

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LAMAR OUTDOOR ADVERTISING,

Petitioner,

Filed 9-13-10

ADELL CHANDLER, CIRCUIT CLERK

By COH Deputy

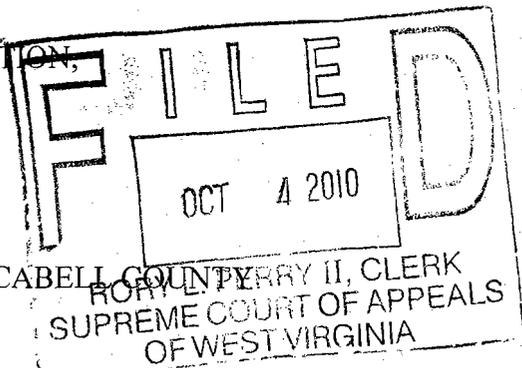
v.

APPEAL NO.: \_\_\_\_\_

CIVIL ACTION NO. 09-C-457

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,  
DIVISION OF HIGHWAYS,

Respondent.



FROM THE CIRCUIT COURT OF CABELL COUNTY, KY.  
HON. L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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PETITION FOR APPEAL

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To the Honorable Justices of the  
Supreme Court of Appeals  
Of West Virginia

A handwritten signature in cursive script, appearing to read "Richard E. Holtzapfel".

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### III STANDARD OF REVIEW AND JURISDICTION

“On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented de novo; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.” Syl. pt. 1, Muscatell v. Cline, 196 W. Va. 588, 474 S.E.2d 518 (1996). “In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.” Syl. pt. 2, Walker v. West Virginia Ethics Commission, 201 W. Va. 108, 492 S.E.2d 167 (1997). The term "de novo" means "[a]new; afresh; a second time." Frymier-Halloran v. Paige, 193 W. Va. 687, 693, 458 S.E.2d 780, 786 (1995) (quoting Black's Law Dictionary 435 (6th ed. 1990)).

Jurisdiction for this appeal is expressly granted to this Court by statute. “Any party adversely affected by the final judgment of the circuit court under this chapter may seek review thereof by appeal the supreme court of appeals of this state, and jurisdiction is hereby conferred upon such court to hear and entertain such appeals upon application made therefor in the manner and within the time provided by law for civil appeals generally.” W. Va. Code § 29A-6-1.

**IV  
PROCEEDINGS BELOW**

Petitioner Lamar is an outdoor advertising company which was served sometime in 2008 by Respondent with a Notice to Remove a certain outdoor advertising sign structure located in Cabell County, West Virginia. Petitioner protested the Notice and appealed to the Commissioner of the West Virginia Department of Transportation, Division of Highways ("WVDOH"). An evidentiary hearing was conducted on November 13, 2008. Thereafter, Petitioner and Respondent each submitted proposed findings of fact and conclusions of law to the Hearing Examiner.

On April 8<sup>th</sup>, 2009, the Hearing Examiner submitted to the Commissioner his Findings of Fact, Conclusions of Law, and Recommended Order wherein he recommended that Lamar's protest be denied and that the Notice to Remove be sustained. The Commissioner adopted the Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order by Order dated April 21, 2009.

Petitioner appealed the Commissioner's findings of fact and conclusions of law in the Circuit Court of Cabell County. A hearing was conducted on Petitioner's appeal on January 14, 2010. By Order dated May 14, 2010, Judge Husted affirmed the Order of the Commissioner. This Petition for Appeal seeks to overturn the lower court's affirmation of the Commissioner's Order.

V  
**STATEMENT OF FACTS**

The material facts in this case are undisputed by the parties. On or about May 20, 1988, West Virginia Department of Highways ("WVDOH") issued Outdoor Advertising Permit Nos. 016-545 and 016-546 to McWhorter Advertising Corp. (hereinafter "McWhorter") for an outdoor advertising sign structure to be located in Cabell County, West Virginia. McWhorter thereafter constructed an outdoor advertising sign structure at the location described in the permits.

On December 17, 1996, McWhorter sent a letter to the WVDOH inadvertently requesting that the aforementioned Permit Nos. 016-545 and 016-546 be cancelled. This cancellation was inadvertent because the structure made subject of those Permits was and is still being used for outdoor advertising. McWhorter apparently meant to cancel other permits in locations where advertising signs had not yet been constructed. The fact that the cancellation was inadvertent is not disputed by the WVDOH and even the Hearing Examiner found that it is more likely than not that McWhorter did inadvertently cancel the permits. As a result, on January 2, 1997, Permit Nos. 016-545 and 016-4546 were cancelled by WVDOH. Once a Permit is canceled, the WVDOH typically has issued Petitioner a "take down" letter informing the permit owner that its structure must be dismantled. No such "take down" letter appears to have been received by either Petitioner or its predecessor in this case.

Prior to and but for the inadvertent cancelation, the subject structure was in compliance with the law.

In or around 1997 and subsequent to the cancellation of the aforementioned Permits, Petitioner Lamar Outdoor Advertising (hereinafter "Lamar") purchased the assets of McWhorter, including the structure made subject of the inadvertently cancelled Permits, which was still in

use. In fact, the sign structure has been used by Lamar since the purchase. From 1997 until 2008, neither Lamar nor the WVDOH had discovered that the subject signs were being used without valid permits.

In the spring of 2008, WVDOH inspectors conducted a compliance inventory of outdoor advertising signs. During the course of this inventory, the WVDOH discovered that the subject structure did not have valid permit tags. The WVDOH notified Lamar of this discovery and requested proof of compliance. Lamar was obviously unable to present proof of compliance in light of the fact that the Permits were inadvertently cancelled by its predecessor.

After explaining that the cancellation of the Permits by McWhorter was inadvertent, Lamar requested the opportunity to do whatever was necessary to bring the Permits into compliance, including paying any past and current fees owed. The WVDOH refused to give Lamar the opportunity to rectify its predecessor's error and bring the once-compliant Permits into compliance. Lamar was instead ordered to dismantle the structure.

VI

ASSIGNMENTS OF ERROR

1. **THE CIRCUIT COURT ERRORED BY FAILING TO FOLLOW CONTROLLING STATE LAW REQUIRING THE RESPONDENT TO HAVE GIVEN PETITIONER THIRTY DAYS TO BRING THE SUBJECT STRUCTURE BACK INTO COMPLIANCE WITH THE LAW.**
  - D. **The Subject Structure Was In Compliance With the Law Until Its Permits Were Inadvertently Cancelled.**
  - E. **The Law Expressly Requires The WVDOH to Give Petitioner Thirty (30) Days to Bring the Structure Back Into Compliance.**
  - F. **The Law Seeks to Promote Business and Enterprise in this State, Not Destroy It.**
  
2. **THE LOWER COURT'S AFFIRMATION OF THE COMMISSIONER'S ORDER EFFECTIVELY DENIED PETITIONER ITS CONSTITUTIONAL PROCEDURAL DUE PROCESS RIGHTS.**

**VII**  
**DISCUSSION OF LAW**

**1. THE CIRCUIT COURT ERRORED BY FAILING TO FOLLOW CONTROLLING STATE LAW REQUIRING THE RESPONDENT TO HAVE GIVEN PETITIONER THIRTY DAYS TO BRING THE SUBJECT STRUCTURE BACK INTO COMPLIANCE WITH THE LAW.**

Outdoor advertising in West Virginia is governed and regulated by W. Va. Code § 17-22-1, *et seq.*, and W. Va. 157 CSR § 6-7. The WVDOH is required to follow these laws when dealing with those who engage in outdoor advertising. The Hearing Examiner and lower court are required to rely upon and employ the precepts found in these laws when deciding disputes concerning outdoor advertising activities.

Here, the subject structure was formerly compliant with W. Va. Code § 17-22-1, *et seq.*, and W. Va. 157 CSR § 6-7, until a clerical error committed by its predecessor rendered it non-compliant. These facts are not in dispute. Upon discovery of the clerical error, the aforementioned law required the WVDOH to give Petitioner thirty (30) days to correct its error. It did not.

In deciding this issue, neither the Hearing Examiner nor the lower court even addressed or followed the thirty day rule and instead upheld the WVDOH's decision that the structure be dismantled. No authority has ever been cited which allows the WVDOH to ignore or forgo the thirty day rule before taking action on a non-compliant structure.

**A. The Subject Structure Was In Compliance With the Law Until Its Permits Were Inadvertently Cancelled.**

It is undisputed that the subject structure was *in compliance* with the state law governing outdoor advertising, specifically W. Va. Code § 17-22-1, *et seq.*, and W. Va. 157 CSR § 6-7, prior to the unintentional cancellation of its Permits. This was not an illegally or secretly

erected structure. The structure was constructed in or around 1988 pursuant to properly obtained Permits and, but for a clerical error, would have continued to have been properly permitted until this day. Both Petitioner and its predecessor were clearly unaware of the inadvertent cancellation and have continuously used the structure as if the Permits were still in effect. Regardless, the fact remains that this structure was formerly in compliance with the controlling rules and regulations.

