

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA LAWFUL GAMBLING CONTROL BOARD

In the Matter of the Proposed
Adoption of the Minnesota Lawful
Gambling Control Board Rules
Governing Paddlewheels, Minnesota
Rules, Parts 7861.0010, 7861.0060,
7861.0100, and 7863.0020.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 9:30 a.m. on Tuesday, December 15, 1992 in Room 15 of the State Capitol Building, St. Paul, Minnesota. This Report is part of a rule hearing proceeding held pursuant to Minn. Stat. §§ 14.131 - 14.20 to determine whether the Agency has fulfilled all relevant substantive and procedural requirements of law, to determine whether the proposed rules are needed and reasonable, to determine whether the Department has statutory authority to adopt the proposed rules, and to determine whether or not the proposed rules, if modified, are substantially different from the rules as originally proposed.

John Garry, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Minnesota Lawful Gambling Control Board (Board). Appearing and testifying in support of the proposed rules on behalf of the Board was Nan Connor, Compliance Officer for the Board. The hearing continued until all interested groups and/or persons had had an opportunity to comment on the proposed rules.

The Board must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, it may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Board does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Board elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Board files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On October 19, 1992, the Board filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.

2. On November 9, 1992, a Notice of Hearing and a copy of the proposed rules were published at 17 State Register pp. 1128 - 1137.

3. On November 10, 1992, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice.

4. On November 20, 1992, the Board filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
- (d) An Affidavit of Additional Notice.
- (e) The names of Board personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
- (f) A copy of the State Register containing the proposed rules.
- (g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 16 State Register p. 1887 (February 10, 1992) and a copy of the Notice.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comment and statements remained open through January 4, 1993, the period having been extended by order of the Administrative Law Judge to 20 calendar days following the hearing. The record closed on January 11, 1993, the third business day following the close of the comment period.

Statutory Authority

6. Except as specifically modified below, statutory authority to promulgate the proposed rules is contained in Minn. Stat. § 349.151, subs. 4 and 4a.

Small Business Requirements

7. The Board has addressed the impact of the proposed rules on small business in its Statement of Need and Reasonableness on page 21. The Board has considered the methods for reducing the impact of the proposed rules on small businesses as required by subdivision 2 of that section and determined that: (1) the proposed rules do not unduly burden small businesses; and (2) because of the importance of maintaining integrity in the industry, the Board cannot be less rigorous in the regulation of one size or type of business over another.

Nature of the Proposed Rules

8. The proposed rules herein seek to comply with the statutory directive contained in Minn. Stat. § 349.151, subd. 4a. that the "Board shall promulgate rules governing paddlewheels before July 1, 1992." Additionally, the legislature provided that, "the rules must provide for operation procedures, internal control standards, posted information, records, and reports." Id. The proposed rules add a definition of "gambling equipment" that specifically applies to paddlewheel games; clarifies that there are two allowable paddlewheel games in the State of Minnesota, one which uses a table and one which is conducted without the use of a table; and include other provisions which govern how the game is conducted, internal controls, and recordkeeping.

9. Some of the proposed rule provisions received no negative public comment and were adequately supported by the Statement of Need and Reasonableness. The Administrative Law Judge will not specifically address those provisions in the discussion below and specifically finds that the need for and reasonableness of those proposed rules has been demonstrated.¹ The

¹In order for an agency to meet the burden of reasonableness, it must demonstrate by a presentation of facts that the rule is rationally related to the end sought to be achieved. Blocher Outdoor Advertising Co. v. Minnesota Dep't of Transp., 347 N.W.2d 88, 91 (Minn. Ct. App. 1984). Those facts may either be adjudicative facts or legislative facts. Manufactured Housing Institute v. Pettersen, 237 N.W.2d 238, 244 (Minn. 1984). The agency must show that a reasoned determination has been made. Manufactured Housing Institute at 246.

discussion which follows the modifications will only address remaining substantive issues of need, reasonableness or statutory authority.

Modifications to the Proposed Rules Made by the Board

10. At the time of, and subsequent to the hearing after a review of all oral comments and written submissions, the Board has modified the proposed rules additionally as follows:

A. Modifications Made at the Hearing

7861.0010 DEFINITIONS.

Subp. 3a. Gambling equipment. "Gambling equipment" means bingo cards and sheets, devices for selecting bingo numbers, pull-tabs, jar tickets, paddlewheels, paddlewheel tables, paddletickets, paddleticket cards, and tipboards, ~~and tipboard-tickets.~~

* * *

7861.0100 PADDLEWHEELS.

* * *

Subp. 11. Conduct of paddlewheels with a paddlewheel table.

* * *

B. The paddlewheel must be spun by the organization's paddlewheel operator. The winning colored number or set of colored numbers is determined by the position of the pointer when the paddlewheel stops spinning. The paddlewheel must make at least four revolutions before stopping at the winning colored number or set of colored numbers.

* * *

L. An organization must post clear and legible house rules on the play of paddlewheels in a conspicuous place on the permitted premises for the paddlewheel being played. The rules must include the following information:

* * *

(10) A winning "odd" or "even" bet is determined by a winning number of only the designated colored circle. However, a player loses all "odd" or "even" bets if the pointer stops on a specially designated "house number" ~~and~~ This rule must be posted only if an "odd" or "even" bet is accepted.

