

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

FLORENCE YOUTH ATHLETIC)
BOOSTERS, 6075 Blondo Street,)
Omaha, Nebraska, Identification)
Number 35-6164552,)
Petitioner,)

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v.)

ORDER

CHARITABLE GAMING DIVISION of)
the STATE OF NEBRASKA)
DEPARTMENT OF REVENUE and M.)
BERRI BALKKA, State Tax)
Commissioner,)
Respondents.)

INTRODUCTION

This is an appeal pursuant to Neb. Rev. Stat. §§ 9-325(3) (1991) and 84-917 (1994) from an Order of the State Tax Commissioner denying the 1994-95 license application of Petitioner Florence Youth Athletic Boosters, Inc. [the "Organization"] to conduct a lottery by the sale of pickle cards.

On November 22, 1994, the Nebraska Department of Revenue [the "Department"] filed a "Motion for Hearing" to determine whether the Organization's application for a 1994-95 license to conduct a pickle card lottery should be denied. The Department's Motion was preceded by a letter to the Organization dated September 16, 1994, outlining the Department's proposed intention to deny the application. On October 11, 1994, the Organization timely petitioned for a redetermination of the Department's proposed action. Hearing on the matter was held on June 20, 21, 22, and 23, 1995, and on August 14, 16, and 18, 1995, before a hearing officer designated by the Tax Commissioner. On December 15, 1995, the Commissioner entered his Order denying the Organization's

application for a license to conduct a lottery by the sale of pickle cards. The Organization appealed the Commissioner's Order to this Court.

Hearing on the Organization's appeal was held on February 6, 1997. The Organization was represented by Attorney Alan J. Mackiewicz. The Department and Tax Commissioner were represented by Assistant Attorney General 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 the 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

Florence Youth Athletic Boosters, Inc. [the "Organization"], is located in Omaha, Nebraska, and is a nonprofit corporation that was incorporated in Nebraska in 1988. According to the Organization's Articles of Incorporation, its purpose is to "act as an amateur athletic and sports organization, organized and operated exclusively to foster national or international amateur sports competition primarily by supporting and developing athletes for national or international competition in all types of team and individual sports". Since 1990, the Organization has held a Class II license to conduct a lottery by the sale of pickle cards, and is therefore authorized to market pickle cards through licensed pickle

card operators. Pickle cards were sold on behalf of the Organization at Kelley's North Bowl, Kelley's Hilltop Lanes, and other locations which were licensed by the Department as pickle card operators.

The Department conducted an audit of the Organization for the period July 1, 1991 to October 31, 1993. During the audit period to May 1, 1993, Roger Stark was president of the Organization, and Roger's wife, Christine, was vice-president of the Organization from March of 1991 to May 1, 1993. Roger also served as a pickle card sales agent for the Organization, and Christine served as the utilization of funds member. The Starks managed the day-to-day operations of the Organization; Christine Stark wrote all checks on the Organization's bank accounts during the audit period.

During the audit period, the Starks paid their personal expenses using the Organization's pickle card proceeds, contrary to Neb. Rev. Stat. § 9-347.01 (Cum. Supp. 1996), which requires that pickle card proceeds be used exclusively for a "lawful purpose." "Lawful purpose" is defined in Neb. Rev. Stat. § 9-309(3) (Cum. Supp. 1996), and does not include, and specifically prohibits, expenditures for the personal benefit of the Organization's directors, officers, members, employees, etc. Unauthorized pickle card revenues were used by the Starks in the following amounts to the following payees:

AMOUNT	PAYEE
\$ 6,645.00	Roncalli High School
3,153.16	Northern Factory Sales
3,694.03	Farm Bureau Insurance

350.00	Benson Radiator Service
770.00	Sutton Security
7,697.83	Mulhall's Nursery
<u>707.97</u>	Nebraska Furniture Mart
\$23,018.26	TOTAL

In addition to the above expenditures, Roger Stark was paid approximately \$32,401.00 in "director's fees" during the audit period. These "fees" were paid with pickle card proceeds in weekly increments with checks signed by Christine Stark, and were in violation of Neb. Rev. Stat. § 9-329.01(3) (Cum. Supp. 1996). The payment of these fees was also in violation of the bylaws of the Organization, which required the directors to serve without compensation.

Roger Stark was ultimately charged with, and pled guilty to the charge of theft by unlawful taking of over \$1,500.00 in connection with all the checks written on the Organization's general accounts for the Stark's personal benefit (\$23,018.26), and the checks written on the Organization's general account characterized as "director's fees" (\$32,401.00).

The formation of the Organization itself in 1988 was the "brainchild" of Steve Kelley, who, until the fall of 1993, was part owner and an officer of Kelley's North Bowl. As Kelley's North Bowl was a licensed pickle card operator, Mr. Kelley could not legally be a "director, manager, trustee, or member of any governing committee, board or body of the licensed organization on behalf of which the pickle card operator sells individual pickle cards." See Neb. Rev. Stat. § 9-329.04 (Cum. Supp. 1996).

Mr. Kelley "recruited" the initial president (Roger Stark), a long time friend, and most of the directors of the Organization. The directors were, for the most part, employees of the bowling alley, or personal friends of Mr. Kelley. During the audit period, the Organization's directors had no meetings, or records of any meetings, to discuss the disbursement of its pickle card proceeds. The Organization did not sponsor or promote any youth activities. Its only "activity" was selling pickle cards.

The chief manner in which the Organization spent its pickle card proceeds (at least those proceeds that were not "diverted" by Roger Stark) was to subsidize youth bowling, and finance related bowling equipment and supply purchases at Kelley's North Bowl. The Organization would either write a check directly to another nonprofit organization who sponsored bowling at Kelley's North Bowl, a supplier, or, beginning in June of 1992, the Organization would write a check to an entity called "Florence Youth Bowling Leagues." Many of the checks were issued under the name "Florence Junior Bowling Leagues", a term apparently used interchangeably with "Florence Youth Bowling Leagues". These checks would then be deposited into a bank account in the name of "Florence Youth Bowling Leagues," which was opened by, and exclusively controlled by, Steve Kelley. From the account of "Florence Youth Bowling Leagues," Steve Kelley would then write checks to himself or Kelley's North Bowl, ostensibly as reimbursement for youth bowling and related supply and equipment purchases. These checks to the "Florence Youth Bowling Leagues" were initially written and signed

by Christine Stark, the utilization of funds member of the Organization, until her "departure" around May 1, 1993. The checks to the "Florence Youth Bowling Leagues" were then written and signed by Hope Jacobsen-Kelley (Steve Kelley's wife), who replaced Roger Stark as the president of the Organization, and was also the utilization of funds member. Apparently, the "Florence Youth Bowling Leagues" account was closed, or at least activity on that account ceased, in December of 1993. Sometime in the late fall of 1993, another account was opened by Ms. Jacobsen-Kelley entitled "Florence Youth Bowling Association," which is used in essentially the same manner as its predecessor account ("Florence Youth Bowling Leagues"), except that Steve Kelley is not a signatory on the account. In late September of 1994, the Organization amended its bylaws to require monthly meetings of its directors in order to review the financial activities of its pickle card accounts.

CONCLUSIONS OF LAW

I. Propriety of the Commissioner's Consideration of Evidence Relating to the Origin and Operation of the Organization.

Initially, the Organization asserts that the Commissioner erred in considering certain evidence offered by the Department at the administrative hearing relating to the origin and operation of the Organization, including the involvement of Steve Kelley, proprietor of Kelley's North Bowl, in the conduct of the Organization's affairs. At the outset of the administrative hearing on this matter, the Organization sought, through a "Motion in Limine," to restrict the Department's proffers of evidence to the illegal activities of the Starks (which were not disputed), and

to exclude all other evidence relating to the operations and overall integrity of the Organization. The Hearing Officer denied the Organization's Motion in Limine. The Organization asserts on appeal, as it did below, that it was improper for the Commissioner to consider evidence related to the organization and operation of the Organization, arguing that the Department's hearing notice was not sufficient to permit introduction of this evidence at the administrative hearing. The Court finds that the Organization had adequate notice of the issue presented and the Department's intent to introduce such evidence at hearing.

Two statutory provisions potentially govern the type of notice the Department of Revenue is required to give licensees, or license applicants, when apprising them of their intent to deny a gaming license application. The Nebraska Pickle Card Lottery Act, Neb. Rev. Stat. § 9-322.02(1) (1991), provides:

Before any application is denied pursuant to section 9-322, the Department shall notify the applicant in writing of the Department's intention to deny the application and the reasons for the denial. Such notice shall inform the applicant of his or her right to request an administrative hearing for the purpose of reconsideration of the intended denial of the application.

If a hearing is requested, Neb. Rev. Stat. § 84-913 (1994), of the Administrative Procedure Act, sets forth the statutory notice requirements for contested cases. In pertinent part, that section reads:

In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place, and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing

or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable . . .

The above sections speak of apprising the licensee (or potential licensee) of the "reasons for the denial," and the "issues involved."

The Organization was apprised by the Department of its intent to deny its license application, and of the specific alleged violations of the Nebraska Pickle Lottery Act, by letter dated September 16, 1994, and again in the Department's "Motion for Hearing" dated November 22, 1994. Both the Department's initial letter, and subsequent "Motion for Hearing" set forth as the basis for the proposed license denial the specific factual allegations concerning the Starks misuse of pickle card revenues, and referenced the specific laws which had been violated. Referencing the Department's "Motion for Hearing," the "Notice of Hearing" set out, among other things, the ultimate issue to be decided by the Tax Commissioner:

Whether or not the 1994-1995 license application of Florence Youth Athletic Boosters, Inc., to conduct a lottery by the sale of pickle cards should be denied.

Although the Department sought the denial of the Organization's license to conduct a lottery by the sale of pickle cards, a number of potential penalties are available for imposition by the Commissioner for gaming violations, ranging in severity from an administrative fine to denial or revocation of the applicable license. See Neb. Rev. Stat. § 9-322 (Cum. Supp. 1996).

Inherent in regulatory proceedings, including those conducted pursuant to the Nebraska Pickle Card Lottery Act, are two distinct

elements that the decision maker must consider in deciding the ultimate issue. The threshold element is obviously the establishment of whether or not a violation of the law actually occurred. In this case, the violation was not disputed by the Organization. The second element is the establishment of any mitigating factors that may be applicable, such as the nature and duration of the violation, the degree of culpability of the individual or organization, remedial measures that may have been taken, and the prognosis for future compliance with the law.

The Court notes that the Organization's "Request for Redetermination," which is the pleading equivalent to an Answer, attempted to explain the circumstances of the alleged violations, and the remedial actions that had assertedly been taken. Moreover, the Stipulation, executed between the Department and the Organization prior to the hearing, agreed to the admission into evidence at the hearing of corporate meetings of directors of the Organization beginning September 25, 1994 through May 28, 1995, an amendment to the Organization's bylaws dated September 25, 1995, and a listing of organizations that have benefited from the Organization. Additionally, the "Witness and Exhibit List of Florence Youth Athletic Boosters," submitted by the Organization three weeks prior to the hearing, stated its intention to offer testimony concerning the composition, nature, operation, and financial activities of the Organization during, and subsequent to, the audit period.

As the Commissioner noted, "[t]he Organization was obviously cognizant, and certainly entitled, to present itself in the best light possible, in order to refute or mitigate possible sanctions." However, as the Commissioner found, the Department was also entitled to present evidence concerning its rationale for the imposition of the particular penalty or sanction requested, denial of the Organization's license application. All of this information, while not an issue in and of itself, was relevant to the ultimate decision of what, if any, sanction was appropriate.

The Nebraska Supreme Court has held:

Charges in administrative proceedings must be specific enough to allow a party to prepare a defense but those charges need not be drawn with the same refinements, strictness, exactitude and subtleties as pleadings for judicial proceedings.

Appeal of Bonnett, 216 Neb. 587, 591, 344 N.W.2d 657, 659 (1984).

Moreover, our Supreme Court stated in *Dieter v. State*, 228 Neb. 368, 375, 422 N.W.2d 560, 566 (1988):

We note that in proceedings before an administrative agency or tribunal, procedural due process requires notice reasonably calculated to inform one of the accusation levied; identification of the accuser; a factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation; and a hearing before an impartial board (citations omitted). In order to satisfy the requirements for due process, the notice and proceedings before an administrative agency must reasonably provide information regarding the accusation.

The Administrative Procedure Act only requires, among other things, that the notice of hearing state the "issues involved." It does not require, nor could it require, a listing of the nature of all anticipated evidence that may be introduced at the hearing.

The Court finds that the notice of hearing adequately and accurately stated the issue in this case. Therefore, the Court finds that the Commissioner did not err in receiving the Department's evidence concerning the operation and organization of the Organization, as it was relevant to the issue of whether license denial was the appropriate sanction to be imposed.

