SUPREME COURT OF ARKANSAS

McLane Southern, Inc. v. Arkansas Tobacco Control Board, 2010 Ark. 498

375 S.W.3d 628 (Ark. 2010) · Decided December 16, 2010

SUMMARY

The Arkansas Supreme Court reviewed challenges by McLane Southern, Inc. to advisory opinions issued by the Arkansas Tobacco Control Board under the Arkansas Unfair Cigarette Sales Act. The court addressed whether cooperative patronage dividends, price matching based on those dividends, free order-entry devices and shelf-stocking services, and border-zone competition implicated the Act, as well as standing and constitutional claims. It affirmed the circuit court's order, while affirming in part and reversing in part the Board's opinions.

CASE DETAILS

COURT	Supreme Court of Arkansas
WRITING FOR THE COURT	Paul E. Danielson
JURISDICTION	Arkansas
DECIDED	December 16, 2010
DISPOSITION	other
PROCEDURAL POSTURE	McLane appealed from a Pulaski County Circuit Court order affirming Arkansas Tobacco Control Board advisory opinions and denying declaratory relief.
STANDARD OF REVIEW	Agency decisions are reviewed under the Arkansas Administrative Procedure Act and may be reversed if arbitrary, capricious, unsupported by substantial evidence, legally erroneous, or otherwise within the statutory grounds for review. The Supreme Court reviews statutory interpretation de novo, although an agency's interpretation is entitled to great deference unless clearly wrong. Standing and questions of law are reviewed de novo; factual findings following a bench trial are reviewed for clear error.
PRECEDENTIAL VALUE	Published Arkansas Supreme Court opinion; precedential.
PARTIES	McLane Southern, Inc. v. Arkansas Tobacco Control Board

TOPICS

judicial review of agency action administrative law statutory interpretation commercial litigation constitutional law

PRACTICE AREAS

administrative law statutory interpretation constitutional law commercial litigation

QUESTIONS PRESENTED

1. Whether the Board acted arbitrarily and capriciously by concluding that cooperative patronage dividends were not rebates or concessions under the Unfair Cigarette Sales Act.
2. Whether McLane could meet a cooperative competitor's price by accounting for patronage dividends.
3. Whether the Board acted arbitrarily and capriciously by characterizing free hand-held ordering devices and free shelf-stocking or inventory services as concessions while stating that it would not initiate enforcement under the hypothetical circumstances.
4. Whether the circuit court properly denied declaratory relief concerning patronage dividends and price matching.
5. Whether McLane had standing to obtain declaratory relief concerning the Board's opinion on free devices and services.
6. Whether McLane had standing to obtain declaratory relief concerning border-zone pricing.
7. Whether the Unfair Cigarette Sales Act, as interpreted by the Board, constituted unconstitutional special legislation.

HOLDINGS

1. Cooperative patronage dividends constitute rebates or concessions under Arkansas Code Annotated section 4-75-708(b), and the Board was clearly wrong to conclude that cooperatives were exempt as buying pools from the antirebating provision.
2. McLane could not reduce its price to match a cooperative's invoice price less the applicable patronage dividend because matching a price that included an illegal rebate could not be made in good faith under section 4-75-704(a)(1).
3. The Board's advisory opinion characterizing free hand-held ordering devices and free shelf-stocking or inventory services as concessions was not arbitrary and capricious.
4. The circuit court properly denied McLane declaratory relief on its claim that it could match a cooperative's price after accounting for patronage dividends.
5. McLane lacked standing to seek declaratory relief concerning the free devices and services because its claims presented no present, actual, ripe controversy and rested on hypothetical future conduct.
6. McLane lacked standing to seek declaratory relief concerning border-zone pricing because it identified no facts showing that it or one of its retailers faced an actual controversy.

7. McLane's special-legislation challenge was moot because the court's holding that patronage dividends are illegal rebates eliminated the alleged competitive advantage to cooperatives.

KEY QUOTATIONS

> *"The foregoing statutes are clear and when given their plain meaning make evident that a cooperative, by virtue of being considered a retailer, is prohibited from providing rebates."* (375 S.W.3d 634)

> *"Because a patronage dividend, as previously defined by this court, is clearly a rebate as that term is defined by the Board, we hold that the Board, while entitled to great deference in its statutory interpretation, was clearly wrong in this instance."* (375 S.W.3d 634)

> *"The Declaratory Judgment Statute is applicable only where there is a present actual controversy, and all interested persons are made parties, and only where justiciable issues are presented."* (375 S.W.3d 638)

FACTUAL BACKGROUND

McLane Southern, an Arkansas-licensed tobacco wholesaler, asked the Arkansas Tobacco Control Board for advisory opinions about whether cooperative patronage dividends were rebates or concessions, whether McLane could match a cooperative's price after accounting for those dividends, whether free ordering devices and shelf-stocking services were concessions, and whether retailers outside a border zone could meet prices offered inside the zone. The Board ultimately issued Opinions 2007-001 through 2007-004. McLane challenged those opinions under the Arkansas Administrative Procedure Act and sought declaratory relief, including a declaration that the antirebating provisions were unconstitutional or void for vagueness.

PROCEDURAL HISTORY

McLane requested advisory opinions from the Arkansas Tobacco Control Board concerning patronage dividends, price matching, free hand-held devices and shelf-stocking services, and border-zone pricing. After McLane sought judicial review under the Arkansas Administrative Procedure Act and declaratory relief, the Board withdrew its original opinions and issued replacement opinions. Following a bench trial, the circuit court affirmed the Board's relevant interpretations, denied declaratory relief, and found that McLane lacked standing on certain claims. The Arkansas Supreme Court affirmed the circuit court but reversed Board Opinion 2007-003.

DISPOSITION

other

CASES CITED

- Northport Health Services v. Arkansas Department of Human Services, 2009 Ark. 619, 368 S.W.3d 308
- Seiz Co. v. Arkansas State Highway & Transportation Department, 2009 Ark. 361, 324 S.W.3d 336
- Houck v. Birmingham, 217 Ark. 449, 230 S.W.2d 952 (1950)
- Arkansas Beverage Retailers Association, Inc. v. Moore, 369 Ark. 498, 256 S.W.3d 488 (2007)
- Solomon v. Valco, Inc., 288 Ark. 106, 702 S.W.2d 6 (1985)
- Poff v. Peedin, 2010 Ark. 136, 366 S.W.3d 347

- Ryan & Co. AR, Inc. v. Weiss, 371 Ark. 43, 263 S.W.3d 489 (2007)
- Stilley v. James, 345 Ark. 362, 48 S.W.3d 521 (2001)
- MacSteel Division of Quanex v. Arkansas Oklahoma Gas Corp., 363 Ark. 22, 210 S.W.3d 878 (2005)
- Andres v. First Arkansas Development Finance Corp., 230 Ark. 594, 324 S.W.2d 97 (1959)
- Cummings v. City of Fayetteville, 294 Ark. 151, 741 S.W.2d 638 (1987)