

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PARKERSBURG BPO
ELKS LODGE #198
Appellant,

VS.

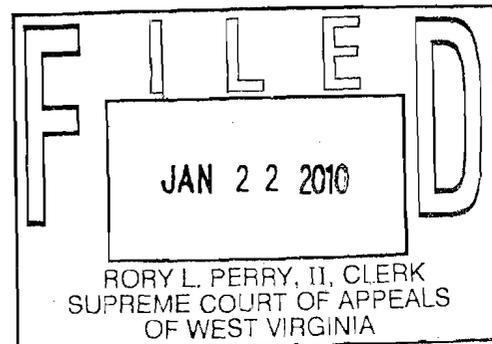
SUPREME COURT APPEAL # 35300

THE WEST VIRGINIA STATE LOTTERY COMMISSION
Appellee.

ADMINISTRATIVE APPEAL FROM KANAWHA COUNTY CIRCUIT COURT

APPELLANT ELKS REPLY BRIEF

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ELKS REPLY BRIEF

WVCSR 179-7-2 IS AN INVALID LEGISLATIVE RULE

Appellant agrees with appellee that the challenged rule must first be examined to determine if it is a legislative rule or an interpretive one. However, appellant asserts that the challenged rule is in fact a legislative rule and not an interpretive rule as the commission urges. This reasoning is based on the case of Paxton v. State Department of Tax and Revenue, 192 W Va 213, 451 SE2d 779, (1994), which counsel for the commission cited in his original brief in the consolidated Kokochak case. In that case, the disabled petitioner was awarded a writ of mandamus requiring the Lottery Commission to issue rules requiring all of its licensed outlets to be accessible to the disabled. The commission had advanced the argument that it was only engaged in licensing decisions without conferring any private benefit. That position was rejected as the court specifically recognized that the granting of a license “[P]rovides an aid, **benefit** or service on a continuing basis to its licensee.” *Id.* At 219 & 785, (emphasis added). The legislature defines a legislative rule as one which “[G]rants or denies a specific benefit.” See W Va Code 29A-1-2(d). The Elk's appeal results from the denial of licensure due to the challenged rule. The challenged rule does therefore directly affect a benefit and is in actuality a legislative rule which has not been duly approved and is therefore invalid.

WVCSR 179-7-2 IS UNCONSTITUTIONAL

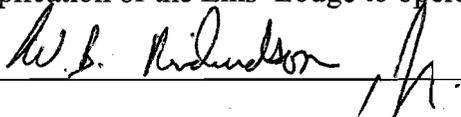
There are also serious constitutional concerns with appellee's position. These are set forth in the case of State ex rel. Mountaineer Park v. Polan, 190 W Va 276, 438 SE 2d 30, (1993). In that case, petitioners sought a writ of mandamus to compel approval of a contract which authorized video lottery terminals at Mountaineer Park. The court refused to award the writ due to concern for Article 6 section 36 of the West Virginia Constitution. The court stated

that the constitution required detailed legislative direction as to how the video lottery should be lawfully conducted in order to justify operation of the terminals. The court also held that the delegation of unbridled rulemaking authority to the lottery commission was unconstitutional. The legislature was constitutionally required to enact laws which provided sufficient guidance for the commission to follow in enacting any rules. Thus, the lottery commission can constitutionally only follow laws not create them as it is attempting to do by the challenged rule.

Moreover, the logical extension of appellee's reasoning would lead to absurd results. The commission's position is that it can use the language in W Va Code 29-22B-1201(a) to justify the unilateral creation of whatever additional conditions or restrictions that it chooses and impose them on any entity that applies for a video license. Certainly, even if the the legislature was constitutionally permitted to convey such broad authority, it would have expressed its intention in a much clearer fashion without the need to massage this code section as the commission is attempting by means of the challenged rule. For instance, contrast W Va Code 29- 22-5(a) (1) enacted in 1985, which specifically exempts the lottery commission from legislative oversight, with the provisions of W Va Code 29-22B-402 in 2001 which clearly require the lottery commission to utilize regular rulemaking procedures to enact limited video lottery regulations.

RELIEF SOUGHT

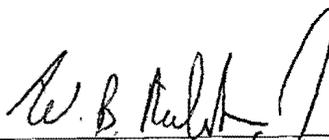
Petitioner requests that the Circuit Court decision be reversed due to error of law and that the Lottery Commission Interpretive Rules in 179 CSR 7-2 (b) and (c) be declared void and that this matter be remanded to the lottery commission with directions to continue to process the application of the Elks'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



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

CERTIFICATE OF SERVICE

I certify that a copy of this reply 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 January 21, 2010, and to Michael Nogay PO Box 3095 Weirton, WV 26062 on the same date.



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