II. PROPRIETY OF THE SANCTION OF DENIAL OF THE ORGANIZATION'S LICENSE TO CONDUCT A LOTTERY BY THE SALE OF PICKLE CARDS.

In addition, the Organization maintains that it was not responsible, and therefore should not be held accountable, for the unauthorized and illegal acts of the Starks. The Court concludes that the Organization must be held accountable, and that the sanction of denial of the Organization's license to conduct a lottery by the sale of pickle cards was proper.

Although there are no Nebraska cases involving corporate responsibility within the purview of the gaming laws, our courts have addressed this issue in other contexts. In *State v. Roche, Inc.*, 2 Neb. App. 445, 511 N.W.2d 195 (1994), reversed on other grounds 246 Neb. 568, 520 N.W.2d 539 (1994), the Nebraska Court of Appeals upheld a criminal conviction of a corporation for theft. The court stated:

[w]hile a corporation may be convicted of certain types of criminal acts committed by its agents, even if the acts have been forbidden by the corporation, in order to impose such criminal liability against the corporation, the agent must have been acting within the scope of his or her authority.

2 Neb. App. at 454, 511 N.W.2d at 208, citing *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 751, 371 N.W.2d 732, 738 (1985).

The court went on to cite *State v. Willard*, 54 So.2d 183, 185 (Fla. 1951) for the proposition that:

. . . a corporation may be held criminally liable for the acts of misfeasance, malfeasance or nonfeasance, even though the act constituting the offense may be ultra vires, or one as to which a specific intent is essential. 2 Neb. App. at 455, 511 N.W.2d at 208.

The purpose of holding a corporation responsible for the unlawful acts of its agents is rooted in the public policy of controlling the actions of such agents by imputing their actions to their employers. See *New York Central R.R. v. United States*, 212 U.S. 481 (1909); *United States v. A & P Trucking Co.* 358 U.S. 121 (1958).

In a case remarkably similar to the one at hand, the Minnesota Court of Appeals upheld the denial of a gaming license for a youth sports organization. *In re Henry Youth Hockey Ass'n*, 511 N.W.2d 452 (Minn. Ct. App. 1994). In that case, the Minnesota regulatory authority audited the youth hockey organization engaged in gambling activities, and found substantial cash shortages. The organization had no internal controls, and there was no significant involvement on the part of its members in the organization's activities. The individual running the gambling operation withheld from members of the organization financial reports, written accounts of gambling activities, and even the results of the audit. At the administrative hearing, and later on appeal, the organization maintained that it should not be held responsible for the illegal acts of its principals. The Minnesota Court of Appeals responded:

The Association argues that the organization is not responsible for the violations of law and board rules

committed by its principals and that the principals' illegal actions should not be imputed to the organization. We disagree. The willful violations of an artificial entity's officers and employees can be imputed to an entity such as the Association . . . The Association may not abdicate its statutory rule responsibilities or plead ignorance of legal requirements by delegating all of its legal responsibilities to an employee.

511 N.W.2d at 456.

The Nebraska Pickle Card Lottery Act requires that organizations obtaining licenses to sell pickle cards in Nebraska must use the proceeds for specific and enumerated purposes. See Neb. Rev. Stat. §§ 9-347, 9-347.01 and 9-348 (Cum. Supp. 1996). Furthermore, Neb. Rev. Stat. § 9-322(2) (1991), prior to its amendment in 1994, authorized the Department:

To deny any license application or renewal application for cause. Cause for denial of an application for or renewal of a license shall include instances in which the applicant or licensee or any person with a substantial interest therein: (a) Violated the provisions, requirements, conditions, limitations, or duties imposed by the Nebraska Bingo Act, the Nebraska County and City Lottery Act, the Nebraska Lottery and Raffle Act, the Nebraska Pickle Card Lottery Act, the Nebraska Small Lottery and Raffle Act, or the State Lottery Act or any rules or regulations adopted and promulgated pursuant to such acts; (emphasis added).

The reference to "any person with a substantial interest" in a licensee clearly encompasses persons involved in the ownership, operation, or management of a corporate licensee, or directors or officers of a corporate licensee. Indeed, this is confirmed by an amendment to § 9-322(2) adopted in 1994, providing the Department with authority to deny a license when, "in the case of a business entity or a nonprofit organization, any officer, director, employee, or limited liability company member of the applicant or

licensee, other than an employee whose duties are purely ministerial in nature. . .," has violated the gaming statutes or regulations. 1994 Neb. Laws, LB 694, § 20. This language is currently contained in Neb. Rev. Stat. § 9-322(2) (Cum. Supp. 1996). The conduct of the Starks' clearly falls within either version of the statute.

To accept the Organization's position, that it is only responsible for the acts if specifically authorized, would render the disciplinary provisions of the Nebraska Pickle Card Lottery Act meaningless. It would be a rare case indeed where an organization would admit to authorizing its officers, directors, employees, etc., to act in an illegal manner.

An organization must stand accountable and accept responsibility for the actions of its officers, directors, and employees. Of course, the degree of an organization's culpability in the commission of an unauthorized or illegal act has a direct bearing on the ultimate sanction that may be imposed, and will depend on the particular facts of each case.

The Court finds that the misuse of pickle card proceeds by the Starks was an egregious violation of the Nebraska Pickle Card Lottery Act, and constituted sufficient grounds for the Commissioner's denial of the Organization's license. Equally alarming, however, was the manner in which the Organization operated. If not in fact, at least in appearance, Steve Kelley was controlling the operations of the Organization, and the

disbursement of its pickle card revenues. This was in circumvention of § 9-329.04, which provides in pertinent part:

. . .A sole proprietor, partner in a partnership, member in a limited liability company, or officer or director of a corporation licensed as a pickle card operator shall not be a director, manager, trustee, or member of any governing committee, board, or body of the licensed organization on behalf of which the pickle card operator sells individual pickle cards.

During the audit period, most, if not all of the Organization's directors were friends of Steve Kelley, or employees of the bowling alley, and held their position in the Organization at the behest of Steve Kelley. The directors never held a meeting to discuss the Organization's activities and finances, nor was there any oversight as to how and where the pickle card proceeds were to be spent. In this type of organizational "environment," it is not difficult to understand how the Starks could steal with impunity over a two and one-half year period.

The Organization does not organize, sponsor, or promote any youth activities on their own. The Organization's only "activity" is selling pickle cards, which is contrary to Neb. Rev. Stat. § 9-326(2)(b) (Cum. Supp. 1996), which requires an organization to "[c]onduct activities within this state in addition to the conduct of lottery by the sale of pickle cards."

Most, if not all, of the pickle card proceeds went to ostensibly subsidize youth bowling leagues and related activities, and equipment purchases at Kelley's North Bowl. It is not unreasonable to conclude from the totality of testimony in the record that the "real" purpose of the Organization was to increase

the profit margin of Kelley's North Bowl, and to personally benefit Steve Kelley. Steve Kelley admitted to taking a \$6,000.00 personal loan (not yet repaid) from the pickle card revenues of the Organization, via the "Florence Youth Bowling Leagues" checking account, as well as utilizing another \$1,000.00 of pickle card revenues to pay his credit card for a "director's meeting" in Las Vegas for himself, a friend, and the Starks. The purpose of the Nebraska Pickle Card Lottery Act (see Neb. Rev. Stat. § 9-302 (1991) is not to enrich, or benefit, private businesses or individuals. That is exactly what happened here.

"A reviewing court. . . [will] not interfere with the penalties or sanctions imposed by an agency decision unless a clear abuse of discretion is shown by the party opposing the decision." *In re Henry Youth Hockey Ass'n*, 511 N.W.2d at 456. The President and Vice-President of the Organization were given the responsibility to use the Organization's money in a lawful manner. They did not do so, and the Organization completely failed in its responsibility to oversee its pickle card activities. The evidence indicates that the Organization was established merely as a means of generating money for a pickle card operator, and that it was controlled by that pickle card operator. The Organization does not conduct any youth sports activity on its own, nor does it conduct any other type of charitable activity; it simply sells pickle cards. In view of the seriousness of the violations of the Nebraska Pickle Card Lottery Act, the sanction of license denial

imposed by the Commissioner is entirely appropriate, and cannot be said to constitute an abuse of discretion.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the Order of the State Tax Commissioner denying the Petitioner's application for a license to conduct a lottery by the sale of pickle cards is affirmed; and

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

DATED this 3 day of April, 1997.

BY THE COURT:

Earl J. Probst
District Judge