

NO. 21219 - BEL-O-MAR INTERSTATE PLANNING COMMISSION AND NORTHERN PANHANDLE AREA AGENCY ON AGING; CENTRAL WEST VIRGINIA AREA AGENCY ON AGING; MID-OHIO VALLEY REGIONAL COUNCIL AND REGION V AREA AGENCY ON AGING; REGION VI PLANNING AND DEVELOPMENT COUNCIL AND REGION VI AREA ON AGING; AND SOUTHEASTERN WEST VIRGINIA AREA ON AGING V. WEST VIRGINIA COMMISSION ON AGING, A PUBLIC CORPORATION ESTABLISHED BY STATUTE

Miller, Justice, dissenting:

The majority opinion implies that this reduction in services to the elderly was a result of legislative action. This was not the case. The record demonstrates that the executive director of the West Virginia Commission on Aging (WVCOA) was pressured into reducing the number of planning and service areas by several legislators after the legislature adjourned and after the Budget Digest was compiled.

The Budget Digest was the subject of our earlier case, Common Cause of West Virginia v. Tomblin, 186 W. Va. 537, 413 S.E.2d 358 (1991), in which the petitioners, nonprofit organizations, urged us to stop the practice of allowing a small group of legislators to allocate budget funds to particular projects or programs, not listed in the budget bill, without the express approval of the full legislature. The evidence in Common Cause reflected that this was being done through the Budget Digest, authorized under W. Va. Code, 4-1-18 (1969),¹ after the legislature adjourned. Specifically, in

¹W. Va. Code, 4-1-18 (1969), states, in pertinent part: "[U]pon the passage of the budget bill . . . a digest or summary of the budget bill . . . as finally enacted by the Legislature . . . shall be prepared at the direction of and approved by members of the conferees

Common Cause the Budget Digest had taken \$11.5 million authorized in the budget bill and, after the legislature adjourned, allocated it to a variety of local pork-barrel projects.

In what can only be termed a Pyrrhic victory for the petitioners, the majority opinion in Common Cause recognized that "the Legislative Budget Digest prepared by the Conferees Committee on the Budget does not have the force and effect of law," but went on to state that the Budget Digest "is a legitimate part of the ongoing dialogue between the legislative branch and executive branch concerning the allocation of state funds[.]" Syllabus Point 2, in part, Common Cause, supra. In Syllabus Point 5 of Common Cause, the majority sanctioned the use of the Budget Digest so long as some minimal record was made during the legislative session that could justify the subsequent alterations made in the Budget Digest.²

committee on the budget[.]"

²Syllabus Point 5 of Common Cause states:

"In order for the Budget Digest to conform to the requirement of W.Va. Code, 4-1-18 [1969], which directs the Conferees Committee on the Budget to prepare a 'digest or summary' of the budget, the finance committees, their chairmen, or the subcommittee chairman must have memoranda of the negotiations, compromises and agreements or audio recordings of committee or subcommittee meetings where votes were taken or discussions had that substantiate the material which is organized and memorialized in the Budget Digest."

In my dissent in Common Cause, I pointed out that by permitting the Conferees Committee to allocate funds through the Budget Digest after the legislature had adjourned, the majority had effectively usurped the legislative power, which under Article VI, Section 1 of our Constitution, is "vested in a senate and a house of delegates." The majority's holding in Common Cause was not only contrary to the Constitution, but it was also against the teachings of our prior cases,³ particularly State ex rel. Barker v. Manchin, 167 W. Va. 155, 279 S.E.2d 622 (1981), wherein we struck down legislation that attempted to give a twelve-member legislative committee the entire authority to approve administrative rules and regulations. Our reasoning in Barker was later approved by the United States Supreme Court in Immigration & Naturalization Service v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

It is against this backdrop that today's appeal rests. The issue in this case is the validity of WVCOA's decision to reduce the number of area agencies on aging from nine to four. The majority's approach focuses on the federal regulation, 45 C.F.R. § 1321.17, which requires a state plan for implementing the Older Americans Act (state plan) to create planning and service areas if they desire to obtain

³See, e.g., Benedict v. Polan, 186 W. Va. 452, 413 S.E.2d 107 (1991); Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1988); Jones v. Rockefeller, 172 W. Va. 30, 303 S.E.2d 668 (1983); O'Connor v. Margolin, 170 W. Va. 762, 296 S.E.2d 892 (1982).

federal funds.⁴ ___ W. Va. at ___, ___ S.E.2d at ___ (Majority op. at 6-7). The majority then reasons that because the federal program for the elderly is not mandatory upon the states, WVCOA can change or abolish such planning and service areas.

However, a review of other applicable federal regulations points to an opposite conclusion where, as here, the state has already applied for and accepted federal funds. First, it is quite clear that while WVCOA is given primary responsibility under 45 C.F.R. § 1321.7(a) for implementing the state plan,⁵ it is required to designate area agencies to perform much of the actual work under 45 C.F.R. § 1321.7(b).⁶ These are the agencies which are affected in this case.

⁴The relevant portion of 45 C.F.R. § 1321.17 is: "To receive a grant under this part, a State shall have an approved State plan as prescribed in section 307 of the Act. In addition to meeting the requirements of section 307, a State plan shall include: * * * (d) Identification of the geographic boundaries of each planning and service area and of area agencies on aging designated for each planning and service area, if appropriate."

⁵45 C.F.R. § 1321.7(a), in relevant part, states: "The Older Americans Act intends that the State agency on aging shall be the leader relative to all aging issues on behalf of older persons in the State."

⁶45 C.F.R. § 1321.7(b) states:

"The State agency shall designate area agencies on aging for the purpose of carrying out the mission described above for the State agency at the sub-State level. The State agency shall designate as its area agencies on aging only those sub-state agencies having the capacity and making the commitment to fully carry out the mission described for area agencies in § 1321.53

Once a state elects to participate in the federal funding for older Americans, as this state has done, there are substantial procedural requirements that must be met. 45 C.F.R. § 1321.17, details the necessary information⁷ that must be submitted by a state to the applicable federal agency for approval. See 45 C.F.R. § 1321.21.⁸

More importantly, 45 C.F.R. § 1321.35(a) outlines when the state agency can withdraw an area agency which has been approved under the state plan. Under this subsection, there are only four criteria that justify a withdrawal: (1) the area agency does not meet plan requirements; (2) the area plan or its amendment is not approved; (3) the area agency fails to comply with its area plan or with the Older Americans Act or state agency policies; or (4) the agency's activities are inconsistent with its statutory function.⁹

below."

⁷45 C.F.R. § 1321.17 contains some twenty-one subparts covering what a state plan must contain.

⁸45 C.F.R. § 1321.21 states:

"Each State plan, or plan amendment which requires approval of the Commissioner, shall be signed by the Governor or the Governor's designee and submitted to the Commissioner to be considered for approval at least 45 calendar days before the proposed effective date of the plan or plan amendment."

⁹45 C.F.R. § 1321.35(a) states:

There is nothing in the record to show that any of the involved area agencies violated any of these provisions. In fact, the director of WVCOA admitted this and indicated that the decision to reduce the area agencies was solely a result of the suggestion in the Budget Digest and his conversation with several members of the Conferees Committee who prepared the Digest.

Even the majority acknowledges that "each of the appellees [the area agencies] met the requirements of the Older Americans Act." ___ W. Va. at ___, ___ S.E.2d at ___ (Majority op. at 7). The majority sanctions the reduction in the number of area agencies by saying that "[t]he usage of the words 'shall withdraw' rather than the words 'may only withdraw' conveys the obvious conclusion that the section does not limit a State agency to withdrawing an area agency designation

"In carrying out section 305 of the Act, the State agency shall withdraw the area agency designation whenever it, after reasonable notice and opportunity for a hearing, finds that:

"(1) An area agency does not meet the requirements of this part;

"(2) An area plan or plan amendment is not approved;

"(3) There is substantial failure in the provisions or administration of an approved area plan to comply with any provision of the Act or of this part or policies and procedures established and published by the State agency on aging; or

"(4) Activities of the area agency are inconsistent with the statutory mission prescribed in the Act or in conflict with the requirement of the Act that it function only as an area agency on aging."

to only those circumstances enunciated therein." ____ W. Va. at ____,
____ S.E.2d at ____ (Majority op. at 7-8). (Emphasis in original).

This conclusion flies in the face of our statutory construction rule that ordinarily the word 'shall' is a mandatory command. Syllabus Point 1, Nelson v. West Virginia Public Employees Ins. Bd., 171 W. Va. 445, 300 S.E.2d 86 (1982). In this situation, the specific enumeration of four grounds for terminating an area agency would foreclose the right to a general termination.

The majority states that the "WVCOA has absolute discretion to reduce or enlarge the number of planning and service areas. There is at present no law or procedure the WVCOA must follow when making a reduction decision." ____ W. Va. at ____, ____ S.E.2d at ____ (Majority op. at 8). (Emphasis in original; footnote omitted). This statement ignores the plain language of 45 C.F.R. § 1321.19, which relates to amendments to the state plan. Under subsection (a)(2), the state plan is required to be amended where there is a material change "in any law, organization, policy, or State agency operation[.]" There is a further requirement of reporting changes to the applicable federal agency under 45 C.F.R. § 1321.19(c).¹⁰

¹⁰45 C.F.R. § 1321.19 states:

"(a) A State shall amend the State plan whenever necessary to reflect:

"(1) New or revised Federal statutes or regulations;

"(2) A material change in any law, organization,

Thus, it seems clear that once a state elects to accept federal funds for the elderly, it may not later abolish area agencies absent one of the causes contained in 45 C.F.R. § 1321.35.¹¹ None of these criteria were met. The state may also have the right to alter or amend provisions of the state plan relating to the establishment of area agencies subject to the provisions of 45 C.F.R. § 1321.19 requiring federal approval. The record shows that this was not done.

Once again, the majority has allowed a small group of legislators to revise the budget and dictate policy to a state agency.¹²

policy or State agency operation, or
"(3) Information required annually by sections 307(a)(23) and (29) of the Act.
"(b) Information required by paragraph (a)(3) of this section shall be submitted according to guidelines prescribed by the Commissioner.
"(c) If a State intends to amend provisions of its plan required under §§ 1321.17(a) or (f), it shall submit its proposed amendment to the Commissioner for approval. If the State changes any of the provisions of its plan required under § 1321.17(b) through (d), it shall amend the plan and notify the Commissioner. A State need only submit the amended portions of the plan."

¹¹See note 9, supra.

¹²The final irony is that the executive director of the WVCOA acknowledged in his testimony before the trial court that an attempt had been made during the legislative session to consolidate the area agency districts. This consolidation effort failed in the House of Delegates. Yet, the desired result was accomplished through the Budget Digest!

I find this action to be contrary to our Constitution and to the principles of a democratic society. I, therefore, dissent.