

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

In the Matter of)
)
BREVIG MISSION TRADITIONAL BINGO) OAH No. 10-0200-GAM
_____)

DECISION

I. INTRODUCTION

The Department of Revenue Tax Division (Division) has determined that Brevig Mission Traditional Council (Brevig Mission) committed several violations in connection with its gaming permit. The Division suspended that gaming permit for ten months. Brevig Mission requested an administrative review of that decision. At the informal conference, the suspension was reduced to nine months.¹ Brevig Mission appealed that suspension.

A hearing was held in Anchorage on July 13, 2010. The Council President and four other Council Members participated by phone. The Division's exhibits 1 – 35 were admitted without objection. Based on the evidence presented at that hearing, the decision to suspend the gaming permit is upheld, but the suspension period is reduced to seven months.

II. FACTS

A notice of violation was sent to Brevig Mission on August 20, 2007.² This notice listed various problems with the Annual Financial Statements (AFS) submitted by Brevig Mission for 2003, 2004, 2005, and 2006. An accompanying letter provided additional information concerning the alleged violations.³ A second Notice of Violation and accompanying letter was sent on October 29, 2009.⁴ A Notice of Suspension was also issued on October 29, 2009.⁵ These documents referred back to the 2007 Notice of Violation and also raised concerns about the 2007 and 2008 AFSs. An Informal Conference Decision was issued on March 31, 2010.⁶

Barbara Post testified for the Division at the hearing. She is an auditor for the Division and was able to explain the significance of the documents admitted as exhibits. Several council members testified briefly on behalf of Brevig Mission, but did not contest any of the relevant facts asserted by the Division.

¹ The Division's pre-hearing brief requests an eight month suspension.

² Exhibit 22.

³ Exhibit 23.

⁴ Exhibits 24 & 27.

⁵ Exhibit 26.

⁶ Exhibit 1.

III. DISCUSSION

A. *Statutory and Regulatory Scheme*

Alaska Statutes 05.15.010 *et seq.* govern charitable gaming in Alaska. An organization must have a permit in order to conduct gaming activities.⁷ Each year the organization must file an annual report providing certain information about its activities.⁸

The organization must also appoint one Member in Charge and at least one Alternate Member in Charge who are responsible for ensuring that appropriate records are kept and reports filed.⁹ These individuals must pass a test to show they are familiar with the requirements of the gaming statutes and regulations.¹⁰

There are limits on how money received through charitable gaming may be spent. The net proceeds¹¹ from gaming may only be used to pay prizes or to support “political, educational, civic, public, charitable, patriotic, or religious uses” in Alaska.¹² Expenses from proceeds are limited to certain authorized expenses.¹³ Those expenses may not exceed 70% of the adjusted gross income¹⁴ from pull-tab activities or 90% of adjusted gross income from other gaming activities except a Calcutta pool.¹⁵

Alaska regulations 15 AAC 160.010 – 995 provide additional guidance and requirements applicable to gaming permits.

B. *Violations*

The Division issued a written decision based on its informal review.¹⁶ It is this document that sets out the issues on appeal and the basis for any suspension.¹⁷ The informal conference decision states:

The October 29, 2009 Notice of Violation and separate letter that accompanied the Notice of Suspension described numerous violations and discrepancies. Despite the seriousness of these violations, DOR provided Brevig Mission with opportunities to avoid or reduce the period of suspension by satisfying the requirements contained in the Notice of Suspension and accompanying letter. However, Brevig Mission failed to correct or explain most of those violations and

⁷ AS 05.15.020.

⁸ AS 05.15.080(b).

⁹ AS 05.15.112.

¹⁰ AS 05.15.112(a).

¹¹ Net proceeds is defined in AS 05.15.690(32).

¹² AS 05.15.150(a).

¹³ AS 05.15.160(a)

¹⁴ Adjusted gross income is defined in AS 05.15.690(1).

¹⁵ AS 05.15.160(c) & (d).

¹⁶ Exhibit 1.

¹⁷ 15 AAC 05.020(b) (“The decision must identify the issues in controversy for purposes of further appeal.”)

discrepancies. Therefore the ten month suspension of Brevig Mission's gaming permit is upheld on appeal with a one month reduction to reflect the limited corrections contained in the amended Annual financial Statements for 2007 and 2008.^[18]

Thus, the issues on appeal are those, and only those, set out in the Notice of Violation dated October 29, 2009,¹⁹ as explained in the letter dated October 29, 2009.²⁰

There was also evidence presented concerning violations alleged in the August 20, 2007, Notice of Violation.²¹ The 2007 Notice of Violation was also mentioned in the Notice of Suspension dated October 29, 2009.²² That Notice of Suspension was appealed, however, and the informal conference decision that resulted from that appeal, discussed above, resolved or limited the issues that remain in controversy for this appeal.²³ To go beyond what was identified as the issues in controversy by the Informal Conference Decision would raise due process concerns.

Based on the admitted exhibits and explanatory testimony from the Division's witness at the hearing, the following violations have been proven.

1. Method of Accounting

The first allegation is that Brevig Mission did not use the accrual method of accounting for bingo or pull-tabs. 15 AAC 160.830(a) requires a permit holder to use Generally Accepted Accounting Principles (GAAP).²⁴ Ms. Post testified that this means the use of the accrual method of accounting.²⁵

Rather than use the accrual method, Brevig Mission was using what is called the ideal net method for its pull-tab accounting. In her testimony, Ms. Post used the 2006 AFS²⁶ to demonstrate how the Division determined that Brevig Mission was using the ideal net method. According to Ms. Post, the ideal net method starts with the total amount of money that could be received from each pull-tab game, assuming each ticket was sold at full value, and subtracts the total amount of prize money payable to determine the ideal net. Exhibit 32, page 29, shows the total receipts and prizes for all pull-tab games played in 2006 under the ideal net method. Those

¹⁸ Exhibit 1, page 2.

¹⁹ Exhibit 24.

²⁰ Exhibit 27.

²¹ Exhibit 22.

²² Exhibit 26.

²³ 15 AAC 05.020(b) ("The decision must identify the issues in controversy for purposes of further appeal.")

²⁴ This rule is limited to bingo and pull-tab operations. 15 AAC 160.830(c).

²⁵ See also, Exhibit 27, page 2 ("GAAP requires the use of the accrual method of accounting for bingo and pull-tabs.")

²⁶ Exhibit 32.

totals are reported on page 2, schedule AP of Exhibit 32 as the gross receipts and cost of prizes for all pull tab games. Ms. Post testified that pull-tabs are often sold at a discounted price when there are fewer tabs left in a game (because larger prizes have already been paid out). She also testified that there were no adjustments made for games opened prior to the beginning of the year, or closed after the end of the year. Based on this, she concluded that Brevig Mission was reporting its pull-tab activities based on an ideal net rather than the accrual method. The 2007 and 2008 AFSs show the same problems with the pull-tab reporting.²⁷ Brevig Mission did not dispute that it was using the ideal net method rather than the accrual method of accounting for its pull-tab activities.

It is not clear how the Division reached the conclusion that Brevig Mission was not using the accrual method of accounting for its bingo activities. The violation alleged, however, is for the failure to use the accrual method of accounting in 2007 and 2008. Since Brevig Mission did not use that method for its pull-tab activities, this violation has been proven.

2. *Failure to File Amended 2006 Return*

In its August 20, 2007, letter, the Division informed Brevig Mission that it must “correct the reporting problems identified above to avoid action against your permit.”²⁸ The letter further instructed Brevig Mission “to amend your 2006 AFS to correct these reporting issues. The amendment is due by November 1, 2007.”²⁹ The authority cited for requiring this amended AFS is 15 AAC 160.880(8). This regulation says that a permit may be suspended or revoked for failing to “file a timely report or supplemental information required by AS 05.15 or this chapter.”³⁰

The Division did not cite any specific statute or regulation that requires a permit holder to file an amended return when requested to do so. To the extent the Division considers the amended return to be “supplemental information,” that supplemental information is not required by AS 05.15 or any regulation. By the terms of the August 20, 2007, letter, Brevig Mission could either file an amended report or risk having action taken against its permit. Action has been taken against its permit. The failure to file the amended AFS is not in and of itself a violation of any statutory or regulatory provision. This violation has not been proven.

//

²⁷ Exhibits 2 & 12.

²⁸ Exhibit 23, page 6.

²⁹ Exhibit 23, page 6.

³⁰ 15 AAC 160.880(8). Relied on in Exhibit 24, page 2.

