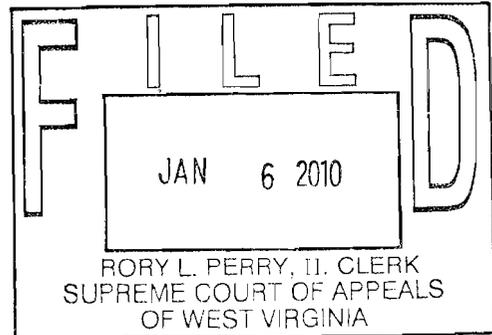


No. 35299
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAVID KOKOCHAK,)
)
Plaintiff below, Appellee,)
vs.)
)
THE WEST VIRGINIA STATE)
LOTTERY COMMISSION,)
)
Defendant, Appellant.)



BRIEF OF DAVID KOKOCHAK, Appellee

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W.Va. Code §29A-4-2

West Virginia Code of State Rules, Section 179-7-2.2c

West Virginia Code §29-22B-1201(a)

West Virginia Code §29-22B-328(b)

West Virginia Code of State Rules, Section 77-1-2.7(c)

West Virginia Code §29A-1-2

MISCELLANEOUS.

Order of Judge Irene Berger dated August 4, 2009, paragraph 9

I. INTRODUCTION.

This matter arises from a ruling by Order entered August 4, 2009, by Kanawha County Circuit Court Judge Irene Berger, which found West Virginia Code of State Rules Section 179-7.2.2(c) void and invalid as promulgated by the West Virginia State Lottery Commission. The ruling below was in response to a Petition for Declaratory Relief filed by David Kokochak, pursuant to West Virginia Code Section §29A-4-2 and a subsequent motion for summary judgment on the merits. It was the conclusion of the Circuit Court below that the rule in question was an “interpretive rule” that regulated private conduct and the exercise of private rights or privileges and had not been properly promulgated as a legislative rule with the benefit of legislative oversight.

II. FACTS.

David Kokochak is a 69-year-old West Virginia resident who owns a building in Chester, West Virginia.¹ Mr. Kokochak hopes to lease the building to a tenant who operates licensed video lottery machines. As is found in an affidavit dated May 15, 2009 and made an exhibit in the case below, Mr. Kokochak is unable to offer the building for lease for such purposes, because it is within 300 feet of a Citgo gas station in Chester. That gas station sells petroleum products used in internal combustion engines. The Kokochak building was recently constructed and is approximately 3600 square feet. The best use of this building, economically, for Mr. Kokochak, would be to operate, or have someone else operate as a tenant, a business that has limited video lottery machines due to its proximity to traffic along West Virginia Route 2 through the city of Chester from the states of Ohio and Pennsylvania and south to Mountaineer Race Track and Gaming Resort (see any state highway map). As Mr. Kokochak cannot lease the building or have it occupied for the purpose he desires, the regulation clearly affects his private property rights, privileges, and interests.

The West Virginia State Lottery Commission admitted below that West Virginia Code of State Rules, Section 179-7-2.2c prohibits the location of limited video lottery licenses within 300 feet of a business that sells petroleum products as fuel for internal combustion engines. As well, the West Virginia State Lottery Commission has maintained that the rule is allegedly “an interpretive rule and was, thus, **never passed by the legislature...**” (emphasis supplied) (Answer at paragraph 7)

¹ See affidavit of Mr. Kokochak dated May 15, 2009, filed below

The regulation in question states as follows:

Section 179-7-2.2: “Licensed limited video lottery location approved by the commission,” as the term is found in W.Va. Code §29-22B-1201(a), means the location in excess of the following straight-line distances from any of the following places: ... 2.2c. The location is at least three hundred feet from a business that sells petroleum products capable of being used as fuel in an internal combustion engine. (emphasis supplied)

Importantly, the West Virginia State Legislature in West Virginia Code §29-22B-328(b), only prohibited lottery machines in

“... a place of business that sells petroleum products in conjunction with the sale of other retail products which may include but are not limited to tobacco, alcohol, or food products, nor may such a place of business establish a separate room or building which is a part of, contiguous to, or adjoining the place of business as a restricted access adult-only facility.” (emphasis supplied)

The lottery commission regulation in question unconstitutionally alters the statute adopted by the legislature. The statute simply prohibits licensed video lottery locations from being “part of contiguous to, or adjoining” a convenience-type store; the regulation prohibits limited video lottery within “300 feet” of a gas station. This is an extraordinary extension of the statute, since locations even across the street or down the block from a convenience-type gas station are now prohibited. The regulation in question clearly denies the Petitioner the “specific benefit” of a limited video lottery license location, to the extent his building is located within 300 feet of a business that sells petroleum products used for internal combustion engines.

III. STANDARD OF REVIEW.

The leading case in this area is Appalachian Power Company v. State Tax Department, 95 W.Va. 573, 466 S.E.2d 424 (1995). Under syllabus pt. 2 of that case, this Court must first determine whether or not the rule of the administrative agency below is an “interpretive rule” or a “legislative rule.” In the state of West Virginia, interpretive rules and legislative rules are defined by statute, as set forth below.

IV. ARGUMENT.

A) The regulation in question is a “legislative rule” which was never approved by the legislative rule-making committee or exempted from approval by the legislature, pursuant to W.Va. Code §29A-3-9, et. seq.

In Simpson v. West Virginia Office of Insurance Commissioner, 223 W.Va. 495, 678 S.E.2d 1 (W.Va. 2009), this court held:

“When determining a rule’s validity, the first step is to determine whether the rule in question is interpretive or legislative. In reviewing a rule or regulation of an administrative agency, a West Virginia court must first decide whether the rule is interpretive or legislative. If it is interpretive, a reviewing court is to give it only the deference it commands. If it is a legislative rule, the court first must determine its validity. Assuming its validity, the two-pronged analysis from Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed 2d 694, should be applied.”

West Virginia Code Chapter §29A-1-2(c) defines an “interpretive” rule:

as every rule, as defined in subsection (i) of this section, adopted by an agency independently of any delegation of legislative power which is intended by the agency to provide information or guidance to the public regarding the agency’s interpretations, policy or opinions upon the law enforced or administered by it and which is not intended by the agency to be determinative of any issue affecting private rights, privileges or interests...(emphasis supplied)

The definition of a “legislative rule” is set forth in West Virginia Code §29A-1-2(d):

Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the legislature, has (1) the force of law, or (2) supplies a basis for the imposition of civil or criminal liability, or (3) grants or denies a specific benefit. Every rule, which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule... (emphasis supplied)

The Simpson court went on:

“... once a rule has been determined to be a legislative rule, its validity must be determined. Syllabus pt. 2, in part, Appalachian Power Co., 195 W.Va. 573, 466 S.E.2d 424. In Syllabus pt. 1, in part, of Chico Dairy Co. Store No. 22 v. West Virginia Human Rights Commission, 181 W.Va. 238, 382 S.E.2d 75 (1989), we held that a rule promulgated by the West Virginia Human Rights Commission was not valid because ‘[that rule is a legislative rule’ under W.Va. Code §29A-1-2(d), as amended, but was not submitted to the legislative rule-making review committee for its approval as required by W.Va. Code §29A-3-9 to 29A-3-14, as amended...

... Therefore, we hold that a legislative rule is valid if (1) it is submitted to the legislative rule-making review committee for approval, as required by W. Va. Code §29A-3-9, et seq., or (2) the Legislature expressly exempts it from such legislative rule-making review and approval pursuant to W.Va. Code §29A-1-3(d).”

The Lottery Commission regulation herein was neither submitted to the legislative rule-making committee for approval (along with the other requirements of W.Va. Code §29A-3-9), nor does it fall with any exemption to obtaining such approval. Judge Berger found below that Rule 179-7-2-2.c regulated private conduct and the exercise of private rights or privileges by precluding businesses within 300 feet of a gas station (a business that sells petroleum products for use in internal combustion engines) from being a licensed video lottery location.

The Circuit Court below also held that:

The unambiguous language of West Virginia Code §29-22B-1201(a) does not give the Respondent (Lottery Commission) legislative authority to promulgate a rule relative to distances but states only that the terminals can be placed in “licensed...locations approved by the Commission.”

In Chico Dairy Company, Store No. 22 v. West Virginia Human Rights Commission, 181 W.Va. 238, 382 S.E.2d 75 (1989) 2, this court struck down a legislative rule adopted by the West Virginia Human Rights Commission which defined handicapped persons for the purposes of the Human Rights Act to include persons who did not, in fact, have a handicap but who were regarded as having a handicap. The Chico Dairy court found that such a rule was invalid because the rule was never submitted to or reviewed by or approved by the legislative rule-making review committee and the legislature as a whole, per W.Va. Code §29A-3-9 to §29A-3-14 (syllabus pt. 1).

