

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

In the Matter of	)	
	)	
AMERICAN LEGION POST #28	)	OAH No. 16-0613-GAM
_____	)	Gaming Permit No. 436

**DECISION**

**I. Introduction**

The Tax Division of the Department of Revenue suspended American Legion Post #28's charitable gaming permit for one month, after discovering that the Post was operating a poker game at the same facility where charitable gaming occurs.

The Post appealed, arguing that it did not charge a fee to enter or purchase chips for its game, so its game was not illegal gambling. The Post does, however, award players more poker chips when they buy food or raffle tickets or perform services. This practice, although not an entry fee, is equivalent to requiring the players to stake a form of consideration in order to participate effectively in the game. Moreover, the Post's poker games are significant events that cannot be characterized as incidental benefits to the purchases.

The Post also contended that poker is a game of skill, not chance. However, Alaska's Legislature has defined gambling broadly, encompassing not merely games that turn primarily on chance but also games in which chance is a material element. The Post's own evidence shows that the variety of poker played at Post #28 is in the latter category.

Accordingly, the Post's activities meet the definition of illegal gambling. The Division's decision is affirmed.

**II. Facts**

American Legion Post #28 is a civic organization in Anchorage. The Post has a charitable gaming permit, which allows it to engage in authorized fundraising activities that have an element of chance. Under this permit, the Post holds frequent split-the-pot raffles. It also sells pull tabs and raffles other prizes to raise funds.

A significant interest among many Post #28 members is Texas hold 'em poker.<sup>1</sup> Post #28 caters to its members' interest by holding Texas hold 'em tournaments. It holds poker games six

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<sup>1</sup> Texas hold 'em is a form of poker where a player is dealt two "hole" cards (private cards, visible only to the player), and then community cards (usable by any player in forming a winning hand) are dealt face up in stages. *See*

nights per week.<sup>2</sup> On Tuesdays, the games are for members only. Other games are open to the public.<sup>3</sup> The tournaments may offer a cash prize to the winner. Some games have no cash prize, but award chips that allow a winner to participate in the next tournament, which may have a cash prize. Cash prizes can be as much as \$10,000 for the semiannual tournament or as little as \$50 for the monthly tournament. A noteworthy reward is qualifying for an opportunity to participate in the annual Fur Rendezvous poker tournament.

Post #28 does not charge an entry fee for its games. It facilitates the game by giving all players a small number of free poker chips. The number of free chips varies. Games may have as few as two or three hundred free chips or as many as five or ten thousand.<sup>4</sup> Buying a meal or a raffle ticket at the Post will greatly increase a player's stake—between 5,000 and 10,000 chips per purchase.<sup>5</sup> The food and tickets cost the same without regard to whether the purchaser plays poker. Buying more food or another ticket early in the evening could result in getting more chips, although extra chips are not supplied in later rounds of the game. Other ways to obtain more chips include giving blood in a Post blood drive, helping to set up the game, or serving as a dealer.<sup>6</sup> The Post does not allow a player to purchase chips alone. For some tournaments, the Post does not allow players to obtain chips through purchases of food or raffle tickets. For some, the only way to obtain the chips is to have won them at a qualifying event.<sup>7</sup>

The Department of Revenue's Criminal Investigation Unit was alerted to the Post's poker activities after receiving a complaint from a disgruntled player.<sup>8</sup> The complaint was about unhappiness with the Semi-Annual Poker Tournament that occurred on Sunday, April 7, 2013. During the tournament, the player had a question regarding interpretation of one of the rules of the game. The Post has a committee of experienced players that resolves disputes. The committee ruled against the player. A few hands later, the complaining player and others were eliminated from the play. The remaining 11 players agreed to divide the pot, taking home \$909

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[www.pokerlistings.com/poker-rules-texas-holdem](http://www.pokerlistings.com/poker-rules-texas-holdem). This game draws on a player's skill at calculating odds (of the next card being in the player's favor and of the opponent holding a beneficial hole card), and at reading an opponent's body language.

<sup>2</sup> Admin. Rec. at 50.

<sup>3</sup> Admin. Rec. at 45

<sup>4</sup> Admin. Rec. at 44; 48; 51; 80. The record is not clear on the number of free chips. *Compare* Admin. Rec. at 24 (asserting that all games have between 5,000-10,000 free chips) *with* Admin. Rec. at 71 (asserting that some games have 200 free chips; some have 5,000).

<sup>5</sup> Admin. Rec. at 45; 80.

<sup>6</sup> Admin. Rec. at 49.