3. *Improper Use of Net Proceeds*

The third alleged violation is that Brevig Mission used the proceeds of its charitable gaming operations improperly.³¹ The use of net proceeds from charitable gaming is limited by AS 05.15.150. In Schedule E of its 2007 AFS,³² Brevig Mission reported transferring over \$25,000 from its gaming account to its general account. It did not otherwise account for this money or show that it was spent for a purpose permitted by AS 05.15.150. In 2008, Brevig Mission paid stipends and at least one raffle expense from gaming proceeds.³³ Many other donations were made without sufficient detail to determine whether they were proper. These payments were marked with an “x” to the right of the dollar amount on Exhibit 12 by Ms. Post.

At least some of the payments listed on Schedule E in 2007 and 2008 were not for purposes allowed by statute. Brevig Mission did not dispute this. This violation has been proven.

4. *Failure to Record Expense in Schedule C*

A raffle ticket expense was listed on Schedule E of the 2008 AFS.³⁴ Not only is this an improper use of net proceeds, it is also a violation of the requirement to list all expenses on Schedule C. This requirement is important because expenses are limited to a percentage of the Adjusted Gross Income. Listing an expense in Schedule E results in underreporting of total expenses and could hide a violation from the Division. This violation has been proven.

5. *Other Reporting Problems*

The testimony and exhibits presented at the hearing show a pattern of accounting problems. Brevig Mission was put on notice of these problems in 2007³⁵ and has done very little since then to correct them. This is true despite the fact that the Division has tried to work with Brevig Mission to solve these problems without suspending or revoking its permit. These problems include excess expenses, excess bingo prizes, improper use of net proceeds, and the failure to use the proper method of accounting. Brevig Mission has also had trouble reconciling its bank balances. During the hearing, Brevig Mission witnesses indicated that Brevig Mission had been using its permit without having a Member in Charge or an Alternate Member in Charge. It was also noted that the 2009 AFS was past due and that it is not legal to continue

³¹ Exhibit 24, page 2.

³² Exhibit 2, pages 21 – 29.

³³ Exhibit 12, pages 6 & 7.

³⁴ Exhibit 12, page 6.

³⁵ Exhibits 22 & 23.

operations when the annual report has not been filed on time or within any period of extension that may have been granted.

These problems are not discussed here as additional violations. Although raised in the Notice of Suspension, they were not included as issues in the Informal Conference Decision. Instead, these problems are listed to help explain why a significant penalty is appropriate in this matter. Brevig Mission has a history of serious problems with its Annual Financial Reports. Evidence of these problems was admitted at the hearing, and Brevig Mission did not object to that evidence or dispute that the problems existed. While there was no evidence that anyone was intentionally violating any of the gaming statutes or regulations, this repeated failure to correct deficiencies is likely to continue unless Brevig Mission is required to discontinue its gaming activities for a significant period of time. Hopefully, it will use that time to put procedures in place that will avoid these problems in the future.

C. Penalty

A permit may be revoked or suspended for a period up to one year for failure to comply with the requirements of AS 05.15 or any regulations adopted under that chapter.³⁶ Brevig Mission has violated several statutory and regulatory requirements. In addition, it has had problems complying with these regulations for several years despite notice of the need to correct those problems.

In its pre-hearing brief, the Division proposed an eight month suspension. At the hearing, testimony from the Council Members discussed the importance of this permit to the Brevig Mission community. That testimony also indicated an understanding of the importance of correcting the accounting and record keeping problems. Council Members indicated a willingness to correct these problems that may not have existed before, or may not have been evident to the Division before this hearing. Accordingly, a small reduction from the recommend suspension is appropriate. Brevig Mission's permit should be suspended for seven months for the violations identified above.

//
//
//
//
//

³⁶ AS 05.15.170(a)(1).

IV. CONCLUSION

Based on the evidence presented at the hearing, Brevig Mission Traditional Council has violated gaming statutes and regulations. **Its gaming permit is suspended for seven months as of 12:01 a.m. April 15, 2010.**³⁷

Dated this 20th day of July, 2010.

Signed _____
Jeffrey A. Friedman
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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 31st day of August, 2010.

By: *Signed* _____
Signature
Jerry Burnett _____
Name
Deputy Commissioner _____
Title

[This document has been modified to conform to technical standards for publication.]

³⁷ The suspension began 15 days after the issuance of the Informal Conference Decision. Exhibit 1, page 2.