

3  
Berk

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

TODD SCHULZ,	)	DOCKET 522	PAGE 069
	)		
Plaintiff,	)		
	)		
v.	)	ORDER	
	)		
DEPARTMENT OF REVENUE	)		
OF THE STATE OF NEBRASKA and	)		
M. BERRI BALKA, STATE TAX	)		
COMMISSIONER,	)		
	)		
Defendants.	)		CT 17 199

INTRODUCTION

This is an appeal pursuant to Neb. Rev. Stat. §§ 9-624 (1991) and 84-917 (1994) from an Order of the State Tax Commissioner denying the application of Plaintiff Todd Schulz for a county/city lottery worker's license. The Nebraska Department of Revenue [the "Department"], by letter dated November 30, 1993, notified Plaintiff of its intent to deny his application for a license as a county/city lottery worker, based on his conviction in 1986 for promoting gambling. Plaintiff filed a request for redetermination, asking the Department to grant his license application. Following a hearing on the request for redetermination before a designated hearing officer, the Tax Commissioner entered his Order denying Plaintiff's license application. In his Order, the Commissioner found that: (1) He had discretion to determine whether Plaintiff's license application should be granted; (2) He was not precluded from denying Plaintiff's license application, even though the Department's letter of intended license denial was issued after expiration of the sixty day probationary license period in Neb. Rev. Stat. § 9-631.01(6) (Cum. Supp. 1994); and (3) In order to preserve public confidence in the integrity of gaming, Plaintiff's

license application should be denied because of his gambling conviction. The Commissioner, determining that he lacked authority to decide the constitutionality of acts of the Legislature, declined to address Plaintiff's claim that the different licensing requirements contained in the Nebraska County and City Lottery Act and the Nebraska State Lottery Act violated the equal protection clauses of the United States and Nebraska Constitutions. Plaintiff appealed the Commissioner's Order to this Court.

Hearing on the Plaintiff's appeal was held on September 4, 1996. Plaintiff was represented by Attorney Wm. D. Kurtenbach. Defendants were represented by Assistant Attorney L. Jay Bartel. The record of the administrative proceedings was offered and received in evidence. As the Petition seeking review of the Tax Commissioner's Order was filed after July 1, 1989, the Court's review of this matter "shall be conducted by the court without a jury de novo on the record of the agency." Neb. Rev. Stat. § 84-917(5)(a) (1994).

The Court, having reviewed the record, and considered the arguments and briefs of counsel, makes the following findings of fact and conclusions of law.

#### FINDINGS OF FACTS

Plaintiff Todd Schulz is the proprietor of TD Sports in Ogallala, Nebraska. TD Sports has been a lottery site for several years, and has conducted keno at its location through a contractual arrangement with Community Lottery Systems, Inc., commonly known as Lotto Nebraska. Community Lottery Systems, Inc., is the lottery operator for Keith County. Keith County receives approximately ten

percent of the gross proceeds wagered on keno at TD Sports; the remainder is divided between taxes and the percentages received by TD Sports and Community Lottery Systems, Inc..

Pursuant to 1993 Neb. Laws, LB 563, § 10 (codified at Neb. Rev. Stat. § 9-631.01 (Cum. Supp. 1994)), Mr. Schulz filed an application for a County/City Lottery Worker's License with the Department. The license application was dated September 8, 1993. Question 7 on the application inquired:

Have you even been convicted of, forfeited bond upon a charge of, or pled guilty or nolo contendere to any felony within ten years preceding the date of this application, or any felony or misdemeanor involving fraud, theft, or any gambling activity?

Mr. Schulz checked the "yes" box in response to this question on his application, and made the notation "Promo of Gambling Class (2) two (1986)".

By letter dated November 30, 1993, the Department notified Mr. Schulz of its intent to deny his application for a county/city lottery worker's license because of his gambling conviction. Mr. Schulz filed a request for redetermination of the Department's intended license denial. On September 21, 1994, a hearing on Mr. Schulz's request for redetermination was held before a hearing officer designated by the Tax Commissioner. At the hearing, the Department introduced certified copies of court records pertaining to Mr. Schulz's misdemeanor conviction in 1986 for the offense of promoting gambling in the second degree. Mr. Schulz did not contest or deny his 1986 gambling conviction, for which he was sentenced to 30 days in jail and placed on one year's probation. Mr. Schulz, through his own testimony and that of Paul Schumacher,

CEO of Community Lottery Systems, Inc., sought to demonstrate that, in spite of his gambling conviction, he possessed the honesty, integrity, and responsibility necessary to be granted a county/city lottery worker license, and requested that the Commissioner exercise discretion to grant his license application.

#### CONCLUSIONS OF LAW

Before the Tax Commissioner, the Department contended that, by virtue of the mandatory language of Neb. Rev. Stat. § 9-620(2)(d) (Supp. 1995), the Commissioner had a nondiscretionary duty to deny Plaintiff's county/city lottery worker license application because of his gambling conviction. The Commissioner rejected this contention, finding that he had discretion to determine whether Plaintiff's application should be granted, in spite of Plaintiff's gambling conviction. Based on the Commissioner's finding in this regard, the question of the Commissioner's discretion to consider granting Plaintiff's license application is not at issue in this appeal. Thus, the issues presented are:

(1) Whether the Commissioner erred in finding that the Department was not precluded from denying Plaintiff's license application, even though the Department's letter of intended license denial was issued after expiration of the sixty day probationary license period in Neb. Rev. Stat. § 9-631.01(6) (Cum. Supp. 1994);

(2) Whether the different licensing requirements under the Nebraska County and City Lottery Act and the State Lottery Act violate the equal protection clauses of the United States and Nebraska Constitutions; and

(3) Whether the Commissioner abused his discretion in denying Plaintiff's application for a county/city lottery worker's license.

**I. Authority of the Department to Deny Plaintiff's License Application After Expiration of the Sixty Day Probationary License Period in Neb. Rev. Stat. § 9-631.01(6) (Cum. Supp. 1994)**

Plaintiff asserts on appeal, as he did before the Commissioner, that, because the Department did not institute proceedings to deny his license application within the sixty day probationary period provided under Neb. Rev. Stat. § 9-631.01(6) (Cum. Supp. 1994), the Department was "estopped" from denying his license application based on his gambling conviction. This contention is without merit.

Neb. Rev. Stat. § 9-631.01(6) provides:

The applicant shall be granted a probationary license to perform work directly related to the conduct of a lottery which shall be valid for a period of sixty days after the filing is received by the department unless such application is denied by the department. If proceedings to deny the license application have not been initiated by the department during such probationary period, the applicant shall be granted a regular license to perform work directly related to the conduct of a lottery.

While Plaintiff's license application was signed and dated September 8, 1993, there is no evidence in the record indicating the date on which the Department actually received the application. The Department's letter of intended license denial was dated November 30, 1993. The Commissioner, however, determined that the Department did not institute proceedings to deny Plaintiff a license within the sixty day probationary period provided in § 9-631.01(6). The Commissioner correctly found, however, that the

Department still had authority to sanction Plaintiff for his gambling conviction, even if it did not institute proceedings to deny Plaintiff's license application within the sixty day probationary period.

While § 9-361.01(6) contemplates that a county/city lottery worker will qualify for a license after the probationary period, this provision must be read in conjunction with other provisions of the Nebraska County and City Lottery Act pertaining to sanctions which the Department may impose on licensees. Specifically, Neb. Rev. Stat. § 9-620(2)(d) (Supp. 1995) provides that the Department may deny any license application or renewal if an applicant has been "convicted of. . .or pleaded guilty or nolo contendere to any offense or crime, whether a felony or a misdemeanor, involving any gambling activity. . . ." Section 9-620(3)(d) further provides that the Department may "revoke, cancel, or suspend for cause any license" if a licensee has been "convicted of. . .or pleaded guilty or nolo contendere to any offense or crime, whether a felony of a misdemeanor, involving any gambling activity. . . ." Thus, the grounds for revoking, canceling, or suspending a gaming license are identical to the grounds for denying a license. Compare Neb. Rev. Stat. § 9-620(2) with Neb. Rev. Stat. § 9-620(3). In each instance, notice must be given by the Department of its proposed action, and the applicant or licensee may request a hearing. If a request for hearing is timely filed, the proceedings are considered contested cases within the purview of the Administrative Procedure Act. See Neb. Rev. Stat. §§ 9-622 and 9-623 (Cum. Supp. 1994).

While the Department's action could have been phrased in terms of a revocation proceeding, as opposed to license denial, it is evident that, from a procedural standpoint, this is, as the Commissioner stated, a situation involving a "distinction without a difference." The grounds for license denial and license revocation in this instance were identical. Procedurally, there is no difference between the denial and revocation process. Indeed, the only real difference is that, in the case of a license revocation, the licensee is permanently disqualified from any right or privilege to ever obtain or hold a license under the Act. See Neb. Rev. Stat. § 9-616 (1991). Denial of a license, although not defined, implies that a subsequent application may be considered in future license years. Thus, Plaintiff certainly was not harmed by the Department's election to pursue proceedings to deny his license application, as opposed to pursuing the harsher, more permanent sanction of revocation.

Plaintiff contends that, as the Department did not initiate denial proceedings within the sixty day probationary period in § 9-361.01, the Department should be "estopped" from denying Plaintiff's license application based on his gambling conviction. Plaintiff construes the statute to mean that, by not initiating action during this period, the Department was powerless to deny Plaintiff a license. Plaintiff goes even further, arguing that, not only was the Department powerless to deny Plaintiff a license, it also could not act to revoke any license held by Plaintiff at the expiration of the probationary period, because his gambling conviction was disclosed on his application.

It is well established that, "[i]n construing a statute, [a] court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose." *State v. Seaman*, 237 Neb. 916, 919, 468 N.W.2d 121, 123 (1991) (quoting *State v. Burnett*, 227 Neb. 351, 353, 417 N.W.2d 355, 357 (1988)). Legislative intent "is not to be thwarted by strained and unusual interpretations of particular words not required under the circumstances. If possible, a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results." *State v. Coffman*, 213 Neb. 560, 562, 330 N.W.2d 727, 728 (1983). Moreover, "all parts of a statute relating to the same subject should be construed together." *Beatrice Manor, Inc. v. Department of Health*, 219 Neb. 141, 148, 362 N.W.2d 45, 51 (1985).

Surely, the Legislature did not intend that the Department be powerless to deny or revoke a license based on the grounds listed in § 9-620 merely because proceedings to initiate license denial were not instituted during the probationary license period provided under § 9-631.01. Such a construction of § 9-631.01 would defeat the legislative purpose in granting the Department responsibility to preserve the integrity of gaming under the Act by enforcing the sanctions provided to ensure the fitness of licensees. The statute specifically provides that the "regular license" granted after expiration of the sixty day probationary period is valid only "unless otherwise suspended, canceled,



revoked, or denied by the department." Neb. Rev. Stat. § 9-631.01(6) (Cum. Supp. 1994) (emphasis added). This language indicates that the Department may act to deny a license application, even after expiration of the sixty day probationary period. In any event, as the Commissioner stated, "[i]t cannot be seriously contemplated that the Legislature intended that serious 'flaws' in an applicant's background be unchecked because they were not discovered within the 60-day probationary period." The Court must reject the unwarranted and unreasonable construction of § 9-361.01 urged by Plaintiff.

## II. Equal Protection.

Plaintiff also argues that the provisions of the County and City Lottery Act requiring lottery workers obtain a license, which license may be denied or revoked for certain criminal conduct, violate the Equal Protection Clauses of the United States and Nebraska Constitutions, because no similar requirements are contained for lottery ticket sellers under the Nebraska State Lottery Act. This contention is also without merit.

Actions of the Legislature are presumed to be constitutional. *State v. Stott*, 243 Neb. 967, 503 N.W.2d 822 (1993). The burden of showing the unconstitutionality of a statute is imposed on the party claiming that the statute is unconstitutional. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993). Plaintiff has failed to carry that burden.

First, as an evidentiary matter, Plaintiff offered no evidence to support his equal protection claim. Specifically, no evidence was offered with respect to the conduct of the games, the handling

of money, the content of any regulations applicable to the activities under each Act, or any other factor which could warrant similar treatment of those seeking licenses as workers under the County and City Lottery Act and those acting as lottery ticket sellers under the State Lottery Act. Absent any such showing, Plaintiff's equal protection claim must fail.

Second, an examination of the statutory schemes governing the conduct of keno lotteries under the County and City Lottery Act and lotteries conducted under the State Lottery Act demonstrates that a rational basis exists for the different treatment of county/city lottery workers and lottery game ticket sellers. The test for determining whether a statute violates the Equal Protection Clause depends on the nature of the right alleged to be implicated or the class of individuals affected. If a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will examine the statute only to determine whether a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that end. *School Dist. No. 46 v. City of Bellevue*, 224 Neb. 543, 400 N.W.2d 229 (1987).

As the ability to work at a keno game does not implicate any fundamental right or suspect class, the Court need only determine that a rational basis exists for the Legislature's determination to require that county/city lottery workers be licensed, and providing that lottery worker licenses may be denied or revoked for certain types of criminal convictions. As the Nebraska Supreme Court

stated in *Botsch v. Reisdorff*, 193 Neb. 165, 169, 226 N.W.2d 121, 127 (1975):

The test, under the Fourteenth Amendment to the Constitution of the United States, when a state statute operates to single out a class of people for special treatment, is whether the suspect classification bears some rational relationship to the legitimate purposes of the legislation. In *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), a very recent case, the United States Supreme Court held: "In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution merely because the classification 'is not made with mathematical nicety or because in practice it results in some inequality. . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations - illogical, it may be, and unscientific. . . . A statutory discrimination will not be set aside if any stated facts reasonably may be conceived justified. . . . But the Equal Protection Clause does not require that the state must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the state's action be rationally based and free from invidious discrimination.

A comparison of the statutory scheme under which keno lotteries are conducted under the County and City Lottery Act, and that governing the conduct of lotteries under the State Lottery Act, demonstrates a rational basis exists to justify the Legislature's different treatment of county/city lottery workers and lottery game ticket sellers. Keno is conducted through lottery operators who are independently licensed throughout the state and conduct a variety of games independent of one another. County/city lottery workers are involved in the selection of numbers to determine winners and also the payout of prizes. On the other hand, under the State Lottery Act, lottery game ticket sellers are not involved in the selection of winners. A mechanism exists for

electronic sweeping of a retailer's account by the State so that an early warning system exists for potential worker dishonesty. In addition, the State requires a lottery game retailer to post a bond guaranteeing the honesty of its employees. Neb. Rev. Stat. § 9-830 (Cum. Supp. 1994). While both statutory schemes deal with forms of gaming activity, there are sufficient distinctions between the functions performed by county/city lottery workers and lottery game ticket sellers to substantiate the Legislature's determination to establish different treatment of these two classes.

Lottery game retailers, while not required to be licensed, must enter into a contract with the Lottery Division. Neb. Rev. Stat. § 9-824 (Cum. Supp. 1994). The Director of the Lottery Division may not enter into a contract unless "[t]he applicant has not been convicted of a felony or misdemeanor involving gambling, . . ." Neb. Rev. Stat. § 9-826(2) (Cum. Supp. 1994). Plaintiff argues that "lottery game retailers", defined as "person[s] who contract[ ] . . . with the division to sell tickets in lottery games to the public" (Neb. Rev. Stat. § 9-803(6) (Cum. Supp. 1994)), are not analogous to county/city lottery workers required to be licensed under § 9-631.01. Plaintiff suggests that a county/city lottery worker is similar to an employee of a lottery game retailer that is authorized to sell lottery tickets to the public on behalf of the retailer.

Section 9-631.01(1) requires that any person seeking to "perform any work directly related to the conduct of a lottery" must obtain a county/city lottery worker license. The phrase "work directly related to the conduct of a lottery" means "any work

involving the actual day-to-day conduct of the lottery, including, but not limited to, ticket writing, winning number selection, prize payout to winners, record keeping, shift checkout and review of keno writer banks, and security." Neb. Rev. Stat. § 9-631.01(3) (Cum. Supp. 1994). As indicated by Plaintiff's testimony, his activities as a keno operator are far more involved in the conduct of gaming activity than are the activities of individuals who merely sell lottery tickets to the public. Mr. Schulz stated that his involvement in "running the keno game" included: (1) maintaining the bank (cash drawer) for the game; (2) filling out required daily reports, including information as to cash receipts, payouts, and ticket information; (3) actual running of the keno games; and (4) payout to winners (Vol. 1, 8:3-9:17). Thus, his activities as a keno lottery "worker" are substantially different than those of a person who merely sells lottery tickets. It was not irrational for the Legislature to require licensing of persons conducting gaming activities such as those undertaken by Plaintiff, and to preclude licensing of persons with criminal convictions involving gambling offenses or other crimes of dishonesty, in order to preserve public confidence in the integrity of such gaming. Thus, Plaintiff's equal protection claim must fail.

### III. Discretion of the Tax Commissioner in Denying Plaintiff's License Application.

Neb. Rev. Stat. § 9-631.01 (Cum. Supp. 1994) provides, in pertinent part:

- (1) No person shall be eligible to perform any work directly related to the conduct of a lottery unless he or she has completed, signed, and filed with the department

and the county, city, or village, an application prepared by the department which includes:

\* \* \*

(d) A statement that the applicant has not been convicted of, forfeited bond upon a charge of, or pleaded guilty or nolo contendere to any felony within ten years preceding the date of the application or any felony or misdemeanor involving fraud, theft, or any gambling activity;. . . .

Neb. Rev. Stat. § 9-620(2) (Cum. Supp. 1994), which provides the Department with the power and duty to deny any license application, provides for denial of a license where the applicant:

(d) Was convicted of, forfeited bond upon a charge of, or pleaded guilty or nolo contendere to any offense or crime, whether a felony or misdemeanor, involving any gambling activity or fraud, theft, willful failure to make required payments or reports, or filing false reports with a governmental agency at any level;

(e) Was convicted of, forfeited bond upon a charge of, or pleaded guilty or nolo contendere to any felony other than those described in subdivision (d) of this subsection within the ten years preceding the filing of the application;

1993 Neb. Laws, LB 563, § 10, which established the licensing requirement for county/city lottery workers, generally incorporated as a basis for license denial the types of criminal convictions referenced in § 9-620(2)(d) and (e). The legislative purpose behind imposition of such requirements was to preserve the integrity of this form of gaming activity. The legislative history of LB 563 indicates that this portion of the legislation was intended to "tighten[ ] the language concerning the reasons to deny a license to include all offenses involving fraud, theft or gambling activity and filing false reports with a government agency." Committee Records on LB 563, 93rd Leg., 1st Sess., 112

(Statement of Ken Winston, Legal Counsel for the General Affairs Committee) (February 22, 1993). This intent was reiterated on the floor of the Legislature by one of the bill's introducers, who stated that "[i]t would allow denial of a license for all offenses involving fraud, theft or gambling activity, or filing false reports with a government agency." Floor Debate on LB 563, 93rd Leg., 1st Sess., 1577-78 (Statement of Senator Schellpeper) (March 10, 1993).

Thus, the purpose of the Legislature's enactment of this part of LB 563 was to ensure the integrity of gaming conducted under the County and City Lottery Act by providing that convictions for certain offenses would constitute grounds for denial of licenses to persons seeking to be involved in such gaming. Among the crimes articulated by the Legislature were gambling activities of any kind, whether felony or misdemeanor offenses. Also, the Legislature placed no limit on the time period when such convictions occurred, as it did with respect to felony offenses not involving fraud, theft, or gambling activity. Thus, Plaintiff's prior gambling conviction is precisely the type of offense which the Legislature intended to serve as a basis for denial of a license to work at keno games in Nebraska.

In enacting LB 563, the Legislature was acting to preserve public confidence in the integrity of keno gaming activity. By specifically providing that persons convicted of certain crimes, including prior gambling offenses, should not be involved in such gaming activity, the Legislature was undoubtedly attempting to address the potential for mischief which may arise if persons who

have exhibited prior disregard for gambling laws might be entrusted with conducting a gaming operation on behalf of a county, city, or village. The Legislature has broad discretion to classify, and its choices need not be drawn with utter precision, but need only be rationally related to the legitimate ends it seeks to achieve. See *Botsch v. Reisdorff*, 193 Neb. 165, 226 N.W.2d 121 (1975). The Legislature's action is clearly rationally related to the legitimate purpose of preserving public confidence in the honesty and integrity of gaming under the Act.

In light of this history, the Commissioner did not clearly abuse his discretion in determining that Mr. Schulz's prior gambling offense justified denial of his application for a county/city lottery worker license. While noting that Mr. Schulz had no subsequent criminal convictions since his 1986 misdemeanor bookmaking conviction, and that Mr. Schulz had apparently served as a county/city lottery worker for two years "without incident", the Commissioner determined that "those circumstances [were] not sufficient to mitigate or negate the obvious intention of LB 563." The Commissioner further stated:

It is clear that a gambling offense was intended by the Legislature to serve as a bar to any involvement in keno games. It is a matter of public perception, and the preservation of the game's integrity, that the games are free from any influence from individuals convicted of gambling offenses. for this reason the application of Mr. Schulz must be denied.

A reviewing court will not interfere with the penalties or sanctions imposed by an administrative agency or officer absent "a clear abuse of discretion." *In re Lawful Gambling License of Hibbing VFW Post 8510*, 529 N.W.2d 476, 480 (Minn. Ct. App. 1995);



*In re Lawful Gambling License of Henry Youth Hockey Ass'n*, 511 N.W.2d 452, 456 (Minn. Ct. App. 1994). In light of the foregoing, it cannot be said that the Commissioner's decision to deny Mr. Schulz a county/city lottery worker's license, based on Mr. Schulz's prior gambling conviction, constituted a clear abuse of discretion.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the Order of the State Tax Commissioner denying Plaintiff's application for a county/city lottery worker's license is affirmed; and

2. That costs of this action are taxed to the Plaintiff.

DATED this 15<sup>th</sup> day of October, 1996.

BY THE COURT:

  
District Judge