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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002483-MR

DIVISION OF CHARITABLE GAMING
PUBLIC PROTECTION & REGULATION CABINET — APPELLANT

v. — APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 97-CI-01132

MILITARY ORDER OF THE PURPLE HEART — APPELLEE

AND — NO. 1999-CA-002485-MR

DISABLED AMERICAN VETERANS #156 AND
NORTH HARDIN LIONS CLUB — APPELLANTS

v. — APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 97-CI-01132

DIVISION OF CHARITABLE GAMING,
JUSTICE CABINET — APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING AND REMANDING IN PART
** ** ** ** **

BEFORE: DYCHE, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: The Justice Cabinet’s Department of Charitable Gaming (formerly the Division of Charitable Gaming) appeals from a September 15, 1999, order of Franklin Circuit Court reversing

and remanding the Cabinet's revocation of the Military Order of the Purple Heart's (MOPH) charitable gaming license. The department maintains that MOPH violated provisions of KRS 238.550(4) (1996)--charitable gaming's original "40% rule"--and that, in concluding otherwise, the trial court misconstrued that statute. In a companion appeal, the Disabled American Veterans #156 (DAV) and the North Hardin Lions Club (NHLC) challenge the same circuit court order affirming the Cabinet's revocation of their charitable gaming licenses. As does the Cabinet, DAV and NHLC take issue with the trial court's construction of KRS 238.550(4) (1996). They also maintain that, even if they did violate that statute, the Cabinet was estopped from penalizing them or was barred under KRS 238.560 (1996) from penalizing them as harshly as it did. For the following reasons, we are persuaded that the Cabinet correctly applied the pertinent statutes to all of these cases. Accordingly, with respect to MOPH in 1999-CA-002483-MR, we reverse and remand, and with respect to DAV and NHLC in 1999-CA-002485-MR, we affirm.

Barred by the Kentucky Constitution until 1992, legalized charitable gaming is a relatively new phenomenon in Kentucky.[1] The charitable gaming act, which both authorizes and regulates such gaming, was first promulgated in 1994 as KRS Chapter 238. Since then the act has very much been a work in progress. The General Assembly adopted major revisions of the charitable gaming laws in both 1996 and 1998, and the changes in

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[1]*See* Commonwealth v. Louisville Atlantis Community, Ky. App., 971 S.W.2d 810 (1997), discretionary review denied, 97-SC-1014 (June 10, 1998); Pigeons' Roost, Inc. v. Commonwealth of Kentucky, Division of Charitable Gaming, Ky. App., 10 S.W.3d 133 (1999).

2000, although not as far reaching as those adopted by the two previous legislatures, were again significant. The wheels of justice turn more deliberately than that. Notwithstanding the many changes the charitable gaming statutes have undergone since then, we are concerned in these cases with provisions of the act's 1996 incarnation.

As of April of that year, KRS 238.550 was amended to provide in pertinent part as follows:

> (4) At least forty percent (40%) of the adjusted gross receipts[2] resulting from the conduct of charitable gaming during each two (2) consecutive calendar quarters shall be retained by the charitable organization and used exclusively for purposes consistent with the charitable, religious, educational, literary, civic, fraternal, or patriotic functions or objectives for which the licensed charitable organization received and maintains federal tax-exempt status or consistent with its status as a common school, as an institution of higher education, or as a state college or university. No net receipts[3] shall inure to the private benefit or financial gain of any individual. (Footnotes added).

Concerned that they would be unable to meet this 40% retention requirement because they were paying too much rent at the bingo hall they shared, MOPH, DAV, and NHLC decided shortly before the new law went into effect to suspend their gaming operations temporarily and move to a new location. They found a new hall; succeeded, after some administrative delays, in having it licensed as a charitable gaming facility; and in September

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[2]"Adjusted Gross Receipts" were defined as "gross receipts less all cash prizes or the cash value of merchandise prizes." KRS 238.505(13) (1996).

[3]"Net receipts" were "adjusted gross receipts less all expenses, charges, fees, and deductions authorized under this chapter." KRS 238.505(14) (1996).

1996 resumed operating bingo games and selling "pull-tabs" under their respective licenses as charitable organizations.

The first applications of the 40% rule occurred in early 1997 as the department reviewed charitable gaming records from the third and fourth quarters of 1996. In the course of that review, the department determined that MOPH had retained 35.49% of its adjusted gross earnings (50.84% during the third quarter and 28.17% during the fourth quarter); DAV had retained 19.15% (32.12% during the third and 13.16% during the fourth quarter); and NHLC had retained 0% of its adjusted gross earnings, (a third-quarter loss off-setting the 20.48% it retained in the fourth quarter). The organizations having failed, in the department's estimation, to abide by the 40% rule, the department initiated administrative proceedings against them pursuant to KRS 238.535(12) (1996), which mandated that a violating organization's license be revoked.

A Justice Cabinet hearing officer heard each case and recommended that all three licenses be terminated. By order issued July 17, 1997, the Secretary adopted those recommendations, whereupon the charities appealed to Franklin Circuit Court. The court, as noted above, agreed with the Cabinet that DAV and NHLC had violated the 40% rule and thereby had forfeited their licenses. MOPH, on the other hand, had satisfied the requirements of KRS 238.550(4), the circuit court believed, despite the fact that its retention rate for the two-quarter period was less than 40%, by virtue of the fact that it had retained at least 40% of its adjusted gross earnings during

one of the two quarters. The Cabinet's interpretation of the statute, the court opined, placed the charity's fate too much at the mercy of one bad quarter and thus tended to negate the statute's apparent intent that compliance with the 40% rule be based on the charity's performance over two quarters. It is from this order that the department, DAV, and NHLC have appealed.

As noted, the original 40% rule was concerned with receipts from gaming "during each two (2) consecutive calendar quarters." The department insists that the quoted phrase refers to two-quarter periods--six-month periods--during which the charity was to retain at least 40% of its adjusted gross earnings. We agree. If the meaning were otherwise, if the legislative focus were on the quarters separately, it seems likely that the phrase would have been "each quarter" or "each of two quarters" rather than "each two quarters." More importantly, were the test, as the trial court believed, whether the charity retained 40% of its adjusted gross earnings during either of two consecutive quarters, the charity could comply with the statute by meeting the 40%-retention rate every other quarter while retaining little or even none of its earnings the other half of the time. This would allow for an overall retention rate far below 40%, which is a result at odds with the statute's manifest intent.

On the other hand, by providing that the department was to review an average of retained earnings over six months--"each two consecutive quarters"--the statute did provide some leeway for fluctuations in earnings and made it possible for the charity

to weather an occasional bad month or two. Indeed, the two-quarter provision allowed for more leeway than a provision calling for review every quarter would have done, and this difference was not rendered meaningless, as the trial court believed, by the fact that MOPH had retained 40% of its adjusted earnings for half of the review period. This is not to gainsay the trial court's observation that the leeway provided by the statute was limited. There is no doubt that under the 1996 version of the 40% rule, a charity would need, from the outset of its operations, to keep its retention rate in the neighborhood of 40%. There is no reason to suppose, however, that this was not the General Assembly's intent. As harsh as that requirement may have proved to be in certain instances, that occasional harshness did not warrant the trial court's alternative, which clearly did depart, we believe, from what the statute intended. Accordingly, we agree with the department that the trial court should have upheld the revocation of MOPH's charitable gaming license.

DAV and NHLC maintain that the 40% rule proved unduly harsh in their cases too. They argue first that the department should not have reviewed their retention rates following the third and fourth quarters of 1996 because their operations had been suspended for most of the third quarter while they made arrangements for their new hall. They should not have come under review, they contend, until after the first quarter of 1997 when it would have been possible to assess their performances "during," *i.e.* throughout, "two consecutive quarters." The department and the trial court both understood "during" to mean

"at any point within" the given quarters, and since DAV and NHLC had both been licensed prior to the third quarter of 1996 and had operated within both quarters, the agency and the court agreed that both charities were subject to review at the end of the fourth quarter. We agree.

As the trial court noted, if "during" meant "throughout" the two-quarter period, then charities would find it a simple matter to evade the 40% rule entirely by periodically shutting down. Although again it is arguable that the result in these particular cases is harsh, that harshness is not such as to permit what would be a clear deviation from the statute's intent.

DAV and NHLC next contend that, even if they were subject to the 40% rule following the fourth quarter of 1996, the department was estopped at that point from applying the rule to them. Apparently, during the months immediately following April 1996 when the 40% rule went into effect, the department distributed news letters, held seminars, and answered inquiries concerning the new law and how it would be enforced. The appellants claim that the department gave them the impression during this period that they would not have their retained earnings reviewed until the end of the first quarter of 1997. The department was thus estopped, they maintain, from proceeding against them contrary to that impression.

At the agency hearings in this matter, the department's director testified concerning the department's educational efforts during the latter half of 1996. He introduced in particular the department's newsletter from the summer of 1996,

which included an article explaining that the 40% rule would be applied for the first time in January 1997 to the previous two quarters. That article was reissued in the fall 1996 newsletter. The remainder of the director's testimony was likewise to the effect that the department had made reasonable efforts to inform the charities that all of them licensed prior to the third quarter of 1996 would have their third and fourth-quarter retained earnings reviewed under the new law early in 1997, as soon as the earnings reports could be processed.

NHLC's secretary, who served as bookkeeper for all three charities, testified that he and other officials of the charities were well aware of the new law and had seen the department's newsletter, at least the fall version. He claimed, however, that, in the course of inspections, during telephone conversations, and in comments following one of the department's seminars, department personnel had told him and other officials that the charities would have two full quarters in which to meet the 40% retention requirement. He had understood that to mean six full months of operation, in effect excluding from review the charities' operations during the latter half of the third quarter of 1996. The appellants did not present testimony by any of the individuals alleged to have made these assurances.

An equitable estoppel, such as that asserted here, may be invoked against a government agency only in circumstances of clear and exceptional unfairness and, of course, only when the party asserting the estoppel has reasonably and detrimentally relied on a misleading assertion or representation by the agency.

Gailor v. Alsabi, Ky., 990 S.W.2d 597 (1999); American Life & Accident Insurance Co. v. Department of Insurance, Ky. App., 1 S.W.3d 478 (1998); Natural Resources and Environmental Protection Cabinet v. Kentucky Harlan Coal Co., Ky. App., 870 S.W.2d 421 (1993). In light of the evidence presented to the Justice Cabinet, the Secretary did not clearly err by finding, apparently, that these conditions had not been proved. The department's concerted efforts to explain the new law and to prepare the charities for its implementation permit a finding that application of the new law to the appellants was not clearly unfair. The evidence of those efforts also permits findings that the appellants either had not relied on the assurances they allege or had done so unreasonably. The secretary's findings being supported by the record, the trial court did not err by upholding them. Urella v. Kentucky Board of Medical Licensure, Ky., 939 S.W.2d 869 (1997).

Finally, DAV and NHLC contend that license revocation was too harsh a penalty for violations that involved no bad faith. They insist that the department was obliged to promulgate regulations providing for penalties other than license revocation but that it failed to do so, and that it failed to consider as an alternative penalty non-renewal of their licenses once the licenses had expired (several months after the violation) rather than immediate revocation. The trial court ruled, and for the following reasons we agree, that these asserted options did not exist.

KRS 238.535(12) (1996) provided in pertinent part that

> [i]f a charitable organization is unable to meet those requirements [the 40% retention requirement among others], the division shall revoke the charitable organization's license or deny its application for renewal licensure by administrative action as provided in [KRS 238.560].

