

No. 30116 - *Cookman Realty Group, Inc., v. Barbara Taylor, Chief, Office of Water Resources, Division of Environmental Protection, The West Virginia Department of Environmental Protection*

**FILED**

**June 25, 2002**

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**RELEASED**

**June 26, 2002**

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Albright, Justice, concurring:

While I concur in the judgment and result in this case, I write separately because I believe that the conclusion reached is supported by law other than that cited by the majority. In my judgment, syllabus point three of *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970), appearing as syllabus point two in the instant case, is not applicable to agencies such as the West Virginia Department of Environmental Protection (DEP) which are subject to the provisions of the Administrative Procedures Act (APA), West Virginia Code §§ 29A-1-1 to 29A-7-4 (Repl. Vol.1998). *Crockett* involved the interpretation of rules and regulations by a city police civil service commission, a municipal administrative agency not governed by the provisions of the APA. See West Virginia Code § 29A-1-2(a) (1982) (defining what constitutes an agency subject to the APA).

A pertinent provision of the APA with regard to the present case is West Virginia Code § 29A-1-2(c), which defines an interpretive rule to mean “every rule . . . adopted by an agency independently of any delegation of legislative power which is intended . . . to provide information or guidance to the public regarding the agency’s interpretations, policy or opinions upon the law enforced or administered by it.” While it is unclear whether the interpretation

by DEP of West Virginia C.S.R. § 47-57-4.1 (1994), at issue in the case before us, has even been given the dignity of an interpretive rule, it is clear from the record that the DEP interpretation is not found in any legislatively approved rule. Therefore, it is no more effective than a properly promulgated interpretive rule of the agency.

In such circumstances, a state agency's interpretation may not be afforded any weight in light of the further language in West Virginia Code § 29A-1-2(c), which reads as follows:

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.

In light of this unmistakably clear legislative language, such an interpretation of a policy by an administrative agency may not be used by a court or administrative agency against the interests of a person regulated or sought to be regulated by the agency. I believe that a new syllabus point should have been adopted by the Court in this case stating that the longstanding interpretations by a state agency of rules it is required to enforce – whether stated in an interpretative rule under the APA or set forth in a less formal expression of agency policy – may not be afforded any weight against a citizen or other party in a contested action of the nature before us.