In Chico, the complainant was a young lady who was blind in her left eye. That eye had been surgically removed when she was an infant to abate cancer and she had since worn a prosthesis or artificial eye. The socket around the eye was sunken or hollow and, in the opinion of the store manager, her “facial deformity” was not something a vendor or customer “would like to encounter.” 382 S.E.2d 78. The hearing examiner** in that case found that although there had been no unlawful discrimination by the employer on account of her being blind in one eye, there had been discrimination based upon the perception of the employer or supervisor that the complainant’s facial deformity was “unsavory and unacceptable.” The

² The undersigned counsel was the hearing examiner in the Chico Dairy case.

hearing examiner expressly found that the complainant's facial deformity in no way affected her ability to perform the duties as a store manager in a satisfactory manner. Id.

The rule in question in the Chico Dairy case, as adopted by the West Virginia Human Rights Commission, was West Virginia Code of State Rules, Section 77-1-2.7(c), in which the Commission defined a handicapped person as one who actually had a handicap or was "regarded as having such a handicap." Our Supreme Court overturned the West Virginia Human Rights Commission's decision based upon the fact that the regulation expanded the West Virginia statutory definition of a handicap by including persons who were "regarded" as having substantial learning impairment. The Court stated that the rule was:

"... a 'legislative rule' and as such is invalid, not having been properly promulgated in accordance with the statutory requirements. Moreover, this rule is invalid because it clearly enlarges the statutory definition of the "handicap" contrary to the obvious legislative intent. 382 S.E.2d 80.

Because the West Virginia State Administrative Procedures Act (W.Va. Code Chapter §29A-3-1, et seq.) had not been followed, the rule was invalid. The Court went on to find that the rule "... expressly extends the statutory definition of 'handicapped' so as to form a basis for the imposition of civil sanctions under the act, as is done in [that] case; the rule confers a right not provided by law; the rule affects private rights and purports to regulate private conduct."

Almost identically, the rule in the case under consideration herein, Rule 179-7.2.2(c), expands the definition of locations that are unable to obtain a limited video lottery license. The exclusion of properties within 300 feet of a business that sells petroleum products as fuel for internal combustion engines is not found anywhere in the statutory scheme and is clearly a legislative rule promulgated by the agency without legislative approval. As such, it must be overturned under the Chico Dairy standard and other decisions of the West Virginia Supreme Court of Appeals.

Further, in Ranger Fuel Corporation v. West Virginia Human Rights Commission, 180 W.Va. 260, 376 S.E.2d 154 (W.Va. 1988) at syllabus point 4, this Court held that the rules and regulations of a state agency "... must faithfully reflect the intention of the legislature; when there is clear and unambiguous language in the statute, that language must be given the

same clear and unambiguous force and effect in the Commission's rules and regulations that it has in the statute."

The regulation in question promulgated by the West Virginia Lottery Commission does not, in fact, "faithfully reflect the intention of the legislature" with regard to limited video lottery locations. Rather, it greatly expands the prohibition of limited video lottery locations in direct contravention to the clear and unambiguous language ("part of, contiguous to, or adjoining...") in the statute set forth hereinabove. A state rule or regulation that denies a private citizen the use of his property for purposes that are otherwise permitted to others clearly "affects" that citizen's private rights. The issue is not whether Mr. Kokochak has a property right to a license previously issued; rather, it is whether or not Mr. Kokochak is being denied the right to apply and receive a LVL license or rent to a licensee because of a legislative rule promulgated by the Lottery Commission, which was never approved by the legislative rule-making committee.³

Judge Berger went on at paragraph nine of her ruling to opine that it was:

" . . . important to note that the West Virginia legislature did, in fact, specifically address the issue of location of limited video lottery retailers in West Virginia Code §29-22B-1202. It specifically excludes certain locations. As argued by the Respondent in another context (below), if there is any ambiguity regarding the legislature's intent to exclude particular locations from its prohibition in this statute, the maxim '*expressio unius est exclusio alterius*' applies here. The specific mention (and exclusions) of certain location(s) implies that other locations would not be excluded. The exclusions are not to be accomplished by interpretive rule." (See August 4, 2009, Order at paragraph 9)

West Virginia Code §29A-1-2 defines what an "interpretive" or "legislative" rule is as promulgated by any agency. Those definitions (not entirely verbatim) are as follows:

An **interpretive rule** is one that is "intended by the agency to provided information or guidance to the public regarding the agency's interpretations,

³ It should be noted below that Judge Berger overruled the West Virginia State Lottery Commission's motion to dismiss based on the fact that Mr. Kokochak had not already applied for a license. In fact, the language of West Virginia Code §29A-4-2 dealing with declaratory judgments challenging rules or regulations is extremely broad and gives standing to any person "when it appears that the rule, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the Plaintiff or Plaintiffs." It is precisely the "threat" that the regulation posed to the ability of Mr. Kokochak to lease his property to a person for limited video lottery purposes which gave him clear standing under the declaratory judgment rule below.

policy or opinions upon the law enforced or administered by it and which is **not** intended by the agency to be determinative of any issues affecting **private rights, privileges, or interests.**” (emphasis supplied)

A **legislative rule** is one that, among other things, under our Code “grants or denies a specific benefit.”

Because the Petitioner in this case, by virtue of Rule 179-7-2.2c, would be unable to place limited video lottery machines on his property because it is within 300 feet of a business that sells petroleum product as fuel for internal combustion engines, his “private rights, privileges or interests” are clearly affected. The rule by its very nature is not an interpretive rule but is a legislative rule.

At paragraph seven of its answer, the State Lottery Commission admitted that this rule was never approved or passed by the legislature. It is, thus, void as a matter of law and has no force or legal effect.

There is nothing in Rule 179-7-2.2c that is “interpretive” in nature. It does not “provide information or guidance to the public regarding the agency’s, interpretations, policy, or opinions upon the law in force or administered by it... “ Rather, it is one that clearly affects “private rights, privileges, or interests.” Its clear purpose is to prohibit (for whatever reason) video lottery sales up to a football field away from gas stations.

In *Simpson*, 678 S.E.2d, at syllabus pt. B, this Court recognized that “A legislative rule of an administrative agency is valid (1) if it is submitted to the legislative rule-making review committee for approval... or (2) the legislature expressly exempts it from such legislative rule-making review and approval.” In the case at bar, there was no submission by the West Virginia Lottery Commission of the rule in question to the legislative rule-making review committee for approval, nor did the legislature expressly exempt the West Virginia Lottery Commission’s expansion of the statutory language.

B) Even if the rule is “interpretive” it should be rejected because of its lack of “Inherent Persuasiveness.”

In Appollo Civic Theatre, Inc. v. State Tax Commissioner, 223 W.Va. 79, 672 S.E.2d 215, 221-222 (W.Va. 2008) (citing Appalachian Power Co. v. State Tax Commissioner, 195 W.Va. at 583, 466 S.E.2d at 434), this Court recognized that:

“Interpretive rules by an agency ‘are entitled on judicial review only to the weight that their inherent persuasiveness commands.’ ”

The Apollo court rejected the tax commissioner’s interpretive rule.

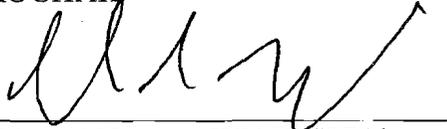
Inasmuch as the rationale of prohibiting the use of limited video lottery machines within 300 feet of a gasoline station is not “inherently persuasive,” this Court should give the agency no deference whatsoever. See also, Family Medical Imaging, LLC v. West Virginia Health Care Authority, 218 W.Va. 146, 624 S.E.2d 493, 499 (W.Va. 2005) (articulated agency reasoning was “persuasive.”)

CONCLUSION.

As set forth in the above argument and for good cause shown, this Court should affirm the Circuit Court’s ruling below.

Respectfully submitted,

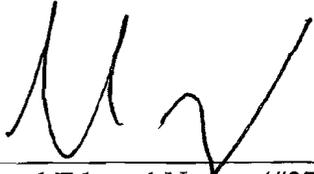
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CERTIFICATE OF SERVICE

Service of the foregoing **BRIEF OF DAVID KOKOCHAK** was had upon the Appellant by providing a true and accurate copy to its counsel of record, Scott E. Johnson, Asst. Attorney General, Office of the Attorney General, State Capitol Complex, Bldg. 1, Room W-435, Charleston, WV 25305, and upon William B. Richardson, Jr., 325 Seventh Street, P.O. Box 266, Parkersburg, WV 26102, all via overnight U.S. Mail, postage prepaid, on this 5th day of January, 2010.

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