<sup>7</sup> Admin. Rec. at 50-51

<sup>8</sup> Admin. Rec. at 52-55.

each.<sup>9</sup> The disgruntled player then submitted his complaint, which led department investigators to suspect that illegal gambling, and other violations of the rules regarding charitable gaming, might be taking place. Based on this information, a department investigator obtained a search warrant and, accompanied by a representative of the Anchorage Police Department, served the warrant on the Post on May 16, 2013. The investigators seized computers and records. After analyzing the records, the investigators prepared an Incident Report, concluding that potential misdemeanor charges should be forwarded to the Office of Special Prosecutions and Appeals.<sup>10</sup>

On February 26, 2014, two investigators with the Division continued the investigation by playing in a poker game at Post 28.<sup>11</sup> A report filed by one of the investigators states that he received 5,000 in free chips. He then made several purchases. He bought a raffle ticket in a gun raffle for \$10 and received 10,000 poker chips. He bought \$20 worth of split-the-pot raffle tickets, and received 6,000 chips. He bought a hamburger for \$7 and received 5,000 chips. He asked if he could pay for a second burger and just get the chips without the burger. He was told to accept the second burger, and take it home. After play began, he bought onion rings for \$4 and received 5,000 chips. He observed that some players were cashing in tickets for more chips. He assumed those tickets were from winning in previous games.<sup>12</sup> He saw that no players were playing with only the 5,000 free chips.<sup>13</sup> The prizes for that night's games were limited to qualifying for play in a subsequent tournament that would offer a cash prize of \$500, as well as varying numbers of chips to use in the \$500 game. The reporting investigator was eliminated without qualifying for any prize, but the co-investigator did advance far enough to qualify for the \$500 game.<sup>14</sup>

The record does not indicate that law enforcement officials ever filed criminal charges against Post #28 or its members. The Division, however, pursued the matter as a violation of charitable gaming rules, which allowed it to take action against the Post's charitable gaming permit. On August 11, 2014, the Division made a finding that Post #28 had engaged in an

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<sup>9</sup> Admin. Rec. at 43-44.

<sup>10</sup> Admin. Rec. at 66-73.

<sup>11</sup> Admin. Rec. at 79.

<sup>12</sup> Admin. Rec. at 79.

<sup>13</sup> Admin. Rec. at 80.

<sup>14</sup> Admin. Rec. at 79-80.

unauthorized gambling activity in violation of the terms of its permit.<sup>15</sup> It suspended Post #28's gaming permit for eleven months.<sup>16</sup>

The Post appealed the suspension to an informal conference. The informal conference decision, issued on October 13, 2015, upheld the finding of violation, but reduced the suspension to one month. On November 1, 2015, the Post appealed the informal conference decision to a formal hearing. The Post nonetheless went ahead and served its one-month suspension. It requested a hearing and decision on appeal because it believed the notice of violation and suspension was unwarranted, and wished to clarify what activities it could engage in in the future. It asked that the violation be struck from its record.

After a seven-month delay, the hearing request was referred to the Office of Administrative Hearings in late May of 2016. The parties agreed that no material facts were at issue and that the case could be resolved upon briefing and a written record. They stipulated to a relaxed briefing schedule leading to an oral argument held on October 21, 2016. Following oral argument, the Division agreed to drop the charge that the Post had misused charitable gaming proceeds by paying poker prizes with charitable gaming receipts.<sup>17</sup> The parties continued to file post-argument submissions until November 25, 2016. The arguments raised by the parties are addressed below.

### **III. Discussion**

#### **A. Was Post #28's poker tournament illegal gambling?**

15 AAC 160.880(a)(19) permits the Department of Revenue to suspend or revoke a charitable gaming permit if the permittee "conducts, or allows others to conduct, a gaming activity, including gambling as proscribed under AS 11.66, for which the [permittee] is not authorized under AS 05.15 or this chapter on premises where an activity subject to AS 05.15 or this chapter is conducted."<sup>18</sup> The Division has alleged that Post #28's conduct falls within this proscription.

As a threshold matter, the Post initially argued that even if it had engaged in illegal gambling, it would not be in violation of charitable gaming law because the Division has no jurisdiction over poker. That argument, however, misses the point. The action against the Post's

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<sup>15</sup> Admin. Rec. at 12. The Division determined that having a permittee conduct a poker tournament violated AS 05.15.100(a) (list of authorized activities) and AS 05.15.180(a) (use of playing cards not authorized).

<sup>16</sup> Admin. Rec. at 9-10.

<sup>17</sup> Division's Notice of Filing Post-Oral Argument Submissions.

<sup>18</sup> 15 AAC 160.880(a)(19).

charitable gaming license is not a sanction for conducting an allegedly illegal poker game. Instead, it is a sanction for conducting the poker game “on premises where an activity subject to AS 05.15 or this chapter is conducted.”<sup>19</sup> The department has jurisdiction over charitable gaming, and may determine that charitable gaming cannot occur where certain other activities are occurring. That is all it seeks to do here.

Alaska statutes prohibit the practice or promoting of “gambling” except where specifically authorized by law.<sup>20</sup> The issue here is whether Post #28’s poker tournaments qualify as “gambling,” as the term gambling is used in these statutes.

Gambling has three elements: payment of consideration to enter into a contest or game; taking a risk in the contest or game based on factors outside the person’s control; and a reward for the winner.<sup>21</sup> As the Alaska Supreme Court has summarized the test:

The courts generally agree that the essential elements of gambling are price, chance and prize. Thus, one gambles when he pays a price for a chance to obtain a prize.<sup>22</sup>

To be illegal gambling, Post #28’s poker tournament has to meet all three of these elements.

The parties agree that the poker tournament had a reward—cash prizes or the opportunity to enter other games that had prizes. The issues in dispute, however, are whether the participants paid any consideration for the privilege of participating in the poker tournament, and whether the Texas hold ‘em games were games of chance. If yes, then the poker games are gambling.

Post #28 has two arguments that its games did not involve a player buy-in that rose to the level of consideration. First, all players were given free chips. Although some players could acquire more chips, Post #28 believes merely allowing some players to have more chips than others is not the same as “pay to play.” Second, in Post #28’s view, a player making a purchase, providing a service, or making a contribution is not staking something of value in order to play because the players involved would buy food or a raffle ticket, provide the service, or give blood

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<sup>19</sup> 15 AAC 160.880(a)(19).

<sup>20</sup> AS 11.66.200; AS 11.66.210; AS 11.66.280(12).

<sup>21</sup> AS 11.66.280(3). The text of the statutory definition of “gambling” is:

(3) "gambling" means that a person stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon an agreement or understanding that that person or someone else will receive something of value in the event of a certain outcome.

The definition goes on to exempt certain activities that might otherwise fall under this definition such as sales of futures in a securities market, sale of insurance, the playing of an amusement device with very limited prizes, and charitable gaming authorized by the Department of Revenue under AS 05.15. None of the exemptions applies to the Post’s poker activities.

<sup>22</sup> *State v. Pinball Machine*, 404 P.2d 923, 925 (Alaska 1965) (footnote omitted).

anyway. Post #28 argues that providing extra chips to those players does not turn the players' purchase of a commodity, performance of a service, or donation of blood into consideration being staked on the game. These two arguments are addressed in subparts 1 and 2 below.

Finally, the Post argues that the games it conducted were purely games of skill, an argument addressed in subpart 3 below.

**1. Does the availability of some free chips for everyone mean that a player who makes a purchase or a contribution for more chips is not staking something of value?**

As discussed in more detail in the factual summary, all players would receive some chips upon sitting down to play. Considerably larger numbers of chips could be accumulated by buying food or raffle tickets, by giving blood, or by serving as dealer or set-up person. Post #28 argues that everyone can participate without staking something of value. Under its reasoning, since some chips were invariably provided for nothing and anyone could begin play without giving anything in return, the chips did not have value and nothing of value was being staked on the games.

This argument is not persuasive. The more chips a player has the more the player can bet, and the more chances the player has to win a large pot. Even if it were not the case that the initial stake of two hundred to a few thousand is usually insufficient to get started in serious play, having more chips early in the game increases a player's chances of weathering early misfortunes or misjudgments and staying in the game. Indeed, Post #28 admitted at oral argument that if additional chips were purchased in a direct cash-for-chips transaction, the players would be staking something of value for the opportunity to increase their participation in the game—without regard to whether the players were given some free chips to start. This effectively concedes the first argument and brings us to the second. Post #28's real argument here is that the player providing the service or purchasing the food or ticket is not giving any value for the additional chips. I turn next to that argument.

**2. Do the players pay an entry fee or otherwise provide consideration to increase their participation in the game?**

With regard to whether the actions taken by players in Post #28's game to garner more chips—such as buying food, serving as dealer, or giving blood—could be consideration, Post #28 believes that the giving of incidental poker chips as an incentive does not turn the incentivized action into consideration. The facts of this case, however, illustrate in the most compelling manner the fallacy of this argument. Although Post #28 doubtless did not intend this result, it

could not have chosen a more colorful and romantic metaphor for the concept of “something of value” than one’s own blood. The point of gambling is to give “something of value” in the hope of getting back something of more value.<sup>23</sup> Under the definition of something of value, when the privilege of playing is conditioned upon a player exchanging property belonging to the player, the player has given consideration in order to play.<sup>24</sup> A player giving blood for the opportunity to increase the player’s odds of winning a substantial sum of money is certainly giving something of value.<sup>25</sup> That Post #28 does not profit from the player’s sacrifice is of no consequence. That the player has given something of value is all that matters, and in the case of a blood donation, the player receives nothing in return *other* than chips.

Not quite as colorfully, but with the same result, the performing of services such as serving as dealer or setting up for the game, in exchange for additional chips, is also clearly giving consideration for the opportunity to win something of value. Although Post #28 argues that the players in question would do these services anyway without the added incentive, the arrangement is structured as payment for services. Obviously, the services have value—that is why the services are being rewarded. Therefore, the services qualify as “something of value” being paid for the opportunity to increase the player’s chance of winning. As for Post #28’s argument that the extra chips merely level the field for the dealer, who, as a player, is at a disadvantage because of the distraction of dealing, that argument raises a fact issue: Is the award of extra chips calibrated so that it levels the field, or is it payment for providing the service of dealing? The Post’s argument seems doubtful, but the question can be reserved for another day because the facts in this record establish that the game is gambling based on other players, such as those rewarded for set-up, providing something of value in exchange for increased opportunity to participate.

A slightly closer question is presented by the awarding of more chips in exchange for the purchase of the meals or the fifty-fifty raffle tickets. To be sure, in each of these exchanges, a player pays fair market value for a product. The burgers cost the same without regard to

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<sup>23</sup> “Something of value” is defined as “any money or property; any token, object, or article exchangeable for money or property; and any form of credit or promise directly or indirectly contemplating transfer of money or property or of an interest in money or property or involving extension of a service, entertainment, or privilege of playing at a game or scheme without charge.” AS 11.66.280(10).

<sup>24</sup> *Id.*

<sup>25</sup> Nothing in this decision addresses whether giving random door prizes to donors in a blood drive to increase participation would be illegal gambling. This decision merely recognizes the obvious fact that giving blood is giving something of value. As explained below, when the giving of blood is a condition for entry into a game that is more than a trivial promotional sweepstakes, the game is illegal gambling. Other fact patterns involving the giving of blood are not addressed here.

participation in a game. The fifty-fifty ticket costs the same, and the odds of winning the fifty-fifty pot are not affected by participation in the poker game. In the Post's view, the player risks nothing—the player keeps the meal, and stays in the raffle, even if the player loses at poker. Given that the exchange for food or a ticket is for fair market value, Post #28 argues that nothing of value is given up in exchange for chips—the chips are, essentially, a free bonus.

It is nonetheless true that when a player pays money for a package deal—food or a raffle ticket and an opportunity to increase one's odds at poker—the player is parting with something of value for an opportunity to increase participation in the game.<sup>26</sup> The point of the package deal is to increase the sales of food and raffle tickets. If a player buys one more burger or one more ticket than he or she might otherwise have done, the player is staking something of value for the poker game. Indeed, even making the choice to buy Post #28's burgers or raffle tickets, when other clubs sell burgers and raffle tickets, is staking something of value. Although the player keeps the meal or ticket, the player loses the opportunity to use that money to buy a different meal or ticket at a different club. Under this logical analysis, the tying of the chips to the product necessarily means that when purchasing the product to increase participation in the game, the player is staking something of value.<sup>27</sup>

Arguably, there is a legal exception to this reasoning called the “incidental benefit rule.” According to a 2001 Attorney General opinion, Alaska has adopted the doctrine that an incidental benefit of allowing a purchaser of a product to participate in a game as part of a temporary marketing promotion is not illegal gambling: “Purchases of merchandise or services are not considered staking or risking something of value if the normal price has not been increased as a result of the game or contest, and if there is an ongoing market for the merchandise or service when the game or contest is not operating.”<sup>28</sup> The accuracy of this sentence as a statement of Alaska law is uncertain, however. In support of its conclusion, the 2001 opinion cites two earlier Attorney General opinions, one from 1992, and one from 1995. In fact, neither of these two

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<sup>26</sup> For an in-depth discussion, see Charles Pickett, *Contests and the Lottery Laws*, 45 Harv. L. Rev. 1196, 1200 (1932) (“no matter how painstakingly it is sought to separate the single transaction into a sale of goods and a gift of a chance, clearly some part of the price is paid for the chance of receiving a prize. Everyone buying the goods contributes to the maintenance of the scheme, since the seller spreads the cost of the prizes over what is presumably an increased number of customers. As the quantum of consideration derived from each participant is immaterial, the courts have fairly uniformly held that the gift enterprise remains a lottery even though the contestants pay no more than the goods are worth.”).

<sup>27</sup> At oral argument, Post #28 stressed that it had designed its games the way it did because it had to make sure that the games were economical to operate. This argument concedes that the Post received valuable services and increased food sales to the point where the game became economical *because of the value that players were contributing to participate, which the Post therefore did not need to contribute from other sources.*

<sup>28</sup> 2001 Inf. Op. Att’y Gen’l (Alaska, 663-01-0183); available at Westlaw 34047280.



opinions had adopted, nor suggested that Alaska had adopted, the incidental benefit rule. Indeed, the 1992 opinion, which thoroughly analyzed the issue, noted that many state courts have rejected the incidental benefit rule, and it questioned whether Alaska courts would adopt the rule.<sup>29</sup> It noted that “[m]any courts have ruled that lottery-type games are not permissible even when they are incidental to a legitimate commercial transaction.” Ultimately, the opinion concluded that “[w]e do not resolve at this time whether sweepstakes used to promote the sale of recognized commercial products are permissible under Alaska law.”<sup>30</sup>

The 1992 opinion did, however, provide the contours of what the incidental benefit rule might look like *if* it were adopted in Alaska. As an example of a promotion that has been accepted in some jurisdictions, the opinion cited a Coke bottle with a game piece in the cap.<sup>31</sup> Another example might be the McDonald’s Monopoly game. For each of these promotions, the product is a bona fide product that is not associated with gambling. The promotion is temporary. The market for the product exists before and after the promotion. The product costs the same before, during, and after the promotion. The permitted incidental promotion is a sweepstakes—a low-chance, low-cost lottery.<sup>32</sup>

In Post #28’s view, there is also an understood “food exception” that is similar to the incidental benefit rule. Under this exception, a person purchasing food may be given chips to participate in a poker game as long as the purchase price of the food is reasonable. The Division denied that any such general food exception existed, but speculated that chips with food might be allowed if the practice was to give a set, uniform number of chips to all customers who bought food, without regard to how much food any one customer bought.

Under the guidance offered by the 1992 opinion, it becomes clear that even if the incidental benefit rule applies in Alaska, it is inapplicable to Post #28’s poker game. The hallmark of the incidental benefit rule—when it applies—is that it applies to sweepstakes that are temporary marketing schemes. Here, Post #28’s poker game would not fit within any safe harbor of the incidental benefit rule because:

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<sup>29</sup> 1992 Inf. Op. Att’y Gen (Alaska, 663-93-0004) at 3-6; *available at* Westlaw 564962. The opinion explained that paying for a game piece bundled with the purchase of a product has been found to be paying consideration for entering a game even when paying only the price of the product.

<sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.* at 5 (citing *Mid-Atlantic Coca-Cola Bottling Co. v. Chen, Walsh & Tecler*, 460 A.2d 44 (Md. 1983)).

<sup>32</sup> Another example of an incidental benefit might be a door prize at a charitable event. Although this issue is not fleshed out, the record includes a notation that at least one Assistant Attorney General has apparently advised the department that having a few door prizes at an expensive charitable fundraising dinner would not give rise to an illegal gambling concern. *See* Exhibit 2 to Post #28’s Report on Post-Oral Argument Submissions at 2 (letter from J. Scott Stair to Jane Smith (citing April 2, 2004, Memorandum from Assistant Attorney General Michael Barnhill)).

- The game is not subservient to the primary goal of selling the product. Here, the poker game is Post #28's primary product and promoting the game is its primary object.
- Even if the poker game were not primary, and selling food and raffle tickets were just as important or more important to the Post than sponsoring the game, the game is not a temporary marketing scheme. The game is a frequent activity of the club that is not intended solely as a marketing promotion.
- The game being used to promote the sales of merchandise is not a game that can be characterized as a sweepstakes.<sup>33</sup> A sweepstakes is a passive game that does not involve the players making bets. Poker is a casino game, and the players are giving consideration for the opportunity to actively play in a serious game.