KRS 238.560 (1996) authorized the department generally to enforce the charitable gaming regulations by investigating alleged and suspected violations and by promulgating hearing procedures and appropriate penalties. The charities maintain that the department neglected a duty under this latter statute to promulgate penalties other than revocation for excusable or "near-miss" violations of the 40% rule.

After all, the charities contend, statutes are to be liberally construed to effect their purposes (KRS 446.080), and the purpose of the charitable gaming act, including KRS 238.560 (1996), is to provide for charitable gaming. KRS 238.560, however, does not expressly confer any right on the organizations regulated under the charitable gaming act. Rights not expressly created by a statute are to be inferred thereunder only when the person or entity asserting the right is a member of the class the statute is intended to protect and only then when recognition of the asserted right is consistent with the statute's express purposes. Skilcraft Sheetmetal, Inc. v. Kentucky Machinery, Inc., Ky. App., 836 S.W.2d 907 (1992). *Cf.* Cort v. Ash, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975) (discussing when federal statutes may be deemed to imply a private cause of action). KRS 238.560 confers authority upon the department to promulgate what it deems to be suitable penalties under the

charitable gaming act. The statute does not, we believe, implicitly confer a right upon individual charities to have that authority--that discretion--exercised in a particular manner. The appellants' invocation of that statute as the source of their asserted right to a less severe penalty is thus unavailing.

A general rule of statutory construction, moreover, provides that statutes specifically addressing a matter take precedence over statutes addressing the matter more generally. DeStock No. 14, Inc. v. Logsdon, Ky., 993 S.W.2d 952 (1999); Withers v. University of Kentucky, Ky., 939 S.W.2d 340 (1997). Even if KRS 238.560 imposed on the department a duty that the appellants could enforce, that statute, which refers to penalties generally, was subordinate to the specific mandate of KRS 238.350(12) that violations of the 40% rule be punished by license revocation. Regardless of its general penalty-making powers and duties, therefore, the department was not authorized to mitigate the appellants' penalties in the manner they seek.

Nor does the reference to license renewal in KRS 238.350(12) (1996) afford the appellants a ground for relief. That provision applied, we believe, to violations of the 40% rule discovered by the department after the pertinent license had expired and revocation was no longer possible. It was not intended as a milder alternative to revocation. The trial court did not err, therefore, by refusing to reverse DAV's and NHLC's penalties as being too harsh.

In sum, we are persuaded that in these cases the Secretary correctly applied the charitable gaming laws, and in

particular the 40% rule, as they existed in 1996. As noted at the outset of this opinion, the 1996 version of the charitable gaming act was the first revision of a complex body of legislation. Plainly, as the charities have shown, that version of the act contained some rough edges. Generally, however, and these cases are not exceptions, it is for the courts to apply statutes as they are, rough edges and all, and to leave to the legislature their refashioning.[4]

For these reasons, in appeal No. 1999-CA-002483-MR, we reverse the September 15, 1999, order of the Franklin Circuit Court in favor of the Military Order of the Purple Heart and remand for entry of a new order consistent with this opinion. In appeal No. 1999-CA-002485-MR, we affirm the remainder of the same September 15, 1999, order.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT DIVISION OF CHARITABLE GAMING:

L.J. Hollenbach, III
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE MILITARY ORDER OF THE PURPLE HEART:

Douglas E. Miller
Miller & Durham
Radcliff, Kentucky

[4]Legislative refashioning of the 40% rule, in fact, has already occurred. The General Assembly modified that rule in 1998. It moved the rule to KRS 238.536, subsection (1) of which now requires charitable organizations to retain 40% of their adjusted gross receipts each calendar year. Subsection (2) establishes graduated penalties for increasingly serious violations of the rule. And subsection (4) permits charities sanctioned under the 1996 rule, such as the charities in this case, to petition for reconsideration under the new regime. MOPH, DAV, and NHLC may thus yet be afforded relief.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS DISABLED AMERICAN VETERANS #156 AND NORTH HARDIN LIONS CLUB:

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