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FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2009 AUG -5 AM 9:13

DAVID KOKOCHAK,)

Petitioner,)

vs.)

THE WEST VIRGINIA STATE)

LOTTERY COMMISSION, a state agency,)

Respondent.)

C.A. NO. 09-C-156

CATHY S. GAYSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

RECEIVED

AUG 06 2009

Attorney General Office
Tax Division

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

Under consideration by the Court is Petitioner's Motion for Summary Judgment and Respondent's reply.

1. This Court has previously found that this matter is appropriately brought before it for a declaratory judgment action.

2. This Court finds that there are no factual disputes relative to the motion for summary judgment. The Petitioner desires to lease a building that is located within 300 feet of a business that sells petroleum products and wishes to have licensed, limited video lottery machines on the premises. West Virginia Code of State Rules 179-7-2.2c prohibits Petitioner from obtaining such a license.

3. Respondent admits that West Virginia Code of State Rules 179-7-2.2c is an interpretive rule, as opposed to a legislative rule. In other words, there is no claim that the rule was promulgated by specific authorization of the legislature.

4. West Virginia Code §29-A-1-2(c) defines an interpretive rule as one which is:

"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. An interpretive rule may not be relied upon to impose a civil or criminal sanction nor to regulate private conduct or the exercise of private rights or privileges nor to confer any right or privilege provided by law ..."

5. West Virginia Code §29-22B-328(b) states that a “restricted access adult-only facility” excludes

“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 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.”

6. West Virginia Code §29-22B-1201(a) states that

“Video lottery terminals allowed by this article may be placed only in licensed limited video lottery locations approved by the commission.”

7. West Virginia Code of State Rules 179-7-2.2c, which is the basis of the controversy in this case, provides that

“Licensed limited video lottery location approved by the commission, as the term is found in West Virginia Code §29-22B-1201(a), means the location in excess of the following straight-line distances from any of the following places: ... 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.”

8. After careful consideration of all the above and the arguments made in the parties’ written submissions, it is clear that Rule 179-7-2.2c does, in fact, “regulate private conduct” and the “exercise of private rights or privileges” and “confers rights or privileges” when it precludes businesses within three hundred feet of a business that sells petroleum products from being a licensed limited video lottery location. No such restriction was made by the legislature. Further, the unambiguous language of West Virginia Code §29-22B-1201(a) does not give the respondent legislative authority to promulgate a rule relative to distances, but states only that the terminals can be placed only in “licensed ... locations approved by the commission.”

9. Further, it is 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, 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.

10. This court finds that West Virginia Code of State Rules, Rule 179-7-2.2c is in fact a "legislative rule" by definition, and not an "interpretive rule." Because said rule was never authorized or approved by the state legislature, it is void and invalid.

Therefore, the Court finds Rule 179-7-2.2c to be invalid for the reasons stated and thus, **GRANTS** the Petitioner's Motion for Summary Judgment, preserving the Respondent's objection and exception.

The Clerk is directed to provide attested copies of this Order to all counsel of record.

IT IS SO ORDERED.

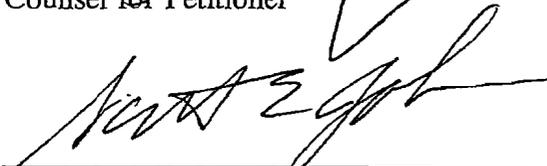
ENTER this 4th day of August, 2009.


JUDGE IRENE C. BERGER
Thirteenth Judicial Circuit

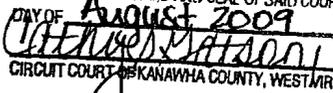
AGREED as to form:



Counsel for Petitioner



Counsel for Respondent

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT,
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 5
DAY OF AUGUST 2009

CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA *ci*