

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF REVENUE**

IN THE MATTER OF

OAH No. 05-0914-GAM

A.N.B.C. No. 2

Gaming Appeal

DECISION AND ORDER ON SUMMARY ADJUDICATION

I. Introduction

This is an appeal of the November 28, 2005 Informal Conference Decision by the Taxation Division of the Alaska Department of Revenue (Division). That decision denied the request of A.N.B.C. No. 2 (ANB) to use the Bingo Time System Alaska in its charitable gaming activities. The parties appeared at a pre-hearing conference and status conferences. Administrative Law Judge Mark T. Handley conducted the meetings. ANB was represented by its attorney, C.A.D., M.A.B., and Dan Branch, Assistant Attorneys General, represented the Division.

The parties both filed motions arguing that no material facts are in dispute and that this case should be decided on the parties' briefing and oral arguments. Summary adjudication is granted to the Division because, based on the undisputed facts, Bingo Time System Alaska is not "bingo" as that term is defined in AS 05.15.690.

II. Facts

A. History

ANB applied for a permittee license authorization allowing the use of a bingo game called Bingo Time System ©.¹ The application was denied by the Division.² ANB requested an informal conference with the Division to appeal the decision. During the informal conference period, ANB made changes to its proposed version of Bingo Time System ©, called Bingo Time System Alaska, in an attempt to address the Division's objections. On November 28, 2005, the

¹ ANB's Ex. 1.

² ANB's Ex. 2.

Division issued an Informal Conference Decision which denied ANB's request to use the latest version of Bingo Time System Alaska in its charitable gaming activities.³

B. Bingo Time System Alaska

In ANB's latest version of Bingo Time System Alaska, which is the subject of this appeal, a Bingo Time System Alaska player may purchase bingo sheets either before or during the game.⁴ Bingo Time System Alaska bingo cards are sold in both paper and electronic format, and they are sold in bingo sheets of four cards per sheet.⁵ Each Bingo Time System Alaska sheet has four cards, sold for \$1.⁶ At the start of the game, the bingo caller manually draws and displays 24 numbered balls from the blower.⁷ These balls are drawn one after another and displayed on the flashboard.⁸ A 25th ball is then picked and shown, but the ball is not called. The number of the 25th ball is not entered on the flashboard.⁹ After the 25th ball is picked and displayed there is a pause in game. During this pause, players may purchase more bingo sheets.

ANB's proposed Bingo Time System Alaska games each would have a total prize value of \$850.¹⁰ The \$850 in prizes would be broken down into four prizes of \$50, \$100, \$200, and \$500.¹¹ The three smaller prizes are called "games along the way" These "games along the way" are awarded for selected bingo patterns that are easier to achieve than pattern for the main prize.¹²

C. Other Multiple Prize Pre- Pulled Ball Bingo Games

For the purpose of this motion, the Division does not dispute ANB's assertion that other bingo games that involve multiple prizes per game and pre-pulled ball are commonly played by Alaska permittees throughout Alaska. For the purpose of this motion, the Division also does not dispute ANB's assertion that there have been no enforcement actions taken against these permittees for playing these other multiple prizes per game and pre-pulled ball games. ANB provided affidavits to support these assertions.¹³ ANB also provided an example of an Alaska

³ ANB's Ex. 5.

⁴ ANB's Ex. 4, page 9.

⁵ ANB's Ex. 4, page 8.

⁶ ANB's Ex. 4, page 8.

⁷ ANB's Ex. 4, page 9.

⁸ ANB's Ex. 4, page 9.

⁹ ANB's Ex. 4, page 9.

¹⁰ ANB's Ex. 4, page 9.

¹¹ ANB's Ex. 4, page 9.

¹² ANB's Ex. 4, page 9.

¹³ ANB's Ex. 7, 9 & 10.

pre-pulled ball game called "Early Bird," which Uses the one of the balls pulled in each the previous eleven games for the twelfth game.

III. Discussion

A. Summary Adjudication

Summary adjudication may be granted if there is no genuine dispute as to any material fact, so that the case may be resolved as a matter of law.¹⁴ In this case, no material facts are in dispute. The parties agreed about the facts related to Bingo Time System Alaska and the Division's decision. The parties' dispute is about whether, as a matter of law, the Division's properly denied ANB's request for a permittee license authorization allowing the use of Bingo Time System Alaska based on the undisputed facts.

B. Bingo Time System Alaska is not Bingo

AS 05.15.690(4) provides:

"bingo" means a game of chance of, and restricted to, the selling of rights to participate, and the awarding of prizes, in the specific kind of game of chance sometimes known as bingo or lotto, played with cards bearing numbers or other designations, five or more in one line, the holder **covering numbers when objects** similarly numbered **are drawn** from a receptacle, and the game being won by the person who first covers a previously designated arrangement of numbers on the card[.]

(Emphasis added) Thus, in a game of bingo as that game is defined in AS 05.15.690, the holder, or player, must cover each number on his bingo card **when** that ball is drawn. One of the two major skill-based objectives for players of the game is to cover the numbers as close to immediately after the numbers are drawn as possible to enable that the player to attempt the second skill-based objective, which is to declare a winning combination before the next ball is drawn. The player is at greater risk of having to split the prize if he waits to cover a number because balls will continue to be drawn until a player declares a winning arrangement of numbers.¹⁵ Seventy five numbered balls must be used.¹⁶

In Bingo Time System Alaska, the importance of this first skill-based objective is diminished. Players have less risk if they fail to cover the numbers as the balls are drawn. A more limited number of balls are drawn more or less immediately and players are allowed to keep buying cards until someone buys a card with! the winning combination with the pre-pulled

¹⁴ *E.g., Smith v. Dept of Revenue*, 790 P.2d 1352, 1353 (Alaska 1990).

¹⁵ 15 A A C 160.590(h)-(m)

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¹⁶ 15 A A C 160.570(b)(1)(B)

balls. Like "instant bingo," which is prohibited,¹⁷ and pull-tabs, which are regulated differently, the focus of the game from the players' standpoint is buying the winning card rather than covering the winning numbers as they are called. Players need not even be present when the balls are pulled in Bingo Time System Alaska. They can appear during the indefinitely long "pause" in the game and keep buying cards until they get a winner.

Whether Bingo Time System Alaska is *closer to* bingo, as that game is defined in AS 05.15.690, than to instant bingo or pull-tabs, is a subject of debate upon which reasonable minds might differ. Whether Bingo Time System Alaska is "bingo" as that term is defined in AS 05.15.690 and described in 15 A A C 160.590 is not.

C. No Estoppel

ANB does not make a persuasive argument that Bingo Time System Alaska is "bingo" as that term is defined in AS 05.15.690. Rather, ANB focuses its arguments on the undisputed fact that two of the ways that Bingo Time System Alaska impermissibly differs from legal bingo that the Division has specifically identified are common practices in Alaska.¹⁸ These two practices are the use of pre-pulled balls and paying multiple prizes for a single bingo game. ANB argues that because these practices are common and the Division has not taken enforcement action against the permittees who engage in these practices, it is improper for the Division to deny its request to play Bingo Time System Alaska.

The Division cited the Alaska Supreme Court case *Jackson v. Kenai Peninsula Borough* to ANB in its rejection of this argument.¹⁹ In that case, the court rejected an argument that a history of past failure to enforce a zoning ordinance estopped the borough from enforcement. In its briefing, however, ANB makes it clear that it is not arguing estoppel, but rather that the Division's historical failure to take enforcement action against the use of pre-pulled balls and multiple prizes means that the Division's decision in this case will change the status quo. ANB argues that this supports its position that the Division is not correctly interpreting the existing law. ANB maintains that the Division is attempting to adopt a new de facto regulation, which is inconsistent with a correct reading of the current law.

¹⁷ 15 A A C 160.590(h)-(m)

¹⁸ Bingo Time System Alaska is so fundamentally different from the game of "bingo" as that game is defined in AS 05.15.690, that there are, as would be expected, other ways that Bingo Time System Alaska does not fit within the current regulatory requirements. For example, a bingo card may not be sold, if the sale allows a player an advantage over another player. *See* 15 A A C 160.510(b). Allowing some players to buy cards before, and some to buy cards after, balls have been pulled and prizes awarded puts early buying players at an advantage over later buying players.

¹⁹ 733 P.2d 1038 (Alaska 1987).

D. Scope of Division's Authority

In 1989 the Alaska Supreme Court reversed the Superior Court's order for the Division to allow computerized bingo. The Supreme Court stated:

The question as to what equipment may be used in bingo has been committed by statute to the discretion of the Commissioner. AS 05.15.060(7). In reviewing a decision on a matter committed to the agency's discretion, we will reverse only if the decision was arbitrary, unreasonable, or an abuse of discretion. *North Slope Borough v. LeResche*, 581 P.2d 1112, 1115 (Alaska 1978).

In our view the superior court erred in granting injunctive relief. The Commissioner reasonably read the statutes to authorize a game played with mechanical rather than electronic devices. The computerized number generator used in the appellees' games does not comport with the requirement in AS 05.15.210(3) that numbered objects be "drawn from a receptacle." Moreover, AS 05.15.180(b) requires that bingo be conducted substantially as it was conducted before January 1, 1959. Computerized bingo games were not played in Alaska before that date.²⁰

AS 05.15.060(a) not only gives the Division the authority to determine what equipment may be used in bingo, as noted by the court, that statute also gives the Division the authority to determine how bingo games will be conducted. AS 05.15.060(a) provides in pertinent part:

(a) The department shall adopt regulations under AS 44.62 (Administrative Procedure Act) necessary to carry out this chapter covering, but not limited to,

(6) the method and manner of conducting authorized activities and awarding of prizes or awards, and the equipment that may be used [.]

E. Standard of Review of Actions Within the Scope of Division's Authority

This appeal challenges the Division's action in an area where the Division has the authority to exercise some discretion, that is, the authority to regulate how bingo games may be played. When agencies make discretionary decisions, and no facts are in dispute, the administrative appeal process is more like a court's review of a final agency decision.²¹ When agencies make decisions within its discretionary authority, the reasonable basis test is applied to a review those decisions because the agency decision-making process is an executive rather than a quasi-legislative or quasi-judicial activity.²² To the extent that this executive decision-making process requires application of law to facts, an executive discretionary decision might be said to

²¹ *Malone v. Anchorage Amateur Radio Club, Inc.*, 781 P.2d 576, 778 (Alaska 1989).

²¹ See *Kelly v. Zainarello*, 486 P.2d 906, 916 (Alaska 1971) (stating that explaining the different standards of review to apply to agency actions that are legislative, judicial or executive in nature).

²² *Kelly v. Zainarello*, 486 P.2d 906, 917 (Alaska 1971).

resemble judicial activity, but the similarity ends where the focus of the decision rests in the exercise of the agency's duty to weigh the complex and sometimes competing policy directives inherent in the statutes that bear on the decision. The reasonable basis standard of review is proper in administrative appeals of executive discretionary acts not requiring formal decision-making procedures because it allows agencies the latitude they need to act in a manner commensurate with their discretion.²³

A more conventional approach to seek approval of a game like Bingo Time System Alaska, would have been to petition the Division to promulgate new proposed regulations to specifically allow this game and amend any existing regulations which would conflict with the new game. If the requested game was allowable under the statute, a decision by the Division to decline to initiate such a rulemaking process would have been just such an exercise of executive discretionary decision making. Such a denial would be subject only to judicial review under the reasonable basis test standard.²⁴

F. Approval Would Be Beyond Division's Statutory Authority

The parties instead chose to treat ANB's request as a proposed amendment to its permit, subject to the administrative appeals process.²⁵ The Division's decision to deny ANB's request was not an exercise of its discretionary authority subject to review under the reasonable basis test standard. The Division's discretionary authority is limited. The Division may approve or disprove variations of bingo games that meet the statutory provisions that define of bingo and control how that game may be played by permittees and operators in Alaska. As discussed above, Bingo Time System Alaska does not meet the statutory definition of bingo.

While the statutes delegate to the Division the authority to adopt regulations establishing method and manner of conducting authorized activities such as bingo, the Division may not allow unauthorized activities through regulation.²⁶ The Division could not for example allow "slot machine bingo" by adopting regulations that would allow the use of slot machines that

²³ *Olson v. State, Dept. of Natural Resources*, 799 P.2d 289j 293 (Alaska 1990).

²⁴ See AS 44.62.230. While ANB incorrectly accuses the Division of improper de facto rule making in its denial of ANB's request for a permit amendment, the creation of a new and fundamentally different form of legal gaming through the permit approval process could result in an improper circumvention of the rule making procedures set out in Administrative Procedures Act at AS 44.62.010-300.

²⁵ 15 A A C 05.010-030.1 notified the parties that the Division could have arguably have denied ANB's request for a hearing, on the grounds that its decision was not a subject matter that can be appealed to a formal hearing under 15 A A C 160.910. See *Order Dismissing Appeal of Millennium Games, Inc.* DOR Caseload No. 020028. Neither party chose to raise this issue.

²⁶ *Lakosh v. Alaska Dept. of Environmental Conservation*, 49 P.3d 1111,1118 (Alaska 2002.).

included some of the elements of the game of bingo. The Division does not have the authority to approve Bingo Time System Alaska. Bingo Time System Alaska is simply not the game described in AS 05.15.690.²⁷

G. Bingo Time System Alaska Not Allowed Under Current Regulations

Bingo Time System Alaska is also inconsistent with the regulations that restrict the conduct of bingo games, and because Bingo Time System Alaska is not bingo, the Division could not adopt regulations that would allow it. Most of the briefing in this case is based on arguments on issues that become issues only if one assumes that the statutes would allow Bingo Time System Alaska if the Division approved it. Because the statutes do not give the Division this authority it is not necessary to deal with theoretical issues that depend on Bingo Time System Alaska meeting the statutory definition of bingo to have relevance.

The Division is correct in its analysis of its regulations in concluding that they do not allow the use of pre-drawn balls, and do not allow multiple prizes. Since the statute does not allow pre-drawn balls because it requires that the numbers be covered when the balls are drawn, the Division does not have the authority to adopt regulations that would allow pre-drawn balls. Furthermore, although the Division's argument that the language of the statute can not be read to allow multiple prizes for a single game is not persuasive, it is certainly within the Division discretion to prohibit multiple bingo prizes through regulations. The Division's regulations do prohibit multiple prizes for different combinations of numbers. Although that prohibition is not explicit, it is implicit both in the language of those regulations and in the effect of the limitations those regulations impose on the conduct of the game.²⁸ The Division is certainly correct in declining to give ambiguities in its regulations readings that would contravene the statutory limitations under AS 05.15.690 in order to allow the approval of Bingo Time System Alaska.²⁹

IV. Conclusion

Based on the undisputed facts in this case, the Division's Informal Conference Decision, which denied ANB's request to use the latest version of Bingo Time System Alaska in its charitable gaming activities, is correct as a matter of law.

²⁷ *Grunert v. State*, 109 P.3d 924, 932 (Alaska 2005).

²⁸ See The use of the singular word "prize" in 15 A A C 160.520(d) & 15 A A C 160.590(c), (d), (j), (l) & (in). The use of the word "prize" in these regulations implies that there will only be one "prize" per game, that the game will be played until that prize is won and that the only way that there will be more than one prize per game is if there are two winners with the same winning combination who split the prize.

²⁹ *Rollins v. State, Dept. of Revenue, Alcoholic Beverage Control*, 991 P.2d 202, 210 (Alaska 1999).

V. Order

The Division's motion for summary adjudication is granted. This case will not be scheduled for a formal hearing. The Division's Informal Conference Decision, issued on November 28, 2005, which denied ANB's request to use the latest version of Bingo Time System Alaska in its charitable gaming activitiesj is affirmed.

DATED this 12th day of December, 2006.

By: Mark T. Handley
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 11th day of January, 2006.

By: Steve Porter
Deputy Commissioner

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

C.D, Atty.
D.B., AAG
1/11/07