Indeed, one of Post #28's primary arguments here is that this poker game is fun. In its view, nobody is engaged in the activity of gambling—this game is just people having fun. In a sense, this is the same reasoning that makes the Coke-bottle sweepstakes or low-value door prizes acceptable—they are just a marketing scheme that is more fun than the usual advertising campaign.

Post #28's poker game clearly is fun—much more fun than participating in a soda cap sweepstakes or a burger restaurant Monopoly game. But perhaps that is itself a problem. This poker game is the real thing—it is a real activity that is much more involved than a trivial sweepstakes designed to sell a product. Because the Post's game rises to the level of serious entertainment, being given extra participation in the game in exchange for the consideration of making a purchase or giving blood is staking something of value to receive something of value.<sup>34</sup> Customers who buy sodas in a supermarket or burgers at a burger chain are in the market for sodas or burgers. They are not in the marketplace because they are looking for an opportunity to gamble. If they think the game is fun, they might choose Coke instead of Pepsi or McDonald's instead of Burger King. At Post #28, however, poker players want to play poker. Many are likely

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<sup>33</sup> According to Black's Law Dictionary, the term "sweepstakes" has evolved to "refer[] generally to contests, often conducted for promotional purposes, which award prizes based on the random selection of entries." *Black's Law Dictionary* 1448 (6<sup>th</sup> ed. 1990). *See also, e.g., Haskell v. Time, Inc.*, 965 F. Supp. 1398, 1403 (E.D. Cal. 1997) (distinguishing between sweepstakes requiring no consideration for entry and illegal lottery).

<sup>34</sup> Thus, because the game is serious, the consideration given by the player meets the requirement of "any form of credit or promise directly or indirectly contemplating transfer of money or property or of an interest in money or property or involving extension of a service, entertainment, or privilege of playing at a game or scheme without charge." AS 11.66.280(10). In contrast, the promotional sweepstakes, with their much lower entertainment value, do not.

serious about wanting to win. They are buying Post #28's raffle tickets or food, or giving blood, at least in part because they want to participate in Post #28's game—not because the game is an incidental benefit of the food purchase or their donation of blood. In short, Post #28's game is not comparable to games that would be allowed under the incidental benefit rule.

The clear message being relayed through the Attorney General opinions that have analyzed similar questions is that if there is an incidental benefit rule, it is narrow, and should not be expanded beyond the most basic, temporary sweepstakes or door prize designed solely to promote a product or event. Expanding the incidental benefit rule to cover poker games that involve a form of consideration for entry would not be consistent with Alaska law as it presently exists.<sup>35</sup>

The Post argues that because criminal law should be interpreted narrowly, this proceeding should adopt a broad reading of the incidental benefit rule (which would have the effect of narrowing the reach of the criminal law). As the 1995 opinion makes clear, however, the opposite is true: laws authorizing legal gambling have to be strictly construed.<sup>36</sup> Moreover, as explained earlier, the definition of gambling under AS 11.66.280(3) explicitly exempts some activities from the reach of the definition, such as sales of futures in a securities market, the playing of an amusement device with very limited prizes, and charitable gaming authorized by the department under AS 05.15. The incidental benefit rule is not included in the list of exemptions. The exemptions show that the legislature knew how to authorize exemptions. That it did not exempt any activities other than those listed in the statute may be an indication that it did not intend any additional exemptions. Rather than ask the executive branch to carve out additional exemptions, the Post's appropriate avenue to obtain authorization is more properly to approach the Legislature and seek an adjustment to the statute.

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<sup>35</sup> See, e.g., 1992 Opinion (finding that scheme of distributing game tickets nominally formatted as informational cards is illegal gambling); 1995 Inf. Op. Att'y Gen (Alaska 663-96-0152), *available at* Westlaw 848571 (finding that proposed charitable events with casino-type games available at no additional charge would be illegal gambling); 2000 Inf. Op. Att'y Gen (Alaska 663-00-0212), *available at* Westlaw 1566306 (finding that selling pre-paid phone cards that offered entry into cash prize sweepstakes would be illegal gambling); 2000 Opinion (finding that games played on computer video machines that offered opportunity for prizes would be illegal gambling without regard to skill required to prevail against other contestants).

<sup>36</sup> 1995 Opinion at 1; *see also* 38 Am. Jur. 2d Gambling § 16 (“Because of the strong public policy against gambling, statutes and regulations concerning legalized gambling are construed strictly or narrowly to limit the powers and rights claimed under their authority.” (Citations omitted.)).

### 3. Is poker a game of chance or skill?

Post #28 argued in its briefing that poker, especially the Texas hold ‘em poker game that it plays, is a game of skill, not chance.<sup>37</sup> If so, even if there is consideration and a prize, the game would not be gambling: “If the combination of an entry fee and a prize equals gambling, then golf tournaments, bridge tournaments, local and state rodeos or fair contests, and even literary or essay competitions [would be] illegal gambling operations.”<sup>38</sup>

Under the common law, a game would not be considered a game of chance unless chance was the “dominant factor” in determining the outcome of the game.<sup>39</sup> Under Alaska anti-gambling law, however, a contest is a game of chance if chance is a material element of the outcome.<sup>40</sup> The 2001 Attorney General opinion analyzes the legislative history of the statute, and concludes that it was intended to overrule the “dominant factor” test that had been followed by the courts. Under Alaska’s statutory rule, more games would be considered games of chance in Alaska than would be the case in common law jurisdictions that apply the dominant factor test.

Even applying the dominant factor test, however, the Pennsylvania Superior Court, after a lengthy review of cases from many jurisdictions, concluded that “Texas hold ‘em Poker is gambling.”<sup>41</sup> The court acknowledged that skill plays a significant role in the outcome, but concluded that poker is “predominately a game of chance” because “players are still subject to defeat at the turn of the cards.”<sup>42</sup> As the Court of Appeals of North Carolina observed, “[n]o amount of skill can change a deuce into an ace.”<sup>43</sup>

Given that even under the more rigorous test, Texas hold ‘em poker has been determined to be a game of chance as a matter of law, Post #28 would be under a heavy burden to come forward with sufficient facts to make this issue a question of fact under the “material element” test. To meet that burden, Post #28 has placed in the record an interesting article on the

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<sup>37</sup> In response to an inquiry at oral argument about whether the question of skill vs. chance was a question of fact that would require a hearing, Post #28 appeared to back away from this issue, because it did not want to participate in a full hearing. The Division, however, then argued that although ultimately a fact question, the issue of whether poker is a game of skill had been decided by so many other jurisdictions that it has become a question of law. Upon a fuller review of the record, the question appears to be resolvable on summary adjudication.

<sup>38</sup> *State v. Am. Holiday Ass’n, Inc.*, 727 P.2d 807, 809 (Arizona 1986). The law on gambling in Arizona is not the same as Alaska’s, so this quote is not meant to imply that it is an accurate statement of Alaska law. It is merely a summary distinction of skill from chance. For a discussion of Alaska law on this distinction, see 2001 Inf. Op. Att’y Gen’l, *supra* note 28.

<sup>39</sup> *Morrow v. State*, 511 P.2d 127 (Alaska 1973).

<sup>40</sup> AS 11.66.280(2) (“‘contest of chance’ means a contest, game, gaming scheme, or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that the skill of the contestants may also be a factor”).

<sup>41</sup> *Commonwealth v. Dent*, 992 A.2d 190, 197 (Penn. Super. Ct. 2010).

<sup>42</sup> *Id.*

<sup>43</sup> *Joker Club, L.L.C. v. Hardin*, 183 N.C. App. 92, 99, 643 S.E.2d 626, 630 (2007).

predominance of skill in poker.<sup>44</sup> Post #28 argues that this article is based on a comprehensive statistical study and expert analysis. Because this article was not available to the courts that had addressed the issue, Post #28 believes that even under Alaska's more rigorous standard, its article proves that statistically, chance is not a material factor in poker over the long haul.

Post #28's argument alone reveals that chance is indeed a material factor in Post #28's game. The Post agrees that chance plays a role in poker over the short term. Only after many hands, it explains, does skill predominate. This admission is sufficient to conclude that chance is a material factor. A poor player who gambles in the hopes of a big win in the short term, knowing that if he or she stays in the game over the long term he or she has little chance of being the ultimate winner, is still engaged in gambling.<sup>45</sup>

Moreover, Post #28's article shows that chance is a material factor in Texas hold 'em well beyond the first few hands. Although the article's actual data analysis was only sufficient to "rule out that we are dealing with a game of pure chance," it used simulations to estimate the number of hands that must be played for skill to become the predominant factor, which the article determined meant a winning level of 75 percent.<sup>46</sup> The article acknowledged that after only a few hands, "the game is hardly different from a pure game of chance."<sup>47</sup> It determined, however, that skill would be the predominant factor over chance 75 percent of the time after playing 1,500 hands.<sup>48</sup>

These statistics prove that chance is a material element of poker. In a pure game of skill, like chess or a foot race, chance is not an element at all. Even if the role of chance were at 25 percent from the first hand, this significant a role would be material. By the same token, even if 25 percent were not considered material, given that chance predominates in the initial hands, and skill does not reach a significant role until after many hands, poker will always be a game of chance because the game cannot be structured to ensure that all players will participate in the requisite number of hands required before chance ceases to be a material factor.

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<sup>44</sup> Exhibit G to Post #28's Opposition to Motion to Affirm Informal Conference Decision (Roger J.D. Potter van Loon, Martijn van den Assem, Dennie van Dolder, *Beyond Chance? The Persistence of Performance in Online Poker*, PLoS ONE 10(3)).

<sup>45</sup> *Cf., e.g., Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973) (holding that element of chance or skill is determined based on average person, not expert).

<sup>46</sup> Post's Exhibit G at 9.

<sup>47</sup> *Id.* at 10.

<sup>48</sup> *Id.*

**B. Is the Division’s action against Post #28 fundamentally unfair when other clubs and restaurants play poker?**

Post #28 also argues that it is unfair for the Division to bring this action because many other competing clubs and restaurants offer poker games without being subject to action by the department. The Division responds that it has prosecutorial discretion to pursue cases as its resources allow and that Post #28 cannot establish that this is a case of selective enforcement.

To prevail on a claim of selective enforcement, Post #28 would have to show

first, that other persons similarly situated to the defendant and equally subject to prosecution were not proceeded against; second, that the defendant was singled out as a result of a conscious, deliberate, and purposeful decision; and, third, that the discriminatory selection of the defendant was based upon an arbitrary, invidious, or impermissible consideration.<sup>49</sup>

Here, the Division’s decision to investigate the Post was based on a complaint. Therefore, the Division had a reason to pursue this case. Nothing in this record indicates a conscious, deliberate decision to discriminate against the Post. The Division’s decision to pursue this matter was not arbitrary and not selective enforcement.

I did not, however, interpret Post #28’s argument to be trying to raise a claim of selective enforcement or other invidious practice. I viewed it as simply stating the unfairness that results because clubs *that have no charitable gaming permit* can play similar poker games with impunity from action by the Division. As long as those clubs can remain under the radar of criminal enforcement, they can do exactly what Post #28 was sanctioned for doing.<sup>50</sup> On the other hand, they cannot engage in charitable gaming while running these poker games—should they apply for a permit to do that, they will face the same jeopardy as Post #28.

Post #28 is correct that the Division cannot enforce criminal law. It can only enforce charitable gaming law. The reason it can take action here is because charitable gaming law prohibits this activity, which falls within a criminal prohibition, from occurring on the charitable gaming premises. A perceived unfairness from an alleged imbalance in vigor between civil

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<sup>49</sup> *Closson v. State*, 784 P.2d 661, 669-70 (Alaska App. 1989) (quoting B. Gershman, *Prosecutorial Misconduct* § 4.3(a)(3), at 4–13 (1985)), *rev’d on other grounds*, 812 P.2d 966 (Alaska 1991). *Cf. also, e.g., In re A.N.B.C. No. 2*, OAH No. 05-0914-GAM (Dep’t of Rev. 2006) at 4 (refusing to reverse enforcement action even though other permittees have engaged in practices that could be viewed as similar infractions without being subject to enforcement action).

<sup>50</sup> Post #28 did not argue that a one-month suspension was an inappropriate penalty for a violation of 15 AAC 160.880(a)(19). *Cf., e.g., In re Brevig Mission*, OAH No. 10-0200-GAM (Dep’t of Rev. 2010) (imposing seven month suspension for multiple accounting and misuse of funds violations).

regulatory enforcement and criminal enforcement, however, is not an administrative law matter that can be addressed in this decision.

#### **IV. Conclusion**

American Legion Post #28 has conducted poker games on its premises that were also used for charitable gaming. Under Alaska law, the Post's poker games were illegal gambling under the rather strict gambling definition applied in Alaska. Therefore, the Division's determination that the Post violated 15 AAC 160.880(a)(19) is affirmed. The Division's imposition of a one-month suspension of charitable gaming activities as discipline for the offense is also affirmed.

DATED this 22<sup>nd</sup> of February, 2017.

By: Signed  
Christopher M. Kennedy  
Administrative Law Judge

### **Adoption**

The undersigned, by delegation from the Commissioner of Revenue and under the authority of AS 44.64.060(e)(1), I adopt this decision 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 20<sup>th</sup> day of March, 2017.

By: Signed  
Jerry Burnett  
Deputy Commissioner of Revenue

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