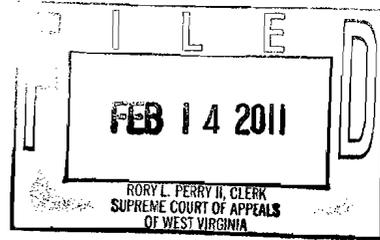


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LAMAR OUTDOOR ADVERTISING,

Petition,



v.

APPEAL NO.: 101285
CABELL COUNTY CA NO. 09-C-457

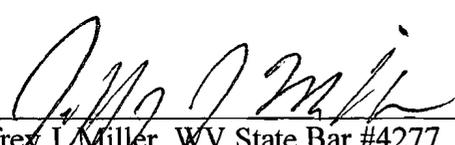
WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS,

Respondent.

FROM THE CIRCUIT COURT OF CABELL COUNTY

RESPONDENT'S SUMMARY RESPONSE TO THE PETITION FOR APPEAL

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



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STANDARD OF REVIEW AND JURISDICTION

Respondent acknowledges jurisdiction in this Court and agrees with the standard of review set out in the Petition for Appeal.

PROCEEDINGS BELOW

Petitioner correctly summarizes the proceedings below in the Petition for Appeal.

STATEMENT OF FACTS

Respondent is in substantial agreement with the statement of facts made by Petitioner in the Petition for Appeal, except as may be noted in Respondent's argument below or to the extent inconsistent with the Hearing Examiner's Findings of Fact.

ARGUMENT IN RESPONSE

Petitioner makes two assignments of error below. First, Petitioner declares that the Circuit Court erred "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." Second, Petitioner argues that "the lower court's affirmation of the Commissioner's Order effectively denied Petitioner its constitutional procedural due process rights." Each assignment of error will be addressed in turn. However, fundamental to both assignments of error is a misapplication of pertinent law to material facts. The two outdoor advertising permits in question, Permits Nos. 016-545 and 016-546, were never revoked – they were cancelled at the express request of Petitioner's predecessor owner and permittee, McWhorter Advertising Corp. Additionally, Petitioner's "clerical error" in requesting that the permits be cancelled was not the only violation of affirmative legal requirements placed on Petitioner by Chapter 17, Article 22 – for over ten years Petitioner failed to renew its permits as required by law and failed to have affixed to the sign structure the permit tags

required by law.

1. **NEITHER THE CIRCUIT COURT NOR THE HEARING EXAMINER ERRED BY FAILING TO CONSTRUE STATE LAW TO REQUIRE RESPONDENT TO GIVE PETITIONER THIRTY DAYS TO “BRING THE SUBJECT STRUCTURE BACK INTO COMPLIANCE.”**

Petitioner repeatedly cites 157 W.Va.CSR §6.7.5 and W.Va. Code §17-22-15(e) as requiring Respondent to give Petitioner thirty days to comply with the provisions of Chapter 17, Article 22.

W.Va. Code §17-22-15(e) provides in pertinent part:

(e) The commissioner may, after thirty days' notice in writing to the permittee, make and enter an order *revoking* any permit issued by him or her under this section upon repayment of a proportionate part of the fee in any case where it shall appear to the commissioner that the application for the permit contains knowingly false or misleading information or that the permittee has violated any of the provisions of this article, unless the permittee shall, before the expiration of the thirty days, correct the false or misleading information and comply with the provisions of this article.

(emphasis supplied). 157 W.Va.CSR §6.7.5 likewise deals with *revocations* of permits by the Commissioner of Highways, not with enforcement of the provisions of Article 22 where permits have long since been *voluntarily cancelled* at the request of the permittee. The rule provides:

7.5. Revocation of Permits. Whenever the Commissioner finds that any material information given on the application for permit is knowingly false or misleading or that the permittee [sic seriatim] has violated any of the provisions of W. Va. Code §17-22-1, et. seq. or this rule, he or she has the authority, after thirty (30) days notice in writing to the permittee, *to enter an order revoking* any permit issued. *Upon revoking a permit*, the Commissioner will repay a proportionate part of the fee unless the permittee shall, before the expiration of thirty (30) days, correct all false or misleading information and comply with the provisions of W. Va. Code, §17-22-1, et. seq. and this rule.

(emphasis supplied). Like the statute, this section of the Rule provides the Commissioner the authority to revoke a permit after thirty days notice to the permittee. In order for a permit to be revoked, it must be in existence. Stated another way, a permit previously cancelled or expired cannot subsequently be revoked because there is nothing to revoke.

Even had the permits not been cancelled at the request of the permittee in January, 1997, they would have expired as a matter of law on June 30th of that year. See W. Va. Code §17-22-15(b): “Application shall be made in like manner for a permit to operate, use or maintain any existing advertising sign, display or device. Permits issued under this section expire on the thirtieth day of June of each year and shall not be prorated and may be renewed upon the payment of a renewal fee as provided in this section. No application is required for a renewal of a permit.” Permittees have the affirmative duty under §15(b) to renew annually any permits they wish to continue, and cannot lawfully operate or maintain a sign subject to the provisions of Article 22 without having such a permit. W. Va. Code §17-22-15(a). The Hearing Examiner found below, in Finding of Fact No. 7, and Petitioner acknowledges, at page 6 of the Petition for Appeal, that sometime in 1997 and subsequent to the cancellations Petitioner purchased the sign structure for which the permits had originally been obtained. At no time since did Petitioner apply for an annual renewal of either permit. While a simple clerical error may have caused the original cancellation, Petitioner’s operation and maintenance of the sign without paying the required renewal fee for over ten years, in violation of law, constitutes at best gross negligence and lack of due diligence.

Similarly, §17-22-16 requires that the permittee affix to each sign a tag bearing the unique permit number, and provides that operation, maintenance or use of the sign without having the tag affixed is prima facie evidence of a violation of the article:

Every permit issued by the commissioner shall be assigned a separate identification number and each permittee shall fasten to each advertising sign or device and each advertising display not posted on an advertising sign a label or marker not larger than two inches by six inches, which shall be furnished by the commissioner, and on which shall be plainly visible the permit number, the

expiration date of the permit and the name of the permittee. Permittees shall be charged five dollars for each label or marker issued. The construction, erection, operation, use or maintenance of an outdoor advertising sign, display or device without having affixed to it a label or marker shall be prima facie evidence that it has been constructed or erected and is being operated, used or maintained in violation of the provisions of this article.

The Hearing Examiner found, in Conclusion of Law 5, that “[t]he subject structure did not have in 2008 the label or marker affixed thereto required by the provisions of W. Va. Code §17-22-16, and apparently had no such valid label or marker affixed thereto since on or about July 1, 1997.” Equity argues against excusing this protracted lapse on the part of the Petitioner (assuming Respondent had the authority to excuse the lapse) not only because Plaintiff is and has for many years been a sophisticated enterprise whose chief business is outdoor advertising, but because Petitioner received yearly reminders from Respondent of the need to renew permits and to check that appropriate tags are affixed. See Transcript of Proceedings, Administrative Appeal, pp. 46 – 50 and Exhibits 8 and 9 to the proceeding (pertinent parts attached). Like Petitioner’s repeated failure to pay the required annual renewal fee, Petitioner’s long continued neglect to comply with its duty under law to maintain tags affixed to the sign demonstrates a lack of due diligence.

Petitioner ends its first assignment of error by arguing that requiring the structure to be dismantled will “violate the efforts of this State to promote business development and growth.” To be sure, in W. Va. Code §17-22-1 the Legislature finds and declares: “(a) [t]hat outdoor advertising is a legitimate, commercial use of private property adjacent to roads and highways; [and] (b) that outdoor advertising is an integral part of the business and marketing function and an established segment of the national economy which serves to promote and protect private investments in commerce and industry.” The Legislature goes on, however, to find and declare also “(c) that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to federal-aid interstate and primary highways should be regulated in order to protect the public investment in such highways, to promote the recreational value of public travel, to preserve natural beauty, and to promote the reasonable, orderly and effective display of such signs, displays and

devices. Even-handed and consistent enforcement of the clear requirements of the Code and the Rule will promote the reasonable, orderly and effective display of outdoor advertising in this State and will ultimately benefit outdoor advertising sign owners and licensees economically by encouraging due diligence in their business practices.

2. THE LOWER COURT'S AFFIRMATION OF THE COMMISSIONER'S ORDER DID NOT DENY PETITIONER ITS CONSTITUTIONAL DUE PROCESS RIGHTS.

Petitioner asserts two bases for its claim that the Lower Court violated Petitioner's constitutional right to due process. First, Petitioner asserts that in December, 1996, when Respondent received the letter from Petitioner's predecessor requesting cancellation of the permits in question, Respondent failed to issue what Petitioner characterizes as Respondent's "standard" take-down letter ordering that the sign structure be dismantled. However, such letters are not issued in all cases, and would certainly not be issued where doing so appears superfluous and unnecessary.

As is true in other states, outdoor advertising in West Virginia is a highly competitive business. Sign structure sites that meet the numerous requirements of Chapter 17, Article 22 and the Rules promulgated by authority of that article, as well as those imposed by federal law, are scarce and highly sought after by licensees. It was not and is not to this day unusual for an outdoor advertising company to obtain a permit for a site with no immediate intention of erecting a sign in order to prevent a competitor from permitting the site and devaluing the permit holder's existing signs in the area. It is likewise not unusual for Respondent to get a request to cancel a permit where no sign has been erected.

By letter dated December 17, 1996 Petitioner's predecessor, McWhorter Advertising, requested that the two permits be cancelled "due to the fact that we are no longer able to build due

to the Roush Bottle Gas Co. going out of business.”¹ Because Respondent reasonably understood from the letter that no sign had yet been built, Respondent did not take the senseless action of demanding that the sign be dismantled.

Petitioner’s second basis for arguing a denial of due process arises out of the same misreading of the law concerning revocation of permits, as opposed to voluntary cancellation by the permittee or expiration for failure to pay a renewal fee, that was addressed *supra*. Respondent cites no law addressing voluntary cancellations initiated by the permittee or expiration of permits due to inaction by the permittee (and with no affirmative action by the agency) that recognizes or establishes any due process rights that were violated by Respondent. It bears repeating that the permits in question were never revoked nor any Commissioner’s Order revoking the permits ever entered. At the time Respondent issued its letter to Petitioner to remove the sign, no permits had existed or been renewed for over ten years. Moreover, it appears that Respondent also failed for over ten years to insure that tags bearing the unique permit numbers were affixed to the structure as required by law. Because the statute and Rule Petitioner cites applies to the affirmative act of Respondent to enter an order revoking a permit, and no revocation occurred in the instant case, its due process argument founded on that statute and Rule must fail. Petitioner has afforded itself of the entire panoply of its due process rights under 157 W.Va.CSR 1.3 and the State Administrative Procedures Act.

CONCLUSION

W. Va. Code §17-22-11 makes it the function and the duty of the Commissioner of Highways to administer and enforce the provisions of the article. §17 of the article states: “All outdoor advertising signs, displays, or devices shall be removed by the permittee within thirty

¹ See Exhibit 6 (attached) of the Transcript of Proceedings, Administrative Appeal. Under Rules applicable at all relevant times, permittees could only erect signs in “unzoned commercial or industrial areas” which had a “qualifying business” sufficiently proximate to the permitted site.

days after the date of the expiration or revocation of the permit for the same.” §22 provides in pertinent part: “the erection or maintenance of any outdoor advertising sign, display or device in violation of any provision of this article is hereby declared to be a public nuisance, and in addition to other remedies provided in this chapter, the state road commissioner or the prosecuting attorney of the county in which the sign, display or device is located may apply to the circuit court or other court of competent jurisdiction of the county in which the sign, display or device is located, for an injunction to abate such nuisance.” Petitioner has operated and maintained – and derived the income from – a sign for which no valid permits have existed or been renewed for over ten years and to which no tags have been affixed, all in violation of state law. Under the facts presented, the Commissioner had both the authority and duty to order the dismantling of the sign.

PRAYER FOR RELIEF

For all the aforesaid reasons, Respondent respectfully requests that the Petition for Appeal be DENIED.

Respectfully submitted,

**THE WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION, DIVISION
OF HIGHWAYS,**

By counsel,



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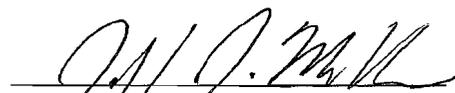
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CERTIFICATE OF SERVICE

I, Jeff J. Miller, counsel for the West Virginia Division of Highways, do hereby certify that I have served a true and correct copy of Respondent West Virginia Department of Transportation, Division of Highways' **SUMMARY RESPONSE TO THE PETITION FOR APPEAL** by depositing same in the United States mail, postage prepaid, this 14th day of February, 2011, addressed as follows:

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE