

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

PARKERSBURG BPO
ELKS LODGE #198
Appellant,

VS.

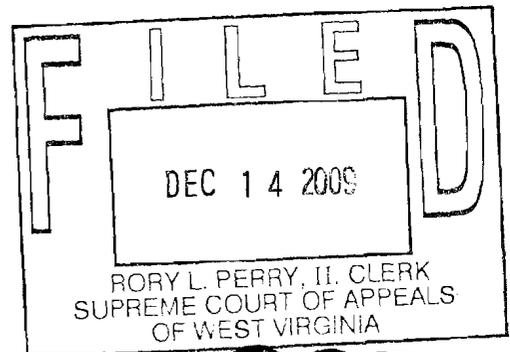
SUPREME COURT APPEAL # 35300

THE WEST VIRGINIA STATE LOTTERY COMMISSION
Appellee.

ADMINISTRATIVE APPEAL FROM KANAWHA COUNTY CIRCUIT COURT

APPELLANT ELKS LODGE BRIEF

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COPY

KIND OF PROCEEDING

This case concerns the legal authority of the 7 member state lottery commission to enforce an interpretive rule which adds restrictions that effectively deny lottery licensure to businesses which the legislature has predetermined are eligible to obtain video lottery licensure. By statute, ABCC licensed beer taverns and private clubs are entitled to operate terminals. However, the interpretive rule states that no video lottery location may be located within 300 feet of a church and other sites such as schools or museums when measured from closest building corners. None of these restrictions are authorized by any statute. Enforcement of this rule has the effect of denying licensure to entities that have valid ABCC licenses such as the Elks Lodge. A hearing examiner and circuit judge have both upheld the rule in this case. However, in a related case which has been consolidated with this one, Judge Irene Berger has declared the rule invalid.

FACTS

The Elks Lodge holds licenses issued by the ABCC to sell beer and to also operate a private club at a downtown Parkersburg location. These licenses entitle it to be eligible to obtain video lottery terminals both by statute and also by legislative rules of the Lottery Commission. (See WV Code 29-22B-504(3) and CSR 179-5-3.3.) The Parkersburg Board of Zoning Appeals has also approved the club site for the operation of video lottery terminals. However, the lodge's application for a license to operate video lottery terminals at its facility was denied by the Lottery Commission. The denial was based on an interpretive rule of the commission (CSR 179-7-2.2) which denies licensure to establishments that are within a 300 foot straight line distance from a church. Significantly, the limitation imposed by this interpretive rule is absent in both the statute and the legislative rule which implements that statute. In fact,

the only restriction in either of them is that a proposed video lottery location may not be within 150 feet of another lottery site. See WV Code 29-22B-1202 & CSR 179-5-20 .

The Elk’s challenge to enforcement of this rule was denied administratively and this denial was upheld on appeal, following oral argument, by Judge L. D. Egnor, who was sitting by assignment. This appeal follows that ruling.

ASSIGNMENT OF ERROR

The purely legal question on appeal is, can the state lottery commission enact an interpretive rule which denies lottery licensure to businesses which are specifically authorized by the legislature to obtain video lottery machines? This appeal asserts that Judge Egnor’s application of the law to the facts of this case is subject to plenary review and that his decision on the question of law is clearly wrong and should be reversed following de novo review.

AUTHORITY

Bowers v. W. Va. Office of the Ins. Commissioner, No.35036, slip op.,(Oct 29,2009).....5

Chico Dairy v WV Human Rights Commission, 181 WV 238, 382 SE2d 75,(1989).....5

Cookman Realty Group v. Taylor, 211 WV 407, 566 SE2d 294, (2002).....5

Lovas v. Cosolidation Coal Co., _ WV _, 662 SE2d 645, (2008).....5

Simpson v. West Virginia Office of Ins.Commissioner, No.34368 ,slip op.,(April 30, 2009)....6

W. Va. Code:

11-16-8 (a) (5).....3

29-22B-402(2).....5

29-22B-504(3).....1,3

29-22B-1201(a).....4

29-22B-1202.....2,3

W. Va.. Code of State Rules (CSR)

175-2-3.2.4.c.....	3
179-5-1.....	4
179-5-3.3.....	1
179-5-20.....	2
179-7-2.2.....	1,3,4,6

ARGUMENT

The legislation establishing video lotteries was enacted in 2001. It contains over 165 separate sections. It specifically authorizes licensed private clubs and/or establishments licensed to sell beer to obtain video terminals unless they are found to be within 150 feet of a pre-existing video lottery facility. (See respectively W. Va. Code sections 29-22B-1202(a) and 29-22B-504(3). There is no requirement in the act which pertains to the location of a lottery facility in relation to the distance from a church or any other entity. However, the lottery commission, on its own, has enacted interpretive rule 179 CSR 7-1 et seq. (2006) which in section 2.2 prohibits lottery licensure to a location that is within 300 feet of a church and other sites such as schools or museums when measured from closest building corners. Appellant's application for a license was denied by this interpretive rule due to being within 300 feet of a church as so measured. Appellant contends that this rule is invalid as contrary to the lottery enabling legislation.

As stated, premises that are licensed to sell alcohol are entitled by law to receive video terminals. Those establishments already have restrictions imposed on them in relation to their distance from a church. See W. Va. Code 11-16-8 (a)(5) which establishes the distance for beer taverns as 300 feet when measured from front door to front door along the sidewalks and the regulation for private clubs which is set forth in 175 CSR-2-3.2.4c, (2007). That regulation has

no definite established distance but does require a determination that the proposed private club location would not adversely impact the activities of a church. The legislature would be cognizant of these restrictions and obviously has chosen not to impose any additional distance requirements on those ABCC licensed businesses in order for them to qualify for lottery licensure. However, the challenged interpretive rule does create additional unauthorized restrictions. For instance, the challenged lottery rule requires the distance measurement to be taken from the closest building corners and not from front door to front door along the sidewalks as it is required to be measured by the statute which regulates the licensing of establishments which sell beer.

The lottery commission justifies its rule by attempting to create an ambiguity where none exists. The interpretive rule in question seeks to further define W Va. Code 29-22B-1201(a) which states, "Video lottery terminals allowed by this article may be placed only in licensed video lottery locations approved by the commission.", (emphasis added). The underlined language is not a word of art which requires interpretation. There is simply no ambiguity for the commission to interpret as it attempts in 179 CSR 7-2.2(b)&(c). The underlined language does not give the lottery commission carte blanche to promulgate rules. Certainly that language can not be contorted to allow the commission, on its own, to add the restrictions in subparts (b) & (c) requiring that any proposed location must be more than 300 feet from a church, school, daycare center, perimeter of a public park or a business that sells petroleum products which are capable of being used as fuel for an engine when those same restrictions are not legislatively sanctioned by either statute or properly adopted legislative rule.

These provisions clearly expand restrictions and effectively unlawfully amend the controlling legislation as set forth in the statute and the approved legislative rules in 179 CSR 5-1 et seq. which were enacted following passage of the statute. Neither the statute nor the approved

legislative rules authorize the restrictions imposed by the challenged interpretive rule. To the contrary, the legislature has specifically stated that the lottery commission may not enact rules which are inconsistent with its legislative intent. See W. Va Code 29-22B-402(2). It is also black letter law that an agency may not, under the guise of interpretation, expand, modify or repeal rights granted by statute. In her decision, Judge Berger correctly applied this principle by finding that the challenged interpretive rule did affect private rights and was contrary to legislative intent and therefore unenforceable.

Numerous cases support this conclusion. For instance, in Chico Dairy v. WV Human Rights Commission, 181 WV 238, 382 SE2d 75, (1989), the court refused to allow an enforcement agency to expand, by rule, the definition of handicap beyond what was set forth in the statute. Likewise, in Cookman Realty Group v Taylor, (per curiam), 211 WV 407, 566 SE2d 294, (2002), an agency's attempt to enforce a rule to impose remediation costs on a non-offending landowner on whose land environmental waste had been deposited was refused as not being allowed by the controlling statute. More recently, in workers' compensation litigation, two rules have been declared invalid as being in conflict with controlling legislation. In Lovas v. Consolidation Coal Co., __ WV __, 662 SE2d 645, (2008), a rule mandating closure of medical claims after 6 months of inactivity was found to be void as conflicting with the controlling legislation. Also, in Bowers v. WV Office of Insurance Commissioner, No.35036, slip op., (Oct. 29,2009), a rule requiring psychiatric claims to be disallowed if not presented for consideration within 6 months of an injury was considered and declared to be invalid. These cases all discussed the interplay between legislation and agency rules declaring that an agency may not create rules which contravene legislative intent as set forth in the controlling legislation.

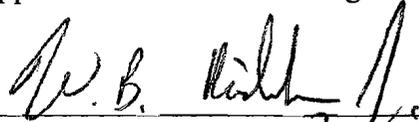
Despite its title, the challenged interpretive rule in this case is in actuality a legislative rule and not an interpretive rule as it does regulate private conduct and the exercise of private

rights or privileges. This is the basis for Judge Berger's declaration that the rule is invalid. That decision is also supported by the case of Simpson v. West Virginia Office of Insurance Commissioner, No.34368, slip op.,(April 30, 2009), in which rules concerning workers compensation disability award guidelines were considered and the difference between legislative and interpretive rules was discussed as well as the proper analysis to use when reviewing each of them. The rules in that case were determined to be legislative as they affected the award of benefits. Likewise, the challenged lottery interpretive rule concerns the granting of a benefit being the license and is in reality a legislative rule which has not been submitted for review.

In the case sub judice the Elks' Lodge has introduced proof that it has ABCC licenses to sell both beer and liquor. By statute, these licenses allow it to obtain video lottery terminals unless the club is within 150 feet of a previously licensed lottery business. For the reasons stated herein, the lottery commission does not have the authority to effectively amend the statute by imposing additional restrictions, by interpretive rule, which are not authorized by the legislature and which deny the Elks Lodge a lottery license. The interpretive rules contained in 179-7-2(b) and (c) should be declared invalid.

RELIEF SOUGHT

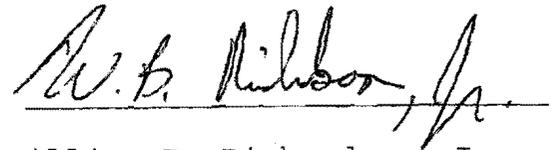
Petitioner requests that the Circuit Court decision be reversed due to error of law and that the Lottery Commission Interpretive Rules in 179 CSR 7-2 (b) and (c) be declared void and that this matter be remanded to the lottery commission with directions to continue to process the application of the Elks' Lodge to operate video terminals.



William B. Richardson, Jr., State Bar # 4557

CERTIFICATE OF SERVICE

I certify that a copy of this appeal brief was sent to The W Va Lottery Commission, by US Mail, postage prepaid to Scott Johnson, Asst. Attorney General, State Capitol, Bldg. 1 Rm. W-435, Charleston, WV 25305, on Dec, 11, 2009 and to Michael Nogay PO Box 3095, Weirton, WV, 26062.



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