

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

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KANAWHA CO. CIRCUIT COURT

IN THE MATTER OF:
PARKERSBURG BPO
ELKS LODGE #198,

(PARKERSBURG BPO
ELKS LODGE #198,

Petitioner,

v.

Civil Action No. 09-AA-43
The Honorable L.D. Egnor
(sitting by designation)

THE WEST VIRGINIA STATE
LOTTERY COMMISSION,

Respondent.)

ORDER DENYING PETITION FOR APPEAL

On April 14th, 2009, there appeared before the Court Petitioner, by Counsel, Bill Richardson, Jr., and there came also the Respondent, by Counsel, Scott E. Johnson, Assistant Attorney General and Kate Casto, West Virginia Lottery Commission Attorney, and made oral argument upon the Petition for Appeal. After maturely considering the Petition for Appeal, the Brief in Opposition, and the oral argument, the Court is of the opinion to, and hereby does, deny the petition for appeal and affirms the decision of Lottery Commission.

I.

FACTS

The Respondent is the State agency charged with administering the Limited Video Lottery Act. The Petitioner sought a Limited Video Lottery License from the Respondent. The Respondent denied the license under West Virginia Code of State Rules § 179-7-2.2(b), an interpretive rule it

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enacted restricting a Limited Video Lottery License from being issued when the licensee's location will be within 300 feet of, among other places, a church. The Elks exhausted its administrative remedies by seeking review in front of the Commission who delegated the hearing responsibilities to a Hearing Examiner. During the administrative hearing, counsel for the Petitioner stated that the location where the limited video lottery would be occurring would be within three-hundred feet of a churches as measured under the procedure set forth in West Virginia Code of State Rules § 179-7-2.2(b). Thus, the sole issue raised by the Petitioner before the Board, and perforce, here is legal, whether West Virginia Code of State Rules § 179-7-2.2(b) is valid and enforceable.

III.

STANDARD OF REVIEW

In reviewing an administrative decision, a reviewing court pays deference to the factual findings of the tribunal that hears the evidence, but applies a *de novo* standard of review in the interpretation and application of law. *Harmon v. Fayette County Bd. of Ed.*, 205 W. Va. 125, 128, 516 S.E.2d 748, 751 (1999). However, the rule of *de novo* review is not as ironclad as it might seem for, as the Supreme Court of Appeals has explained, “[a]n inquiring court—even a court empowered to conduct *de novo* review—must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion.” *Appalachian Power Co. v. State Tax Dep’t*, 195 W. Va. 573, 582, 466 S.E.2d 424, 433 (1995).

IV.

DISCUSSION

The Administrative Procedures Act provides that an interpretive rule is every rule 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" W. Va. Code § 29A-1-2(3). "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 and is not admissible in any administrative or judicial proceeding for such purpose, except where the interpretive rule established the conditions for the exercise of discretionary power as herein provided." *Id.* Thus, "[w]here any provision of th[e] code lawfully commits any decision . . . or judgment to the sole discretion of any agency or any executive officer or employee, the conditions for the exercise of that discretion, to the extent that such conditions are not prescribed by statute or by legislative rule, may be established by an interpretive rule and such rule is admissible in any administrative or judicial proceeding to prove such conditions[.]" *Id.*

The Petitioner contends that Interpretive Rule 2.2(b) is invalid on two grounds: (1) that it is in reality a legislative rule because it affects private rights; and, (2) that it exceeds the authority granted to the Respondent by the Legislature. The Court deals with each in turn.

First, the Petitioner "has no right to a license or to the granting of the approval sought. Any license issued or other commission approval granted pursuant to the provisions of this article is a revocable privilege and . . . The licensing, control and regulation of limited video lottery by the state does not create . . . the accrual of any value to the privilege of participation in any limited video lottery activity" W. Va. Code § 29-22B-203(1) & (2)(D). Further, the Court observes that limited video lottery is owned by the State, *State ex rel. Cities of Charleston, Huntington and its Counties of Ohio and Kanawha v. West Virginia Econ. Develop. Auth.*, 214 W. Va. 277, 289, 588

S.E.2d 655, 667 (2003), and “[t]he state has a longstanding and substantial interest in regulating the implementation and promotion of its own lottery.” *West Virginia Assoc. of Club Owners and Fraternal Services, Inc. v. Musgrave*, 553 F.3d 292, 294 (4th Cir. 2009). Rule 2.2(b) does not, therefore, regulate the kind of *private* rights or privileges that would make it a legislative rule.

Second, the Limited Video Lottery Act provides that “[v]ideo lottery terminals allowed by this article may be placed only in licensed limited video lottery locations approved by the commission[.]” W. Va. Code § 29-22B-1201(a), but does not detail what a “licensed limited video lottery locations approved by the commission” is. Under the West Virginia Code, an interpretive rule may be used to establish the conditions for the exercise of exclusive agency discretion. W. Va. Code § 29A-1-2(3). “A statute which provides for a thing to be done . . . by a prescribed person or tribunal implies that it shall not be done . . . by a different person or tribunal; and the maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies to such statute.” Syl. Pt. 1, in part, *State ex rel. Battle v. Hereford*, 148 W. Va. 97, 133 S.E.2d 86 (1963). The only body empowered to approve locations is explicitly the Respondent; the exclusive right to approve locations is vested with the Respondent which brings the Rule 2.2(b) clearly within the ambit of the agency discretion portion of West Virginia Code § 29A-1-2(3). And, in so doing, the interpretive rule is limited only when “such conditions are . . . prescribed by statute or by legislative rule[.]” Thus, West Virginia Code § 29A-1-2(c) creates not a negative limitation on agency authority, but imposes the an affirmative obligation on the Legislature. That is, the Legislature must specifically and explicitly *speak* to create conflict between a positive statute and the interpretive rule to invalidate the interpretive rule—an interpretive rule cannot be invalidated (in the agency discretion sphere at least) by Legislative *silence*. Indeed, the very purpose of

administrative agency authority is to provide an agency with the flexibility and authority necessary to protect the public. *Quesenberry v. Estep*, 142 W. Va. 426, 446, 95 S.E.2d 832, 844 (1956).

V.

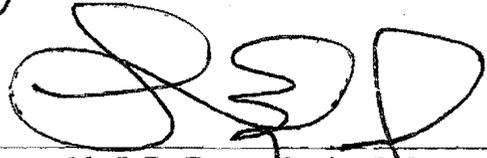
CONCLUSION

For the above reasons stated, the Court **DENIES** the Petition for Appeal and **AFFIRMS** the decision of the Respondent to deny the Petitioner a Limited Video Lottery License and **STRIKES** this case from the docket of the Court.

The objections and exceptions of all parties are noted and preserved.

The Clerk is ordered to send a certified copy of this Order to counsel for the parties.

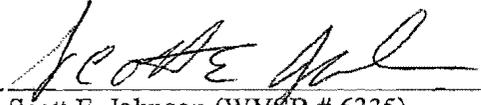
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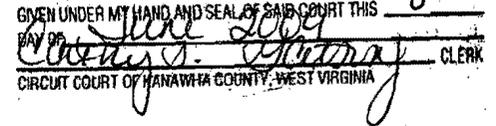


The Honorable L.D. Egnor, Senior Judge
Circuit Court of Kanawha County, West Virginia
(Sitting by Designation)

L.D. EGNOR, JR.
Senior Status Judge
For Judge Zakaib
In His Absence

Prepared pursuant to Trial Court Rule 24.01(d):


Scott E. Johnson (WVSB # 6335)
Assistant Attorney General
State Capitol, Bldg. 1, Rm. W-435
Charleston, WV 25305
Counsel for the 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 8th
DAY OF June 2009
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA