IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

AMERICAN LEGION POST #28, Appellant, v. STATE OF ALASKA, DEPARTMENT OF REVENUE, Appellee.	)	Case No. 3AN-17-05896 CI

DECISION ON APPEAL FROM ADMINISTRATIVE LAW JUDGE

The appellant in this case, American Legion, hosts poker games at several of its facilities across the state. One such facility is Post #28. American Legion Post #28 ("Post") has a charitable gaming license issued by the appellee, Department of Revenue ("DOR"). In 2017, following an investigation, DOR concluded that various aspects of Post's poker games constituted unlawful gambling and therefore suspended Post's charitable gaming license. Post appealed the decision. DOR's appellate officer reduced the suspension but did not overturn it. Post next appealed to an administrative law judge. The administrative law judge upheld DOR's decision, so Post appealed to this court. The parties completed appellate briefing and then orally argued the merits of the case on May 1, 2018. Having considered the record on appeal and the parties' argument, the ALJ's decision is hereby AFFIRMED in part and REVERSED in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

American Legion Post #28 is a civic organization in Anchorage and offers various charitable programs to the community. To support those programs, Post has a charitable gaming permit that allows it to sell split-the-pot and raffle tickets during fundraising events. Without the permit, sale of those tickets would constitute unlawful gambling.[1]

[1] AS § 05.15.100(a).

American Legion sells the split-the-pot and raffle tickets during "Texas hold-em" poker tournaments that it hosts six nights each week at Post #28. Post does not charge an entry fee, and every player initially receives the same amount of poker chips. The players compete for either modest cash prizes, entry into subsequent tournaments that offer larger cash prizes, or chips to use in later tournaments.[2] The amount of starting chips and size of the prize vary depending on the tournament. Post does not allow players to directly purchase additional chips before or during the game, and the chips have no monetary value. Players cannot "cash-out" their chips.

Players can, however, obtain additional chips for use in each tournament in various ways.[3] Players can gain additional starting chips by volunteering to either set up tables and chairs before the game or dealing during the game. Players that recruit new members also receive additional starting chips, as do players that donate blood to blood drives. Players can gain additional chips *during* each game by purchasing either food or split-the-pot and raffle tickets.[4] The price of those items is the same regardless of whether the purchaser is playing in the poker game and receives chips with the purchase. Post stops providing extra chips with those purchases in the late stages of each game.

In 2013, a disgruntled player filed a complaint with DOR's Criminal Investigation Unit, alleging Post's poker tournaments were unlawful gambling.[5] Poker is not an activity that can be authorized as lawful gambling, and so if Post hosts poker tournaments that involve gambling, then it violates its charitable gaming license.[6] Soon after the complaint was filed, investigators obtained a search warrant and seized records from Post. On February 26, 2014, two DOR investigators continued the investigation by participating in a poker game at Post #28. Each received 5,000 starting chips. One investigator bought raffle tickets, split-the-pot tickets, and a hamburger and onion rings. He received

---

2 ALJ at 2.

3 Post offers other types of supplemental chips, but DOR only challenges the legality of those listed here.

4 The raffle tickets can also "cash-in" the raffle tickets at later games for additional chips.

5 ALJ at 2-3.

6 AS § 05.15.100(a); AS § 05.15.170; 15 AAC § 160.880(a)(19); CITE PERMIT.

additional chips for each purchase. When the investigator asked if he could pay for a second burger and just get the chips without the burger, the Post employee told him that he could not. The employee told the investigator to take the second burger home.

Six months later, on August 11, 2014, DOR concluded its investigation and found that Post engaged in an unauthorized gambling activity, violating its charitable gaming license. Under the authority of AS 05.15.170 and 15 AAC 160.880(a)(19), DOR suspended Post's license for 11 months.

Post appealed the suspension, and a DOR Revenue Appeals Officer affirmed the suspension, but reduced its length to one month. Post sought to have the violation struck from its record, and so it appealed again. The appeal was assigned an ALJ from the Office of Administrative Hearings in May of 2016. After taking briefing and oral argument, the ALJ issued a decision on February 22, 2017. The ALJ concluded that the provision of each type of challenged poker chip involved gambling.[7] The Deputy Commissioner of the DOR adopted the ALJ's decision and Post's suspension was upheld.

II. STANDARD OF REVIEW

On appeal from an administrative decision, courts generally review questions of law *de novo*, using their independent judgment.[8] Questions of fact, however, are reviewed under the substantial evidence standard.[9] Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[10]

III. DISCUSSION

The parties agree "gambling" is generally illegal under Alaska statutory law.[11] The parties disagree as to whether Post's poker games constitute "gambling" under the statutory definition.[12] Post argues that gambling must involve some risk of loss for the

---

7 ALJ at 15.

8 *Tesoro Corp. v. State, Dep't of Revenue*, 312 P.3d 830, 837 (Alaska 2013); *see also infra* Section III.A.i.

9 *Tesoro Corp.*, 312 P.3d at 837; *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 788 (Alaska 2015).

10 *Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992).

11 AS § 11.66.200.

12 AS § 11.66.280(3).

players and that the supplemental chips Post provides during its poker games do not carry any risk of loss. DOR argues gambling is much broader, however, and occurs whenever a single transaction involves payment of money and receipt of poker chips. Thus, DOR proposes a "single transaction" interpretation.

Two principal issues are presented in this case. First, we must answer the legal question of whether gambling requires a risk of loss. Second, if so, we must make a factual determination as to whether any of the transactions that entitle players to supplemental chips at Post #28 require the player incur a risk of loss in order to obtain the chips.

A. Definition of "Gambling" According to Alaska Statute

Under AS 11.66.280(3), "gambling" occurs when

> 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 parties do not dispute that Post players must provide "something of value" to receive supplemental chips.[13] Nor do the parties dispute that poker is a "contest of chance" and that Post's poker tournaments provide "something of value" as a prize. The dispute focuses exclusively on what it means for a person to "stake or risk" something of value on the poker game. Before interpreting that phrase, however, we must determine which standard of statutory interpretation applies.

1. DOR's Interpretation of "Gambling" Is Not Entitled to Deference.

When interpreting a provision of an Alaska statute for which an agency has expressed an interpretation, courts apply one of two standards, depending on the agency's

[13] "Something of value" includes "money or property" and "any form of credit or promise directly or indirectly contemplating transfer of money . . . or involving . . . privilege of playing at a game or scheme without charge." AS 11.66.280(11). The money used to purchase food and raffle tickets is clearly "something of value;" the various services also have value – setting-up allows the games to occur, dealing helps each game run smoothly, and donating blood saves lives.

expertise.[14] First, if the statutory question implicates either the formulation of "fundamental" agency policy or the agency's expertise as to "complex matters," then courts apply the "reasonable basis" standard.[15] Under this standard, courts defer to the agency's interpretation of the statute or regulation if it is reasonable and consistent with the statute's text.[16] Second, if the reasonable basis standard is inapplicable, then courts apply the "substitution of judgment" standard.[17] Under that standard, courts "adopt the rule of law that is most persuasive in light of precedent, reason, and policy" rather than defer to the agency's interpretation.[18] Thus, a preliminary issue in this case is which standard should be used to interpret the statutory definition of "gambling" and the particular phrase at issue here, "stakes or risks." This issue determines the scope of DOR's authority to regulate activities that award prizes based on chance.

DOR argues its interpretation of "gambling" is entitled to deference under the reasonable basis standard. However, DOR has not articulated what makes it an expert in determining whether a certain activity is gambling under the statute. Nor has DOR shown that defining gambling is a "complex" issue. In other words, DOR has not shown it has any "'specialized knowledge and experience [that would] be particularly probative'" as to what the legislature intended the phrase "stake or risk" to mean within the definition of "gambling."[19] Rather, the statutory question at issue here requires "the application and analysis of various canons of statutory construction," which is the "type of question [that]

---

14 *Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011). DOR erroneously argued that "[t]his case is not about the interpretation of AS 11.66.280, but the application of 15 AAC 160.880." The regulation fundamentally depends on the interpretation of the statute. It is impossible to interpret or apply the regulation without first interpreting the statutory definition of gambling.

15 *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982).

16 *Grunert v. State*, 109 P.3d 924, 929 (Alaska 2005).

17 *City of Valdez v. State*, 372 P.3d 240, 246 (Alaska 2016).

18 *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1231 (Alaska 2003).

19 *State, Dep't of Corr. v. Hendricks-Pearce*, 254 P.3d 1088, 1094 (Alaska 2011), *quoting Matanuska–Susitna Borough v. Hammond*, 726 P.2d 166, 175 (Alaska 1986); *N. Alaska Envtl. Ctr. v. State, Dep't of Nat. Res.*, 2 P.3d 629, 633 (Alaska 2000) ("The substitution of judgment standard thus applies where the agency's expertise provides little guidance to the court . . . .").

is regular grist for judicial mills."[20] DOR is not entitled to deference based on its alleged expertise.

DOR also failed to show that the definition of "gambling" involves formulation of a fundamental DOR policy. DOR's strongest (and only) evidence on that point is the fact that DOR is authorized to regulate gaming licenses and to promulgate regulations to carry out its authority.[21] Agencies are, of course, creatures of statute and so authority to promulgate regulations and administer a specific statutory scheme suggests policies impacting the administration are critical to the agency. Such authority, however, does not necessarily entitle an agency to deference on all related issues of statutory interpretation.[22] Courts must scrutinize the specific statutory provisions that delegate authority to determine whether deference is appropriate.[23]

Here, two provisions delegating authority to DOR must be addressed. First, the definition of "gambling" itself grants DOR authority and discretion to modify the definition of "gambling," but DOR's discretion is confined to *shrinking* the definition by *authorizing* activities that would otherwise fall under the definition of unlawful gambling.[24] The statute does not confer broad discretion to declare what *is* "gambling," it authorizes DOR to declare that some things are *not* gambling. Moreover, the statute specifically defines several key phrases within the definition of "gambling," but leaves "stakes or risks" undefined. Unless another statutory provision authorizes DOR to fill in that gap, the decision to leave "stakes or risks" undefined suggests the legislature intended "stake or risks" to have its ordinary, non-technical meaning.[25]

---

[20] *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903–04 (Alaska 1987); *N. Alaska Envtl. Ctr. v. State, Dep't of Nat. Res.*, 2 P.3d 629, 633 (Alaska 2000) ("We review the agency's interpretation of such non-technical statutory terms under the substitution of judgment standard.").

[21] AS 05.15.010; AS 15.15.060.

[22] *State, Dep't of Health & Soc. Servs., Div. of Pub. Assistance v. Gross*, 347 P.3d 116, 121–23 (Alaska 2015).

[23] *Id*. at 122.

[24] AS § 11.66.280(3)(C).

[25] *Kelly v. State, Dep't of Corr.*, 218 P.3d 291, 300 (Alaska 2009) (undefined terms are "construed according to their common usage"); *Fed. Deposit Ins. Corp. v. Laidlaw Transit, Inc.*,

The only provision that comes close to granting DOR such authorization stops short of doing so. AS 05.15.060(a)(6), authorizes DOR to adopt regulations covering "the method and manner of conducting authorized activities and awarding of prizes or awards, and the equipment that may be used." Like DOR's authority to shrink the definition of gambling, the authority conferred under AS 05.15.060(a)(6) is narrowly tailored. It does not allow DOR to define which activities are authorized, it merely allows DOR to determine how activities are conducted once they have been authorized.[26] The legislature did not manifest an intent for DOR to define "gambling" generally, much less the specific phrase at issue here, "stakes or risks."

Indeed, if DOR could define the outer boundaries of "gambling," then it could define the scope of its own authority to regulate gambling activities. But "[d]etermining the extent of an agency's authority involves the interpretation of statutory language, a function uniquely within the competence of the courts and a question to which [courts] apply [their] independent judgment."[27] The question here is whether DOR has authority to regulate, as "gambling," transactions that provide players with poker chips but that do not involve risk of loss. DOR's interpretation would increase its own authority, and deference to that interpretation invites administrative overreach.

The circumstances of this case invite administrative overreach for another reason as well. AS 05 provides DOR authority to regulate gambling activities via gaming licenses. The statutory definition of "gambling" is found in AS 11, which is part of the

---

21 P.3d 344, 351 (Alaska 2001) ("When a statute or regulation is part of a larger framework or regulatory scheme, even a seemingly unambiguous statute must be interpreted in light of the other portions of the regulatory whole.") (Internal quotation marks and alterations omitted).

[26] AS 05.15.060 authorizes DOR to promulgate regulations "covering, but not limited to" the many subsections listed therein, including (a)(6). Another subsection, (a)(11), grants broad authority to promulgate regulations for "other matters the department considers necessary to carry out this chapter or protect the best interest of the public." Neither modifier, however, overcomes the fact that the subsection discussing DOR's authority to regulate gambling, (a)(6), is narrowly proscribed. To expand DOR's authority from regulating conduct *within* an authorized gambling activity to *defining* gambling would be an impermissible judicial amendment of a statute. *Gottschalk v. State*, 575 P.2d 289, 296 (Alaska 1978) (noting that courts cannot "step[ ] over the line of interpretation and engag[e] in legislation").

[27] *Grunert v. State*, 109 P.3d 924, 929 (Alaska 2005).

criminal code. The criminal code and the crime of "gambling" operate outside of DOR's authority to administer gaming licenses. Deferring to DOR's interpretation here would have impacts outside of its scope of authority. Deference is thus inappropriate.

Nevertheless, DOR suggests "gambling" can have two definitions, one for criminal activity and one for administration of gaming licenses. The plain language of the statute—"stakes or risks"—does not unambiguously support DOR's "single transaction" theory.[28] At best, the statute is ambiguous as to whether the transaction must carry a risk of loss for the player. Under the principle of "lenity," which has been followed by our supreme court, if an individual were charged criminally with "gambling" the court would be compelled to construe the statute narrowly and limit its application.[29] At least one court has embraced this approach in the context of gambling, and indicated that it would construe an anti-gambling law narrowly if the state attempted to apply it to bona fide business transactions.[30]

DOR maintains, however, that the anti-gambling statute should be construed *broadly*, at least in the administrative context.[31] If this court were to accept DOR's position, then it would be possible for a DOR-licensed organization to operate an unlawful gambling activity even though no one participating in the activity is actually "gambling" within the meaning of AS 11.66.280(3). Not only is that result absurd, the inconsistent definitions would introduce confusion and unnecessary complication into the statutory scheme. Moreover, DOR does not cite any examples or law showing a statute can have divergent definitions for criminal and administrative activities. The court

---

28 *See infra* Section III.A.ii.

29 *State v. Strane*, 61 P.3d 1284, 1286 (Alaska 2003)(statutes imposing criminal liability should be construed narrowly).

30 *McKenzie v. Municipality of Anchorage*, 631 P.2d 514, 518 (Alaska Ct. App. 1981) ("We do not believe that the Anchorage gambling ordinances could be reasonably construed to apply to bona fide business transactions.").

31 *See* Opposition at 13–14, *citing* 2 Am. Jur. 2d Gambling Sec. 16.

concludes that, on balance, the substitution of judgment standard should be applied in interpreting the statutory terms "gambling" and "stake or risks."[32]

2. Under the Statutory Definition, a Player Does Not "Gamble" Unless the Player Incurs a Risk of Loss.

Under either a "reasonable basis" standard of interpretation or the "substitution of judgment" standard, DOR's interpretation of "gambling" is inconsistent with the statutory text.[33] Under DOR's "single transaction" theory, DOR would treat every transaction that includes payment of money and receipt of a chance to win a prize as "gambling," even if the transaction does not subject the player to a risk of loss. Such a reading replaces the statutory phrase "stakes or risks" with DOR's preferred term "provides." This court does not have the power to amend statutes. DOR's "single transaction" theory, therefore, must be rejected in favor of Post's "risk of loss" interpretation.

"In interpreting a statute, [courts] consider its language, its purpose, and its legislative history, in an attempt to 'give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others.'"[34] Courts "decide questions of statutory interpretation on a sliding scale: '[T]he plainer the language of the statute, the more convincing contrary legislative history must be.'"[35] Additionally, courts presume "'that the legislature intended every word, sentence, or provision of a statute to have

---

[32] *See Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011) ("[T]he comparative qualification of court and agency to decide the particular issue is the most important factor for whether a court should substitute its judgment for that of an agency's.") (internal quotation marks and alteration omitted).

[33] For reference, under AS 11.66.280(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."

[34] *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1234 (Alaska 2003). Thus, courts interpret statues "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters." *Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011).

[35] *Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011)

some purpose, force, and effect, and that no words or provisions are superfluous.'"[36] Words and phrases that are not defined in the statute should be "construed in accordance with their common usage."[37]

The statutory definition of "gambling" is based on transactions in which a player "stakes or risks something of value upon the outcome of a contest of chance." The statute specifically defines several phrases used in the definition of "gambling."[38] It does not, however, define the phrase at issue here: "stakes or risks." This strongly indicates the legislature meant "stake" and "risk" to be construed in accordance with their "common usage."[39] Dictionaries are used to discern a word's common usage.[40]

Black's Law Dictionary defines "risk" as "[t]he uncertainty of a result, happening, or loss; the chance of injury, damage, or loss; especially the existence and extent of possibility of harm."[41] The definition of "stake" is: "something (especially money) bet in a wager, game or contest."[42] In turn, "bet" is simply defined as a "stake or pledge in wager," while "wager" is defined as "money or other consideration risked on an uncertain event; a bet or a gamble."[43] Implicitly or explicitly, each definition incorporates risk *of loss or harm*, not just a chance of benefit based on an uncertain outcome. People "risk" a loss, they do not "risk a benefit;" when someone "stakes" money on an uncertain event, they risk not getting it back. The plain meaning of "stake or risk," and therefore "gambling," requires that a transaction carry a risk of loss for the player.

To be clear, the anti-gambling statute is not based on transactions in which "a person *provides* something of value," it is based on transactions in which "a person *stakes or risks* something of value." The legislature's use of the specific, relatively narrow terms "stakes or risks" precludes DOR's broad "single transaction" test and requires that the

---

36 *Pederson v. Arctic Slope Reg'l Corp.*, 331 P.3d 384, 396 (Alaska 2014) (internal quotation marks and citation omitted).

37 *Kelly v. State, Dep't of Corr.*, 218 P.3d 291, 300 (Alaska 2009).

38 *See* AS 11.66.280(2), (7), (11).

39 *Kelly v. State, Dep't of Corr.*, 218 P.3d 291, 300 (Alaska 2009).

40 *See, e.g., Benavides v. State*, 151 P.3d 332, 336 (Alaska 2006).

41 BLACK'S LAW DICTIONARY (9th ed. 2009).

42 *Id*.

43 *Id*.

transaction include some risk of loss. Indeed, in *Gilman v. Martin*, the Alaska Supreme Court emphasized that "[t]he statute only specifies that a person engages in gambling when he or she '*stakes* or *risks* something of value.'"[44] Although the court resolved *Gilman* on other grounds, it noted that the $10.00 non-refundable deposit required for entry into the lottery at issue there did not appear to be "at risk" and therefore "arguably" was not gambling under AS 11.66.280(3).[45] If DOR's single transaction test were appropriate, the *Gilman* opinion would have found that the lottery *unequivocally constituted gambling* because the transaction involved both payment of money and receipt of a chance to win a prize. Instead, the court focused on "risk," as does the statutory definition of "gambling.".

Rather than the text of the statute, DOR relies on an Alaska Supreme Court case to support its position that "gambling" does not require risk of loss. *State v. Pinball Machine*s identified three elements of gambling: "price, chance and prize. Thus, one gambles when he pays a price for a chance to obtain a prize."[46] The gambling device at issue was a pinball machine that would award the player free games if the player shot enough balls into specific holes in the machine's playing field. Chance generating-mechanisms in the machine determined the likelihood of winning free games. The opinion found that the "price" element was met because "one may not play a pinball machine without paying a price, that is, by inserting money into the machine to activate it for play."[47]

DOR argues the *Pinball Machine*s decision means that whenever a player, in a single transaction, provides something of value and receives a chance to win a prize, the transaction constitutes gambling *per se*. Under this reading, the uncertain chance of gaining a benefit renders the entire transaction "gambling." Thus, according to DOR, gambling does not require a risk of loss.

---

44 *Gilman v. Martin*, 662 P.2d 120, 124 (Alaska 1983) (emphasis in original).

45 *Id*.

46 404 P.2d 923, 925 (Alaska 1965).

47 *State v. Pinball Machines*, 404 P.2d 923, 925 (Alaska 1965).

DOR's reading of *Pinball Machines* is overbroad. In that case the pinball machine actually did involve a risk of loss: specifically, the purchase price of the initial game. Usually, a pinball machine does not offer a prize based on chance: a player simply pays money for the entertainment of playing pinball. But when the machine does offer a prize based on chance, the machine becomes indistinguishable from a game of poker or a lottery. In each activity, the player pays money and receives both entertainment value and a chance to win a prize. Significantly, the player does not receive anything independent of the game. As a matter of law, the fun of the game is subsumed by the chance of the prize, which makes return on the payment subject to the uncertainty and renders the entire game "gambling." If that were not true, then no poker game would be gambling: poker players would simply be paying to enjoy the game with a chance to win a price, without any legally recognized risk of loss. But both parties agree such a poker game involve a risk of loss and *would be gambling*; likewise, the pinball machine at issue in *Pinball Machines* involved a risk of loss.

Even if DOR's reading of *Pinball Machines* is correct, the legislature enacted the anti-gambling statute after that case was decided, and so the language of AS 11.66.280(C) controls.[48] The plain language of the statute requires risk of loss.[49] And the *Gilman* opinion, which, unlike *Pinball Machines*, was decided after the legislature enacted the statute, specifically emphasized that "gambling" requires a player to "stake or

---

[48] "[When] the legislature enacts a statute to govern the same matter, the statute controls." *Dominguez v. State*, 181 P.3d 1111, 1114 (Alaska Ct. App. 2008); *see also State, Dep't of Nat. Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1215 (Alaska 2010) ("AS 38.05.070 restricted the common-law right to wharf out when it was passed in 1959.").

[49] The legislative history of AS 11.66.280(3) is not sufficiently clear to overcome the statute's plain language. The legislative history includes a comment that "[f]or the most part the coverage of existing law has been preserved" and quotes *Pinball Machines*' three "essential elements" of "price, chance and prize." However, *Pinball Machines* involved a fourth element: risk of loss. Although the legislative history notes that gambling "includes any activity that brings profit based on chance," that simplistic definition was *not* adopted in AS 11.66.280(C). Moreover, there is nothing in the legislative history that disavows the "stakes or risks" language used in the statute and, arguably, activities that involve both risk and profit based on chance are captured by the legislative history notation. In short, the legislative history does not embrace DOR's "single transaction" test.

risk" something of value, not just *provide* something of value. Thus, this court holds that a transaction is not "gambling" under the statute unless it subjects the player to a risk of loss.

B. Application of the Statutory "Risk of Loss" Requirement to Each Kind of Supplemental Chip American Legion Offers at Post #28

When reviewing an administrative decision, courts defers to the agency's factual findings under the substantial evidence test, but apply a different standard when deciding whether the agency correctly applied those facts to the relevant law.[50] Here, the latter standard is substitution of judgment.[51] Thus, accepting all DOR's factual findings that are supported by substantial evidence, this court applies its own judgment to determine whether the transactions in which Post provides players supplemental chips meet the legal definition of "gambling."

The DOR found that five varieties of Post's supplemental chips involve gambling: dealer chips, set-up chips, blood-drive chips, food chips, and raffle chips. The five varieties can be treated as really two categories: (1) chips provided for performing a service and (2) chips provided for purchasing a good. The transaction underlying each category is different from the other, and so each category must be separately examined to determine whether it involves gambling. The test is whether the record contains substantial evidence to support DOR's factual finding that each type of transaction subjects the player to a risk of loss.[52] If so, then the transactions constitute gambling.

---

50 *Earth Res. Co. of Alaska v. State, Dep't of Revenue*, 665 P.2d 960, 964 (Alaska 1983) ("Whether the appropriate rule of law has been applied to a given set of facts is a question which requires a standard of review different than the substantial evidence test, which is used in the review of questions of fact.").

51 *See supra* Section III.A.i.

52 Post also argues that neither DOR nor the courts have authority to regulate the "internal rules of the game," such as how players can obtain chips during a poker game. The contention is meritless, however, and even defeated by Post's concession that directly purchasing additional chips during a game would be unlawful gambling. Also, if the transactions are found to constitute "gambling," DOR has specific statutory authority to regulate the internal rules of the game. *See* AS § 05.15.060 "The department shall adopt regulations . . . [covering] . . . the

1. Providing Service Chips Constitutes Gambling.

Post's provision of supplemental "service chips" involves risk of loss and therefore constitutes "gambling." In each transaction, the player provides a valuable service and receives poker chips that increase the player's chance of winning a prize. Unless the player wins the prize, the player receives nothing in exchange for the services rendered.[53] Thus, the player risks that the value of their services will be lost.

Post opposes this conclusion, arguing that the players receive a sense of moral satisfaction independent of the outcome of the game. When players volunteer to set-up the tables or deal the cards, they receive the satisfaction of helping Post's charitable mission. When they give blood, they receive the satisfaction of saving a life. Post argues the moral satisfaction eliminates any risk of losing the value of their services without compensation.

While players may indeed receive moral satisfaction from providing the services that entitle them to supplemental chips, moral satisfaction does not eliminate the players' economic risk. If it did, then the definition of "gambling" would not apply to charitable organizations; charitable organizations could even institute buy-ins for poker tournaments because all payments would go to helping the charitable organization, which players could legitimately experience moral satisfaction in doing. Post, therefore, concedes poker games with buy-ins constitute unlawful gambling, even for charitable organizations. Moreover, the legislature specifically made the gaming license scheme applicable to charitable organizations.[54] If the legislature shared the same interpretation of "gambling" as Post, then there would be no need to include charitable organizations in the licensing scheme. The organizations would be free to do as they wished even without a charitable gaming license. Moral satisfaction does not eliminate the risk from the transactions that

---

method and manner of conducting authorized activities and awarding of prizes or awards, and the equipment that may be used."

[53] The simple pleasure of playing poker is not sufficient, otherwise gambling simply would not exist. *See supra* pages 11–12.

[54] AS § 05.15.120; AS § 05.15.690(39); AS § 05.15.100(a); AS § 05.15.122.

entitle Post poker players to "service chips."[55] Those transactions, therefore, constitute unlawful gambling, and Post violated its permit.

2. <u>Providing Goods Chips Does Not Constitute Gambling.</u>

In order to affirm the DOR's finding that Post's provision of "goods chips" constitutes unlawful "gambling," the record must contain substantial evidence that the underlying transactions subject the players to a risk of loss. But the record supports only a finding that the transactions create an incentive to buy the items, not that the transactions carry a risk of loss.

In contrast to "service chips," the transactions that provide players with "goods chips" also provide the players an item that is independent of the uncertain outcome of the poker game. Post argues those transactions do not involve any risk of loss for the player, and therefore do not constitute gambling, because the player receives an item of equal value to their payment (*i.e.* fair market value). The ALJ specifically agreed that "in each of these exchanges, a player pays fair market value for a product."[56] DOR does not dispute that finding.[57] Post also notes that players are not forced to return the purchased items if they lose the poker game. Thus, each player receives an item of equal value to their payment regardless of what happens in the poker game. The extra poker chips, and the increased chance to win the tournament, are a free bonus without any risk of loss. The transactions involving "goods chips," therefore, do not constitute "gambling."

DOR's finding to the contrary--that players risk the money spent in those transactions--is not supported by substantial evidence. DOR highlights two main factual aspects of the transactions. First, players cannot get their money back if they lose the poker game. DOR argues this fact alone means the players "risk" the money on the poker game.[58] That fact, however, is overcome by two other, more relevant facts: (1) players

---

55 For the same reason, the incidental benefit does not create an exception to gambling.

56 ALJ at 7.

57 *See* Record at 000004.

58 Opposition at 11. In the decision below, the ALJ agreed with DOR: "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 chips to the product

receive an item at fair market value in exchange for the money and (2) players do not need to give the item back if they lose the game. As a result, the players do not need to get their money back in order to avoid a loss. The extra chips add only the potential for an additional *benefit*, they do not create a risk of loss.

The second fact DOR emphasizes is that players can only obtain extra chips during each game by purchasing an item that provides "goods chips."[59] This dynamic creates an incentive for the players to buy the items *with the intent to improve their odds of winning*. While that is certainly true, it must be considered with the fact that the items are sold at fair market value and the chips are, therefore, a "bonus." The question is: does the incentive created by attaching extra chips to the purchased items transform the "bonus" into a risk? In other words, does incentive equal risk?

Based on the statutory definition of "gambling," the answer has to be no. As DOR points out, each transaction of this type carries incentive to buy the items in order to gain chips and improve the player's odds of winning. That is simply a matter of logic. Thus, if the legislature intended to make these transactions unlawful, it would have based the definition of "gambling" on transactions in which "a person *provides* something of value." Instead, it based the definition on transactions in which "a person *stakes or risks* something of value." Mere incentive to buy an item in order to get extra chips does not create risk so long as the purchaser also receives something of value commensurate with the payment.[60] Thus, providing chips as an incentive to buy the items does not render the transactions "gambling."

---

necessarily means that when purchasing the product to increase participation in the game, the player is staking something of value." ALJ at 8.

[59] Transactions that provide "service chips" are unlawful gambling. *See supra* Section III.B.i.

[60] It might be possible that the incentive to buy items in order to gain chips, despite any lack of desire for the items themselves, is so great that the transactions become objectively risky. Several factors appear relevant: the value of the item being sold at fair market value; the value of the prize; the ratio of starting chips to chips provided in each transaction; whether the chips can be obtained in the later stages of a game. DOR did not make a factual finding that the incentive to buy any of the items at issue here is so great that a reasonable person would be compelled to

The ALJ offered two alternative grounds for affirming DOR's decision, but both are flawed. First, the ALJ reasoned that, in order to make up for the cost of the poker tournament prize, Post must allocate some of the payment from each sale to cover the cost of the prize. Thus, "some part of the price is paid for the chance of receiving the prize."[61] The ALJ's logic, however, requires sleight of hand to create risk of loss on behalf of the player rather than merely a chance of *benefit* for the player or diminished profit from each transaction for *the operator*. As long as the player receives an item at fair market value, which is undisputedly the case for each transaction at issue here, it is wholly irrelevant how the operator distributes the cost of the prize. The player pays $10 and receives a burger worth $10 even if the operator has to put some of that money toward covering the cost of the prize. The transaction does not involve any *risk* for the *player*, and so it is not gambling.

The ALJ's alternative ground for affirming DOR's initial classification is flawed because it again focuses on Post's profits rather than the players' risk of loss. The ALJ found it dispositive that "[t]he point of the package deal is to increase sales of food and raffle tickets."[62] That fact, however, is irrelevant. It would be problematic if Post increased the *price* of the items to the point that they were priced above fair market value, but that is not the case here. If anything, the provision of poker chips with the purchase of items at fair market value gives the players a better deal than they would get elsewhere. That does not create a risk of loss for the players and, therefore, does not constitute gambling. It is simply effective marketing.[63]

The record does not contain substantial evidence to support finding that any transaction involving "goods chips" at Post #28 subjected the players to a risk of loss. Therefore, none of the transactions constitute "gambling."

---

respond to the incentives in a risky manner. Instead, DOR simply concluded that a drop of incentive poisons the well.

61 ALJ at 8 n.26.

62 *See* ALJ at 8.

63 The incentive this marketing scheme creates does *not*, in turn, create risk of loss for the players. *See supra* note 61 and surrounding discussion.

IV. CONCLUSION

In the proceedings below, DOR and the ALJ applied an improper definition of "gambling." Under the proper definition, the transactions in which players purchase goods at fair market value and receive supplemental chips do not constitute "gambling." However, substantial evidence supports the finding that the players who provide Post #28 services in return for extra poker chips *do* incur a risk of loss, therefore the use of such chips constitutes "gambling." Thus, Post violated its charitable gaming license by conducting unlawful gambling, and the suspension of Post's license was proper. DOR's decision and the ALJ's decision below is, therefore, AFFIRMED, in part, and REVERSED, in part.

ORDERED this 27th day of July, 2018, at Anchorage, Alaska.

Signed
ANDREW GUIDI
Superior Court Judge

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]