

No. 35299 - *David Kokochak v. The West Virginia State Lottery Commission, a State Agency*

No. 35300 - *Parkersburg BPO Elks Lodge # 198 v. The West Virginia State Lottery Commission*

Benjamin, Justice, dissenting:

FILED
July 12, 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

W. Va. C.S.R. § 179-7-2.2 does not interpret a law enacted by the Legislature. Rather, it is a stand-alone rule wholly created by the Lottery Commission for the purpose of determining a person's privilege to operate a limited video lottery. Consequently, § 179-7-2.2 is not a valid interpretive rule. Moreover, because the rule was not promulgated by specific authorization of the Legislature, it is not a valid legislative rule. Therefore, this Court should have found § 179-7-2.2 to be invalid. Because the majority held to the contrary, I respectfully dissent.

According to W. Va. Code § 29A-1-2(c) (1982), in pertinent part:

“Interpretive rule” means 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. 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[.]

A “Legislative rule,” on the other hand, is a rule which, in relevant part, “when promulgated

after or pursuant to authorization of the Legislature, has (1) the force of law, or (2) supplies a basis for the imposition of civil or criminal liability, or (3) grants or denies a specific benefit. Every rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule.” W. Va. Code § 29A-1-2(d). It is clear that C.S.R. § 179-7-2.2 is not an interpretive rule because it denies the benefit of operating a video lottery establishment within three hundred feet of a business that sells petroleum products.

In its opinion, the majority quotes the definitions for interpretive and legislative rules set forth above, but then disregards the operative language of these definitions in its analysis. The majority concludes that “[i]nsofar as interpretive rules, by definition, may not ‘be determinative of any issue affecting private rights’ or ‘regulate . . . the exercise of private rights or . . . confer any right,’ it is clear that § 179-7-2.2’s clarification of W. Va. Code § 29B-1201(a) functions as a valid interpretive rule.” Slip op. 15-16 (*quoting* W. Va. Code § 29A-1-2(c)) (footnotes omitted) (ellipses in originally). The majority bases this conclusion on the fact that “there does not exist a right to obtain a limited video lottery license or to operate such an establishment[.]” Slip op. at 15.

However, the majority omits significant language from the statutory definition of “interpretive rule” which compels a different conclusion than that arrived at by the majority. According to W. Va. Code § 29A-1-2(c), an “Interpretive rule” may not “be

determinative of any issue affecting private rights, *privileges or interests*” or “regulate *private conduct* or the exercise of private rights *or privileges* nor to confer any right *or privilege* provided by law[.]” (Italics added). Plainly, interpretive rules may not be determinative of or confer a privilege provide by law.

The majority correctly indicates that a “license to participate in limited video lottery is a privilege.” Slip op. at 15. It cannot seriously be denied that the rule at issue is determinative of who receives the privilege of operating a limited video lottery. Specifically, the rule denies a limited video license to an establishment located within three hundred feet of a business that sells petroleum products. As a result, § 179-7-2.2 is not an interpretive rule pursuant to the express definition of an interpretive rule in W. Va. Code § 29A-1-2(c). Further, § 179-7-2.2 is not a valid legislative rule because it was not promulgated by specific authorization of the Legislature pursuant to W. Va. Code § 29A-1-2(d). Having determined that § 179-7-2.2 is neither a valid interpretive rule nor a valid legislative rule, I must conclude that the rule has no legal force and effect. For this reason, I respectfully dissent to the majority opinion.