**B. The Law Expressly Requires The WVDOH to Give Petitioner Thirty (30) Days to Bring the Structure Back Into Compliance.**

Upon discovering that Petitioner's once-compliant structure was not in compliance with W. Va. Code § 17-22-1, *et seq.*, and W. Va. 157 CSR § 6-7, due to a clerical error, the WVDOH was required by that same law to provide Petitioner thirty (30) days to bring the structure *back* into compliance. When "any of the provisions of W. Va. Code § 17-22-1, *et seq.*, or this rule" have been violated, the Commissioner is required to give Petitioner thirty (30) days to "comply with the provisions of W. Va. Code, § 17-22-1, *et seq.*, and this rule." W. Va. 157 CSR § 6-7.5. (Emphasis supplied). *See also* W. Va. Code § 17-22-15(e).

Instead of giving Petitioner the required thirty days, Respondent merely asked Petitioner for *proof of compliance*. This request was rational, reasonable and logical in light of the fact that this sign had been properly erected and used in compliance with the law. Of course, Petitioner was unable to produce proof of compliance due the inadvertent cancelation of the Permits. Upon informing the WVDOH of the clerical error of its predecessor, the WVDOH was required to follow W. Va. 157 CSR § 6-7.5 and give Petitioner thirty days to bring the structure back into compliance. Instead, the WVDOH ordered the structure to be dismantled.

Clearly, the fact that the Hearing Examiner expressly found that Petitioner's predecessor's error in cancelling the Permits was "inadvertent" is important and cannot be disregarded. This undisputed fact reflects that the Permits were not intentionally or willfully cancelled. Instead, this fact shows merely that a clerical error had occurred.

Clerical errors are not uncommon in any profession or business. However, our lawmakers certainly did not intend to have every structure with paperwork that doesn't have every "i" dotted and every "t" crossed dismantled. Instead, a purposely designed safety net was built into the regulations by and through W. Va. 157 CSR § 6-7.5. Clearly, the intent was to give sign-owners the opportunity to correct errors and oversights involving otherwise compliant signs.

In rendering his opinion, the Hearing Examiner failed to even address the applicability or non-applicability of W. Va. 157 CSR § 6-7.5 and instead errantly focused on sections of the law irrelevant to the issues at hand. The Examiner cited multiple sections of the West Virginia Code which demonstrate that a permit is required for a *new* sign, a fact which is not in dispute here. This is not a new sign, but one that has been in existence for over twenty (20) years. The Examiner focused on the fact that a new sign could not be erected in the place where the existing structure stands because of a change in the law that occurred *after* the structure was erected. However, under that same law, this sign was "grandfathered" in because it was already in existence, rendering it merely a "non-conforming sign" which can still be used by Petitioner for advertising purposes. *See* W. Va. 157 CSR §§ 6-2.23 and 6-7.15.b, *et seq.*

The Examiner also focused on the time lapse between the inadvertent cancelation and the discovery of the same and opined that Petitioner's lack of diligence caused it to lose its rights to the structure. Importantly, no authority was cited in support of this finding. Neither the

governing statute nor the applicable regulations provide for such a finding. Regardless, the length of time between when a clerical error is committed and the time it is discovered is irrelevant to W. Va. 157 CSR § 6-7.5 and does *not* render this section inapplicable to the facts at hand. While Petitioner is unable to explain why it never discovered that its predecessor had inadvertently cancelled the Permits, the fact remains that the law provides Petitioner a thirty day window of opportunity to remedy clerical errors like the one here.

It is telling that no authority was ever provided or cited which overrules or supersedes the thirty (30) days to comply requirement as provided for in W. Va. 157 CSR § 6-7.5 and W. Va. Code § 17-22-15(e). No authority has ever been provided which gives Respondent the right to automatically order the dismantling of a structure which was once in compliance with the law without an opportunity to come back into compliance. Since there has never even been any dispute that W. Va. 157 CSR § 6-7.5 and W. Va. Code § 17-22-15(e) applies here and controls the way the WVDOH should have acted in this case, it is the authority upon which the Hearing Examiner's decision should have been based. However, noticeably absent from the Hearing Examiner's findings is even *a single quote, reference or distinguishing comment about any of the aforementioned law cited by Petitioner*, including W. Va. 157 CSR § 6-7.5 and W. Va. Code § 17-22-15(e).

As such, pursuant to W. Va. 157 CSR § 6-7.5, Petitioner should have first been allowed to rectify the clerical error by completing any necessary paperwork and paying any overdue fees owed since the time of the inadvertent cancellation. While Petitioner made this offer to Respondent, it was rejected without option, consideration or hesitation. Instead, the WVDOH ordered the destruction of a revenue-producing structure which cost thousands of dollars to

construct and maintain plus the costs of leasing the property upon which it sits simply because of a clerical error. The destruction and removal of the structure will be quite costly as well, with the end result being that both Lamar and the State stand to lose income. However, because it was constructed and operated in compliance for many years, Lamar should have been given its thirty day opportunity to correct the error that rendered the structure non-compliant.

**C. The Law Seeks to Promote Business and Enterprise in this State, Not Destroy It.**

If the WVDOH's decision to order the structure dismantled is upheld, it will certainly violate the efforts of this State to promote business development and growth. As stated above, the structure was costly to construct and will be costly to tear down. Lamar will lose revenue generated by the structure and the State will lose tax revenue. The message being sent is that clerical errors and oversights will subject West Virginia businesses to punitive consequences. What business would want to come into a state when it knows any part of its business could be instantly eradicated because of a simple clerical error or oversight? Regardless, the fact is that everyone involved will suffer financial consequences if the lower court's decision is upheld. However, there will be no negative consequences for allowing the structure to stand and in fact will contribute to the economy of this State. Clearly, one significant purpose of the thirty-day rule found in W. Va. 157 CSR § 6-7.5 is to promote business enterprise and not to subject businesses to harsh financial consequences simply because of minor mistakes.

**2. THE LOWER COURT'S AFFIRMATION OF THE COMMISSIONER'S ORDER EFFECTIVELY DENIED PETITIONER ITS CONSTITUTIONAL PROCEDURAL DUE PROCESS RIGHTS.**

According to Article III, Section 10 of the West Virginia Constitution, "No person shall be deprived of life, liberty, or property, without due process of law and the judgment of his

peers.” Petitioner's Constitutional procedural due process rights were denied in two separate instances. First, after the Respondent received the December 17, 1996, letter inadvertently canceling the permits, the Respondent failed to issue its standard "take down" letter ordering the dismantling of the sign. If Respondent had issued this letter, McWhorter would have been put on notice of the inadvertent cancellation and would have corrected its mistake at that time. By Respondent failing to follow its own internal procedures, Petitioner was effectively denied its procedural due process rights.

Respondent was again denied Petitioner its procedural due rights when, as outlined in Section 1, *supra*, it failed to follow the law providing due process in this very situation. The Hearing Examiner's decision attempts to gloss over this issue by claiming that Respondent gave due notice to Lamar by affording it an opportunity to present evidence of compliance. As stated above, the State was required under W. Va. 157 CSR § 6-7.5 to give Lamar the *opportunity to comply*, not just the opportunity to present *evidence of compliance*. By asking only for evidence of compliance the WVDOH failed to follow the existing due process procedures contained in the applicable law.

As outlined above, due process provisions are built into the law governing outdoor advertising. Under W. Va. 157 CSR § 6-7.5 and W. Va. Code § 17-22-15(e), the Respondent was required to give Petitioner thirty (30) days to "comply" with the law, not to "present evidence of compliance." Even the legislators understood that there is no way to "present evidence of compliance" unless you are first given opportunity to comply. Since it first became aware that the permits had been inadvertently canceled, Petitioner has begged for the opportunity to come into compliance by correcting the paperwork, reapplying for the permits and paying any back fees due. However, the Respondent has consistently and inflexibly refused to let the

Petitioner do so. Dismantling the sign has been the only "option" provided.

Through procedural due process, the law seeks to avoid the "risk of an erroneous deprivation of the protected interest through the procedures used", Syl. pt. 5, Major v. DeFrench, 169 W.Va. 241, 286 S.E.2d 688 (1982). "When due process applies, it must be determined what process is due and consideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been impaired by government action." Syl. pt. 2, Bone v. West Virginia Department of Corrections, 163 W.Va. 253, 255 S.E.2d 919 (1979). Citing the United States Supreme Court's decision in Morrissey v. Brewer, 408 U.S. 47 (1972), the Bone Court noted that "due process is flexible and call for such procedural protections as the particular situation demands." Bone at 260, 922.

The facts of the Bone case are distinguishable from Petitioner's case and assist in the decision to be made here. Officer Bone was a Correctional Officer I at the State Penitentiary. After refusing to follow orders given by a supervisor, Bone received a letter in the mail saying that his employment had been terminated due to gross misconduct. Bone filed a motion against the West Virginia Department of Corrections claiming that his due process rights were violated when he was terminated from his employment without due notice. However, the court found, after examining the facts in the case, that Bone had been given due notice. The Superintendent had tried to repeatedly meet to him to discuss an accumulation of infractions. After the last violation that had been committed, the Superintendent had tried once again to meet with Bone in his office. After Bone had ignored multiple requests to meet with his supervisors, he was sent the notice of termination. The court found that because he had been given opportunities to comply, his due process rights were not violated. Bone at 255-257, 920-921.

Unlike Bone who was given multiple opportunities to comply, Petitioner was never given even one opportunity to comply. Instead, Petitioner was only given a notice to dismantle the structure. Instead of being flexible as this “particular situation demands”, Respondent took a clearly inflexible and unyielding approach.

The Bone Court also requires that consideration be given to the private interest that is being impaired by the government action. The Major Court made it clear that the private interests at stake in a due process case be carefully examined. “The specific procedural protections accorded to a due process liberty or property interest generally requires consideration of three distinct factors: first, the private interest that will be affected by state action; second, the risk of an erroneous deprivation of the protected interest through the procedures used, and the probably value, if any, of additional or substitute procedural safeguards; and third, the government’s interest, including the functions involved and the fiscal and administrative burdens that the additional substitute procedural requirements would entail.” Syl. pt. 5, Major v. DeFrench, *supra*.

Considering these factors, it is clear that Petitioner should not be ordered to dismantle its structure because of a clerical error. Here, Petitioner is trying to do business in this great State by and through outdoor advertising on a structure that has been in existence for over twenty (20) years. It has not even been suggested that the structure is somehow harmful, deadly or dangerous. While it will not only cost Petitioner a significant sum to dismantle and remove the structure, it will also weaken Petitioner’s business by taking away income. It will cost nothing to leave it up and in fact will generate income for the state. Thus, ordering the dismantling of a structure simply because of a clerical error will work to both the detriment of the Petitioner and the economy of the State of West Virginia.

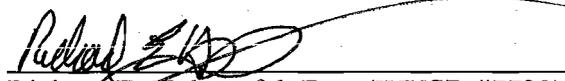
The West Virginia Legislature expressly recognizes the importance of outdoor advertising and seeks to promote it through regulation. W. Va. Code § 17-22-1. As a matter of public policy, the Legislature would never seek the automatic eradication of a twenty-year-old sign in compliance with the law in all other aspects save for a clerical error. The express Legislative intent to promote the business of outdoor advertising along with the catch-all language contained in W. Va. 157 CSR § 6-7.5 and W. Va. Code § 17-22-15(e) make it clear that "procedural protections" should be flexibly given in situations like this in order to promote due process. Bone at 260, 922.

Petitioner should not be erroneously deprived of its protected interest in the subject sign by and through Respondent's inflexible ultimatum to "show proof of compliance" or else dismantle the sign. The Constitution, along with the controlling statutes, case law and regulations, require that the Petitioner be given due process by and through an opportunity to correct its error and comply with the law.

**VIII**  
**PRAYER FOR RELIEF**

WHEREFORE, based upon the above stated, the Petitioner prays this Court to grant the Appeal in this case, overturn the lower court's order affirming of the order of the Commissioner of Highways and order that the Petitioner be given the required thirty days to bring the subject structure into compliance with the law, along with all other and further relief this Honorable Court deems just and proper.

**LAMAR OUTDOOR ADVERTISING,**  
**By Counsel,**

  
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By CDL Deputy

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CIVIL ACTION NO. 09-C-457

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,  
DIVISION OF HIGHWAYS,

Respondent.

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on the 13<sup>th</sup> day of September, 2010, a true and correct copy of the foregoing *Petition for Appeal* was served upon respondent by mailing the same via United States mail, postage prepaid, to the following address:

Jeff J. Miller, Esquire  
WVDOH - Legal Division  
Rm. A519, Building Five  
1900 Kanawha Boulevard, East  
Charleston, WV 25305-0430

  
Richard E. Holtzapfel WWSB #7723