



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
STATE CAPITOL
BUILDING 1, ROOM W-435
CHARLESTON 25305

ATTORNEY GENERAL

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

(304) 558-2522
FAX (304) 558-2525

February 2, 2009

The Honorable Christopher G. Morris
State Tax Commissioner
1001 Lee Street, East
Post Office Box 11771
Charleston, WV 25339-1771

2009 FEB -5 AM 10:39
RECEIVED
SECRETARY OF STATE

Re: Request for an Opinion of the Attorney General pursuant
to West Virginia Code § 5-3-1

Dear Commissioner Morris:

This will acknowledge receipt of your letter dated January 16, 2009, in which you requested an opinion on three questions of law in relation to your application and enforcement of West Virginia's charitable gaming laws. Specifically you requested a written opinion of the Attorney General on the following questions of law:

- (1) Is the use of a charitable raffle ticket dispenser machine by a charitable raffle licensee permitted under West Virginia's charitable gaming laws? See W. Va. Code § 47-21-1, *et seq.*; W. Va. Code § 47-23-1, *et seq.*; W. Va. C.S.R. § 110-37-3.
- (2) If the use of a charitable raffle ticket dispenser machine is permitted, may the Tax Commissioner compel charitable raffle licensees to comply with the five criteria set forth for the operation of charitable raffle ticket dispenser machines?
- (3) If the criteria are enforceable, may the Tax Commissioner provide that a machine may not pay "money or tokens" directly to a player, as set forth in criteria number three . . . or does this prohibition impermissibly expand the scope of C.S.R. § 110-37-3.1.8, which states that "all winning [raffle

GENERAL OPINION

tickets] shall be verified by a worker from the licensee organization before any prize money may be distributed”?

To assist us in addressing these questions you provided us with the following facts:

The State Tax Commissioner is charged with administering certain provisions of the West Virginia Code pertaining to raffles and charitable gaming, including but not limited to the licensing and enforcement of charitable raffle operations. *See* W. Va. Code § 47-21-1, *et seq.* (charitable raffles); W. Va. Code § 47-23-1, *et seq.* (Charitable Raffle Boards and Games Act).

In 2001, the Tax Commissioner began receiving requests from charitable raffle licensees to authorize the use of certain charitable raffle ticket dispenser machines. The Commissioner, acting under the authority of West Virginia's charitable gaming laws, authorized the use of such machines provided that the machines met five specific criteria. The Tax Commissioner currently regulates the use of charitable raffle ticket dispenser machines based on these criteria. The criteria are not codified within a statute or legislative rule. Rather, the criteria are based upon the Commissioner's interpretation of what is permissible under West Virginia's charitable gaming statutes and rules. *See* W. Va. Code § 47-21-1, *et seq.*; W. Va. Code § 47-23-1, *et seq.*; W. Va. C.S.R. § 110-37-3.

The five criteria for the operation of charitable gaming machines set forth by the Tax Commissioner are as follows:

- (1) The device uses traditional paper charitable raffle tickets preexisting at the time play is initiated.
- (2) If the machine has a video display, the device dispenses such tickets prior to or simultaneously with the video activity, thereby making the video activity irrelevant to the game.
- (3) The device cannot pay money or tokens directly to the player.
- (4) The device cannot mechanically (or electronically) credit the winning prizes to allow further game play.

- (5) Use of the device requires traditional redemption of winning (paper) tickets with a cashier.

It appears that one of the reasons the five criteria were established was to make sure that such a machine could not be mistaken for a machine operated under the authority of the West Virginia Lottery Commission. Also, the five criteria to use charitable raffle ticket dispenser machines will ensure that the use of such machines will not alter or change the character of the authorized "charitable raffle games."

Based upon our review of the statutes and rules regulations relative to the questions of law presented, as will more fully hereinafter appear, we have answered your questions as follows:

Question 1: Is the use of a charitable raffle ticket dispenser machine by a charitable raffle licensee permitted under West Virginia's charitable gaming laws? See W. Va. Code § 47-21-1, *et seq.*; W. Va. Code § 47-23-1, *et seq.*; W. Va. C.S.R. § 110-37-3.

Answer: Yes, provided that the charitable raffle licensee complies with the five criteria established by you for the use of such raffle ticket dispenser machines and the use of the machine is compatible with the definitions of "Raffle" and "Charitable raffle board" or "Charitable raffle game."

Question 2: If the use of a charitable raffle ticket dispenser machine is permitted, may the Tax Commissioner compel charitable raffle licensees to comply with the five criteria set forth for the operation of charitable raffle ticket dispenser machines?

Answer: Yes, but this answer is a qualified yes. If a charitable raffle licensee were to violate the five criteria set forth for the operation of charitable raffle ticket dispenser machines, you would enforce that violation by charging the licensee for violating the definitions of a raffle or charitable raffle and the definition of "charitable raffle board" or "charitable raffle game" and for the violation of the other statutes and legislative rules as a result of the wrongful use of the lottery ticket dispenser machine. Since the criteria prescribed by you do not have the force and effect of a legislative rule or the force and effect of law, we believe that it would be a mistake to try to charge a licensee with the violation of those specific criteria. You can reach the same result however, by charging the licensee for using the machine for purposes other than a charitable raffle ticket dispenser machine under the relevant statutes and legislative rules. The fact that the licensee violated the criteria established by you for the use of such machines would be inconsequential on the question of whether the use of the machines violated the relevant statutes and

legislative rules. We believe, however, that a licensee would be permitted to show that his use of the charitable raffle ticket dispenser machine was based upon his or her good faith reliance on such criteria. In that event, whether the licensee violated the five criteria would be relevant and admissible.

We believe that the five criteria established by you are proper because they are based upon your interpretation of the provisions of the West Virginia Code § 47-21-1, *et seq.*, West Virginia Code § 47-23-1, *et seq.*, and the Legislative Rules. However, we believe that the Court would state that the purpose of the criteria was to provide information or guidance to the charitable raffle licensees and the public regarding the Tax Commissioner's interpretations of the proper use of a charitable raffle ticket dispenser machine and may not be relied upon to impose civil or criminal sanctions. Our conclusion in this regard is based upon the definition of an "interpretative rule" set forth in W. Va. Code § 29A-1-2(c).

It should be noted that there is no definition of "charitable raffle ticket dispenser machine." Therefore, under the law those words will be given "their common, ordinary and accepted meaning in the connection in which they are used." See Syl. pt. 6, *Apollo Civic Theatre, Inc. v. State Tax Commissioner*, ___ S.E.2d ___, 2008 WL 5192218 (Dec. 10, 2008). In view of the criteria established by you, if a charitable raffle ticket dispenser machine is used for any purpose other than dispensing valid raffle tickets, such use would be unlawful and the offender could be charged under the appropriate statutes and legislative rules.

Question 3: If the criteria are enforceable, may the Tax Commissioner provide that a machine may not pay "money or tokens" directly to a player, as set forth in criteria number three above, or does this prohibition impermissibly expand the scope of C.S.R. § 110-37-3.1.8, which states that "all winning [raffle tickets] shall be verified by a worker from the licensee organization before any prize money may be distributed"?

Answer: The answer to the first part of Question Number 3 is yes because if a machine were to pay money or tokens directly to a player, it would violate your interpretation of the statutes you are charged to administer and C.S.R. § 110-37-3.1.8 which requires that all winning raffle tickets be verified by a worker from the licensee organization before any prize money can be distributed. The answer to the second part of the question is no. This prohibition does not impermissibly expand the scope of C.S.R. § 110-37-3.1.8, but to the contrary is entirely consistent therewith.

History of Raffles and Charitable Gaming Laws

It may be helpful to understand our answers to the above Questions of Law, to have a brief discussion of the history of raffles and charitable gaming laws in West Virginia.

West Virginia has a long history of banning gaming enterprises by its Constitution from the time it became a state in 1863, up until 1984. In 1984, the Constitution was amended to create a narrow exception to the ban. As amended, Article VI, § 36 of the West Virginia Constitution provides:

The legislature shall have no power to authorize lotteries . . . for any purpose, and shall pass laws to prohibit the sale of lottery . . . tickets in this State; except that the legislature may authorize lotteries which are regulated, controlled, owned and operated by the State of West Virginia in the manner provided by general law . . . and may authorize state-regulated bingo games and raffles for the purpose of raising money by charitable or public service organizations or by the State Fair of West Virginia for charitable or public service purposes: . . .

W. Va. Const. Art. VI, § 36 (emphasis added).

Soon after the amendment was ratified, the West Virginia legislature passed the Charitable Raffle Act, W. Va. Code § 47-21-1, *et seq.* and the Raffle Boards and Games Act, W. Va. Code § 47-23-1, *et seq.*¹ The State Tax Commissioner is charged with administering the provisions of these statutes which includes, but is not limited to, the licensing and enforcement of charitable raffle operations. *See* W. Va. Code § 47-21-1, *et seq.* (Charitable Raffles) and W. Va. Code § 47-23-1, *et seq.* (Charitable Raffle Boards and Games Act). The Legislature expressed its intent in enacting the Charitable Raffle Act by stating:

The Legislature, in recognition of the need charitable and public organizations have for a practicable way of raising funds, declares its intent to grant the privilege of holding raffles to those organizations which qualify as provided in this article.

W. Va. Code § 47-21-1.

¹The constitutionality of these acts as of this time have not been challenged. However, the West Virginia Supreme Court of Appeals has held that both the Racetrack Video Lottery Act and the Limited Video Lottery Act are constitutional. *See State ex rel. Cities of Charleston, Huntington and its Counties of Ohio and Kanawha v. West Virginia Economic Development Authority*, 214 W. Va. 277, 588 S.E.2d 655 (2003).

OPINION

The Legislature in W. Va. Code § 47-21-2(n) defines "raffle" as follows: "'Raffle' means a game involving the selling of tickets to participate in such game entitling the holder or holders to a chance on a prize or prizes."

C.S.R. § 110-37-2.1.22 defines "Raffle" as follows:

"Raffle" means a game authorized by W. Va. Code §47-21-1 *et seq.*, involving the selling of tickets to participate in the game which entitles the holder or holders to a chance on a prize or prizes. It includes a game authorized by W. Va. Code §47-23-1 *et seq.*, involving the selling of so called "tip boards" or "pull tabs" which when opened or separated reveal a winning prize or combination of numbers or symbols which when read together designate a winning ticket; Provided, That, the selling of "tip boards" and "pull tabs" may only occur in conjunction with a charitable raffle occasion authorized under W. Va. Code §47-21-1 *et seq.*

The Legislature defined a "charitable raffle board" or "charitable raffle game" in W. Va. Code § 47-23-2(e) as follows:

(1) A board or other device that has many folded printed slips to be pulled from the board or otherwise distributed without a board on payment of a nominal sum in an effort to obtain a slip or chance that entitles the player to a designated prize; (2) a series of paper cards with perforated break-open tabs, a face value of which is covered or otherwise hidden from view to conceal one or more numbers, letters or symbols, which, on payment of a nominal sum, entitles the player to obtain a chance to a designated prize; or (3) such other similar game which may be defined by the state tax commissioner by legislative rule.

Both acts give the Tax Commissioner express authority and direction to promulgate rules and regulations. West Virginia Code § 47-21-21(a) and (e) (Charitable Raffles) provides:

(a) The commissioner shall promulgate rules and regulations to administer the provisions of this article in accordance with the provisions of chapter twenty-nine-a of this Code.

....

(e) The commissioner shall promulgate reasonable rules and regulations necessary to the administration of this article.

West Virginia Code § 47-23-11(a) (Charitable Raffle Boards and Games) provides:

(a) The commissioner shall propose for promulgation, rules to administer the provisions of this article in accordance with the provisions of chapter twenty-nine-a of this code: Provided, That the initial promulgation of rules to administer the provisions of this article shall be by emergency rule. Additionally, the commissioner shall promulgate a rule which requires that every charitable raffle board or game shall each bear verification, as defined by section two of this article, printed by a manufacturer on each ticket in a game unless, upon application by the taxpayer showing undue hardship, the tax commissioner consents to waive this requirement in favor of some other form of verification.

The State Tax Commissioner has adopted legislative rules and regulations for the administration of the Charitable Raffle Act and the Raffle Boards and Games Act. See C.S.R. 110-37-1, *et seq.* for the Charitable Raffle Act and C.S.R. 110-35-1, *et seq.* for the Raffle Boards and Games Act rules.

The statutes enacted under the Charitable Raffle Act and the Raffle Boards and Games Act have only been reviewed by the West Virginia Supreme Court in one case, namely *Loyal Order of Moose v. State Tax Comm'r*, 219 W. Va. 119, 632 S.E.2d 59 (2006), which does not address the question presented in this case. Since the acts being administered by the Tax Commissioner have not been interpreted by the West Virginia Supreme Court of Appeals on the questions presented in this Opinion, it is necessary for the Tax Commissioner to interpret and construe provisions of these statutes and the rules promulgated under the Commissioner's rule making authority in order to properly administer these acts.

Analysis

Now, we're going to proceed with our analysis of the statutes and rules in order to answer your questions of law.

Question of Law Number 1: Is the use of a charitable raffle ticket dispenser machine by a charitable raffle licensee permitted under West Virginia's charitable gaming laws? See W. Va. Code § 47-21-1, *et seq.*; W. Va. Code § 47-23-1, *et seq.*; W. Va. C.S.R. § 110-37-3.

As previously stated herein, beginning in 2001 the Tax Commissioner had received requests from certain charitable raffle licensees or their representatives for authorization to use charitable raffle ticket dispenser machines to dispense the raffle tickets instead of requiring the players to obtain a raffle ticket from an operator or worker of the charitable raffle game. There is no specific authorization for the use of charitable raffle ticket dispenser machines in either the statutes or the

rules and regulations. The Tax Commissioner, after reviewing the statutes with which he is charged to administer, as well as the rules and regulations, determined that the use of a charitable raffle ticket dispenser machine is proper provided that the machines meet the specified criteria hereinbefore set forth and fit within the definition of "raffle," "charitable raffle board" or "charitable raffle game." Specifically the Commissioner interpreted the definition of "charitable raffle board" or "charitable raffle game" as set forth in W. Va. Code § 47-23-2(e) which provides:

- (1) A board or other device that has many folded printed slips to be pulled from the board or otherwise distributed without a board on payment of a nominal sum in an effort to obtain a slip or chance that entitles the player to a designated prize;
- (2) a series of paper cards with perforated break-open tabs, a face value of which is covered or otherwise hidden from view to conceal one or more numbers, letters or symbols, which, on payment of a nominal sum, entitles the player to obtain a chance to a designated prize; or
- (3) such other similar game which may be defined by the state tax commissioner by legislative rule.

The Tax Commissioner interpreted these definitions as giving him the authority to authorize charitable raffle licensees to use charitable raffle ticket dispenser machines provided that they fit within the definition of a raffle and within the definition of a "charitable raffle board" or "charitable raffle game" as defined above. Raffle is defined in the Charitable Raffles Act in W. Va. Code § 47-21-2(n) as "a game involving the selling of tickets to participate in such game entitling the holder or holders to a chance on a prize or prizes." The Tax Commissioner's primary concern in authorizing the use of these machines to dispense the raffle tickets was to make sure that the use of the machines did not include games that would not be permitted under the Charitable Raffle Act and the Raffle Boards and Games Act or perform the same or similar function that the limited video machines would perform.² Although there is no specific statutory or regulatory authorization for use of charitable raffle ticket dispenser machines, it should be noted that W. Va. Code § 29-22B-331(a)(1) of the Limited Video Lottery Act defines the term "video gambling machine" and expressly contains an exclusion from that definition computerized devices "used, possessed or operated pursuant to and under the requirements of the provisions of . . ." Charitable Bingo Act, W. Va. Code § 47-20-1, *et seq.* and the Charitable Raffle Act, W. Va. Code § 47-21-1, *et seq.* Therefore the Legislature made it clear that any machines used under the Charitable Raffle Act could not come within the definition of the term "video gambling machine" as defined in the Limited Video Lottery Act. Therefore in order to ensure that the charitable raffle ticket dispenser machine was limited to dispensing the raffle tickets and not performing the functions of a video gambling machine, the Commissioner established the five criteria for the use of such machines as hereinbefore set forth. It appears that the Commissioner did not abuse his discretion in interpreting the statutes

²W. Va. Code § 29-22B-1705(a) provides that after December 31, 2001, any person who has a video gambling machine in their actual or constructive possession in this State is guilty of a felony.

and rules to provide authorization for the use of these charitable raffle ticket dispenser machines provided that the charitable licensee meets the specific criteria set by the Tax Commissioner and otherwise complies with the Acts and the Legislative Rules.

The West Virginia Supreme Court of Appeals in the case of *The West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W. Va. 326, 472 S.E.2d 411 (1996) provided in Syllabus points 2, 3, 4 and 5

2. Once a disputed regulation is legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight. As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious.

3. If the language of an enactment is clear and within the constitutional authority of the law-making body which passed it, courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery. Even when there is conflict between the legislative rule and the initial statute, that conflict will be resolved using ordinary canons of interpretation.

4. "Judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage." Syllabus Point 3, *Appalachian Power Co. v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

5. "If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W. Va. Code, 29A-4-2 (1982)." Syllabus Point 4, *Appalachian Power Co. v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

In the instant case, the Legislature has not spoken to the precise question at issue. That is whether charitable licensees can use charitable raffle ticket dispenser machines to distribute the raffle tickets. In addition, the definitions of a "charitable raffle board" or "charitable raffle game" are ambiguous when applied to this question. In accordance with the above rules, where the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

We believe that when a reviewing court considers the actions taken by the Tax Commissioner and the careful thought that was provided into authorizing the use of these machines, provided they met the five specified criteria provided by the Tax Commissioner, and such use does comport and fit within the definition of a "raffle," "charitable raffle board" or "charitable raffle game," would hold that his decision was based on a permissible construction of the statutes and rules.

The court in the case of *Apollo Civic Theatre, Inc. v. State Tax Commissioner*, ___ S.E.2d ___, 2008 WL 5192218 (Dec. 10, 2008) in addressing this same issue stated as follows:

Generally speaking, a rule promulgated by the Commissioner interpreting a statute is entitled to considerable deference by this Court. As we stated in *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. at 583, 466 S.E.2d at 434, while "interpretive rules do not have the force of law nor are they irrevocably binding on the agency or the court," nonetheless, "they are entitled to some deference from the courts[.]" While the Commissioner concedes that this Court interprets a statute *de novo*, the Court has said that "in this sphere we are not entirely free to substitute our own judgment or that of an administrative agency, as '[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." *CB&T Operations Co., Inc. v. Tax Comm'r*, 211 W. Va. 198, 202, 564 S.E.2d 408, 412 (2002) (quoting Syllabus Point 4, *Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp., Inc.*, 166 W. Va. 775, 277 S.E.2d 613 (1981)). Thus, "a construction given a statute by the officers charged with the duty of executing it ought not to be discarded without cogent reason." *State ex rel. Daily Gazette Co. v. County Court*, 137 W. Va. 127, 132, 70 S.E.2d 260, 262 (1952). In other words, "[a]n inquiring court - even a court

empowered to conduct *de novo* review - must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion." *Appalachian Power Co.*, 195 W. Va. at 582, 466 S.E.2d at 433.

Apollo Civic Theatre, Inc., at 8-9 (emphasis added).

Using that analogy, the Tax Commissioner's interpretation of the statute defining "charitable raffle board" or "charitable raffle game" as defined in the statute was not clearly erroneous and should not be discarded without a cogent reason. It is our opinion that the Commissioner's interpretation of the rules to authorize the use of these machines subject to the criteria prescribed by him was permissible and lawful.

Question of Law Number 2: If the use of a charitable raffle ticket dispenser machine is permitted, may the Tax Commissioner compel charitable raffle licensees to comply with the five criteria set forth for the operation of charitable raffle ticket dispenser machines?

We have answered this question yes, but the means of enforcement would not be by enforcing compliance with the five criteria set forth for the operation of charitable raffle ticket dispenser machines as such, but rather it would be using your enforcement powers under the law for the charitable licensee operating a game that does not comply with the definitions of a raffle and does not comply with the definition of a "charitable raffle board" or "charitable raffle game" and does not comply with the requirements of the statutes and legislative rules.

Ways to Enforce Unlawful Use of Charitable Raffle Ticket Dispenser Machines

First an application for raffle license issued by the Tax Commissioner is required to include specific information to obtain a license for a limited occasion license or an annual license. See W. Va. Code § 47-21-8. Some of the information required in an application for a license under W. Va. Code § 47-21-8 is as follows:

(c) for an annual license, the names, addresses and telephone numbers of three or more bona fide active members of the applicant organization who are charged with overall responsibility for the applicant's raffle operations, at least one of whom shall be present when the winning numbers or names are drawn, announced, posted and verified and the prizes are awarded; and the names and addresses and telephone numbers of the highest elected officer of the licensee and his officially appointed designee, one of whom shall be present when the winning numbers and names are drawn, announced, posted and verified and the prizes are awarded;

(d) The address or location of the premises where licensed raffles are to be held;

....

(g) The name of the owner of the premises where the raffle occasions are to be held; and providing a copy of all rental agreements involved if such premises are leased or subleased by the applicant from the owner or lessee;

....

(i) State the charitable or public service purpose or purposes for which the raffle proceeds will be expended;

(j) Provide statements to the effect that the individuals specified in subdivision (c) of this section and the officers of the applicant understand:

(1) That it is a violation of this article to allow any persons other than those authorized by this article to conduct the raffle or concessions operated in conjunction therewith;

(2) That it is required that the reports be filed and the records kept as provided by this article; and

(3) That it is a crime to violate the provisions of this article and, that a violation of such provisions may result in suspension or revocation of the raffle license and denial of applications for subsequent raffle licenses.

If a licensee is using a charitable raffle ticket dispenser machine for any purpose other than dispensing raffle tickets, it would be impossible for the licensee to keep the required records and to make the required reports.

As noted above, it is a crime to violate the provisions of Article 21 of Chapter 47 and that a violation of such provisions may result in suspension or revocation of a license and denial of applications for subsequent raffle license.

West Virginia Code § 47-21-26 provides:

A licensee may use only raffle equipment which it owns or

which it borrows without compensation, or leases for a reasonable and customary amount, from another licensee.

Under this statute a charitable licensee who is using a charitable raffle ticket dispenser machine must either own it or borrow it without compensation or lease it for a reasonable and customary amount from another licensee.

West Virginia Code § 47-23-7a provides:

(a) Any wholesaler or distributor supplying charitable raffle boards or games to retailers in this state shall be registered to do business in this state pursuant to the provisions of article twelve, chapter eleven of this code.

We believe that an interpretation of this statute would require a wholesaler or distributor who supplies a charitable raffle ticket dispenser machine to a charitable raffle licensee be registered to do business in the State of West Virginia. Subsection (b) provides

(b) Nonresidents otherwise complying with the provisions of this article may be licensed as wholesalers or distributors of charitable raffle boards or games upon designating to the tax commissioner a resident agent upon whom notices, orders or other communications issued pursuant to this article may be served and upon whom process may be served.

A nonresident, in addition to complying with (a) to do business in this State, is required to designate the Tax Commissioner as a resident agent upon whom notices, orders or other communications issued pursuant to Chapter 47, Article 23 may be served and upon whom process may be served.

West Virginia Code § 47-21-18 provides:

In addition to any other offense set forth in this Code, any person who or licensee which knowingly conducts or participates in a fraudulently or deceptively conducted raffle with intent to defraud is guilty of a felony, and, upon conviction thereof, shall be fined not less than five hundred nor more than ten thousand dollars, or imprisoned in the penitentiary not less than one, nor more than five years, or both fined and imprisoned.

Any person who is using a charitable raffle ticket dispenser machine as a video gambling machine could be charged with the felony of intent to defraud the State of West Virginia, in addition

February 2, 2000

GENERAL OPINION

to being charged with a felony under the LVLA. See W. Va. Code § 29-22B-1705(a).

West Virginia Code § 47-21-19 provides:

In addition to any other offense set forth in this Code, any person who or licensee which knowingly obtains or assists another in obtaining a raffle license under false, deceptive or fraudulent pretenses is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than ten thousand dollars.

A person who acquires a charitable raffle ticket dispenser machine for any purpose other than dispensing a raffle ticket may be in violation of this statute.

West Virginia Code § 47-21-20 provides:

Any person who knowingly violates any provisions of this article, other than the provisions of sections eighteen and nineteen, is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred nor more than one thousand dollars; and, upon a second or subsequent conviction thereof, shall be fined not less than one hundred nor more than one thousand dollars or imprisoned not more than one year or both fined and imprisoned.

West Virginia Code § 47-21-21 provides in relevant part:

(b) The commissioner shall deny an application for a license or modification thereof if he finds that the issuance thereof would be in violation of the provisions of this article.

(c) The commissioner may revoke, suspend or refuse to renew a license if the licensee or any member of a licensee organization has been convicted pursuant to section eighteen or nineteen of this article and the commissioner finds that it would be in the public interest to do so; or if the licensee has violated any of the provisions of this article: Provided, that before revoking or suspending a license issued under the authority of this article, the commissioner shall give at least ten days, three days for a limited occasion license, notice to the licensee. Notice shall be in writing, state the reason for revocation or suspension and designate a time and place when the licensee may show cause why the license should not be revoked or suspended. The notice required by this section shall be by personal or substituted

service, in accordance with the West Virginia rules of civil procedure for trial courts of record, on the person who applied for the license on behalf of the licensee. The licensee may, at the time designated for the hearing, present evidence in its behalf and be represented by counsel. A decision of the commissioner revoking or suspending a license is subject to judicial review upon the appeal of a licensee. Such decision shall be subject to judicial review in the same manner as other decisions of the commissioner.

As you can see, if a charitable licensee is using a charitable raffle ticket dispenser machine for a purpose other than dispensing raffle tickets for a legitimate raffle, charitable raffle board or charitable raffle game, there are plenty provisions under which the offender can be charged and penalized, which include, but are not limited to, prosecutions for criminal offenses, the revocation, suspension or refusal to renew a license if the licensee has violated any of the provisions of Chapter 47, Article 21 of the West Virginia Code provided that due process is provided to the licensee as set forth in W. Va. Code § 47-21-21 and the Administrative Procedures Act, and assessment of civil penalties and fines.

In summary, the enforcement of the unauthorized use of a charitable raffle ticket dispenser machine would be through charging violations of specific statutes administered by the Tax Commissioner and the rules and regulations promulgated by the State Tax Commissioner without resorting to the specific criteria required for the use of the raffle ticket dispenser machines.

Question of Law Number 3: If the criteria are enforceable, may the Tax Commissioner provide that a machine may not pay "money or tokens" directly to a player, as set forth in criteria number three . . . or does this prohibition impermissibly expand the scope of C.S.R. § 110-37-3.1.8, which states that "all winning [raffle tickets] shall be verified by a worker from the licensee organization before any prize money may be distributed"?

Since the unlawful use of a charitable raffle ticket dispenser machine can be enforced by the State Tax Commissioner, the answer to the first part of the above question is that the Tax Commissioner may provide that a machine may not pay "money or tokens" directly to a player as set forth in criteria number 3. If the machine could pay money or tokens directly to the player, then it would not be a raffle ticket dispenser machine and would not fall within the definitions of a raffle or a "charitable raffle board" or "charitable raffle game."

A raffle contemplates that the players be able to purchase raffle tickets to participate in the game which entitles the holder or holders to a chance on a prize or prizes. See W. Va. Code § 47-21-2(n). A machine that pays money or tokens directly to a player can not possibly come within that definition of a raffle. In addition, as stated in C.S.R. § 110-37-3.1.8, all winning raffle tickets shall be verified by a worker from the licensee organization before any prize money may be distributed. It would be impossible for a charitable raffle licensee to comply with that rule if the machine could

pay money or tokens directly to a player. A machine that could pay money or tokens directly to a player would not comply with C.S.R. § 110-37-3 which provides for raffle operations. C.S.R. § 110-37-3.1.2 provides:

No games of chance other than a raffle authorized in W. Va. Code §47-20-1 et seq., and charitable raffles as defined in this rule may be conducted or allowed at any raffle occasion.

C.S.R. § 110-37-3.1.3 provides:

"Tip boards", "pull tabs" or other authorized games of chance shall be sold to the licensee by a distributor which has registered with the Department of Tax and Revenue to sell and distribute those games of chance under W. Va. Code §47-23-1 et seq. This provision does not apply to perforated raffle tickets printed for an organization by a local printing company.

C.S.R. § 110-37-3.1.6 provides:

All raffle material shall possess a serial number given by a distributor which is licensed to operate in this State.

We believe that this includes raffle tickets.

C.S.R. § 110-37-3.1.8 provides:

All winning raffle tickets, "pull tabs" or "tip boards" shall be verified by a worker from the licensee organization before any prize money may be distributed.

C.S.R. § 110-37-3.1.9 provides:

All raffle occasions shall be open to the general public.

C.S.R. § 110-37-3.1.11 provides:

Every player shall be given an equal opportunity to win.

In every raffle operation, every player shall be given an equal opportunity to win. If the machine could pay money or tokens directly to a player again that rule would be impossible to comply with. Accordingly, we think the Tax Commissioner can and should provide that a machine may not pay money or tokens directly to a player. The same arguments can be made in regard to

ATTORNEY

criteria numbers 4 and 5.

In answer to the second part of the above question, we do not believe that criteria number 3, which states "The device cannot pay money or tokens directly to the player" impermissibly expands the scope of C.S.R. § 110-37-3.1.8 which states that "[a]ll winning raffle tickets . . . shall be verified by a worker from the licensee organization before any prize money may be distributed." In fact, that rule along with the other rules set forth in C.S.R. § 110-37-3 of the raffle operations are consistent with criteria number 3.

We believe the actions you have taken are lawful for the reasons hereinabove provided and that any violation of using a charitable raffle ticket dispenser machine for any purpose other than disbursing raffle tickets can be enforced in the manner herein provided. However, we recommend that you consider revising criteria number 2 to provide that the machines may not have a video display or in the alternative that the machines be designed or fixed so that they can only dispense valid charity raffle tickets and so that they can not give any prizes or credits of any kind. Otherwise, those machines may become gray machines in the sense that they dispense raffle tickets but have the capability of functioning as video lottery machines.

If you have any questions concerning any of the foregoing please feel free to contact us.

Very truly yours,

Darrell V. McGraw, Jr.
Attorney General

By 

Ronald R. Brown
Assistant Attorney General