* * *

Subp. 12. Operating procedures and internal controls.

* * *

- F. The organization's paddlewheel chip and cash bank cashier must prepare a fill slip whenever paddlewheel chips are distributed to a paddlewheel table from the chip bank. An organization may not transfer or make change of chips directly from one table to another table. The fill slip must be at least a two-part carbonless form. On the original and duplicate fill slip, at least the following information must be recorded:

* * *

(5) the table identification number if required by subpart 2 14, item A.

B. Modifications Made Subsequent to Hearing

Part 7861.0100 PADDLEWHEELS.

Subp. 10. Opening and closing of paddlewheel tables.

A. To open a paddlewheel table for use, a gambling employee or volunteer of the organization shall lift the top of the table and inspect the cavity for any paddletickets, paddlewheel chip, or foreign object that may have fallen through the slots, and shall ~~secure~~ affix a paddlewheel chip tray to the table and lock a paddlewheel drop box to the table.

Part 7864.0020 MANUFACTURER OPERATIONS, ACCOUNTS, AND RECORDS.

Subpart 1. Sale of gambling equipment. The following items apply to the sale of gambling equipment:

* * *

- C. A manufacturer may not sell or provide any deal of pull-tabs or tipboards to a licensed distributor unless the deal meets the standards established in subpart 2.

(1) The manufacturer must place the flare for each pull-tab deal and each tipboard deal, with the Minnesota registration stamp affixed, inside the wrapping of each deal.

(2) The manufacturer must provide a master flare with each sealed grouping of ~~up-to~~ 100 paddleticket cards.

(3) Each flare must fully describe the prizes and winning number, symbol, set of symbols, notice to pull-tab purchasers, and the bar code according to standards prescribed by the commissioner of revenue, and manufacturer's label or trademark. Each flare must also contain the odds, house percentage, or number of tickets.

The above-modifications were made in response to public testimony and written comment contained in the record in this matter. The Administrative Law Judge

finds that the need for and reasonableness of the above-modifications have been demonstrated and that none constitute a substantial change from the rules as initially proposed.

Discussion of the Proposed Rules

11. Minn. Rule 7861.0100, subp. 9D. -- This proposed new rule mandates that paddlewheel chips must be issued in certain denominations and that each denomination must be a specific color (\$1.00 chips must be white, \$2.00 chips must be yellow, \$5.00 chips must be red, and \$25.00 chips must be green). Additionally, the rule requires that each chip must show the license number of the organization holding the premises permit on at least one side. The Board's Statement of Need and Reasonableness (SONAR) states that these provisions are necessary "to provide that the game will be played uniformly and that adequate records will be available for verification of proceeds".

Jill Reis, on behalf of the Camp Chicagami Association, testified that because the paddlewheel chips her organization uses do not comply with the color requirement (the Camp's \$1.00 chips are gray rather than white) and none of the Camp's chips have the license number imprinted on one side, an expense of approximately \$1,000 to \$2,000 would be incurred to purchase new chips and/or imprint the license number on the chips. Ms. Reis contends that the proposed rule would impose an unreasonable burden on the Camp due to the increasing costs of business operation and of taxes. Ms. Reis stated candidly that the Camp could not afford to replace and/or imprint its chips to comply with the rules. Ms. Reis suggested that the Board provide a "grandfather" provision in the proposed rules to allow organizations who currently use non-conforming paddlewheel chips to continue using those chips until the chips need to be replaced due to wear or loss.

The Board responded by stating that a "grandfather" provision would be cumbersome to administer and difficult to enforce; and that it would undermine the fundamental purpose of the proposed paddlewheel chip color rule for some "unknown and potentially long period of time". The Board stated that in order for it to be effective in providing the needed tracking and regulatory control, it is important that no exceptions be made to the proposed requirements.

The Judge concludes that the imposition of an immediate requirement concerning paddlewheel chip color and license number identification would impose an unreasonable burden on organizations who must purchase new chips or imprint chips with their license number as soon as the rules become effective or stop conducting the paddlewheel game. The Board has not demonstrated the reasonableness of adopting a rule which causes the hardship described above. In order to correct this defect, the Board could adopt one of the following options: (1) include a "grandfather" provision which would expire in one year and include the submission of sample chips to the Board; or (2) have the effective date of this rule provision be one year from publication of the adopted rules in the State Register. If either of these options are selected, the Judge finds that the need for and reasonableness of the proposed rule provisions has been demonstrated.

12. Minn. Rule 7861.0100, subp. 9 -- This proposed rule establishes design parameters for paddlewheels. The rule requires that a paddlewheel must

be divided into three concentric circles; each circle must be a different color and must be marked off into equally spaced sections; each section in a circle must contain a different number; the inner circles may contain up to one-half of the number of numbers as the adjacent outer circles; and the numbers in each circle must be sequential starting with the number 1 but may be placed randomly in that circle. These criteria specifically define the type of paddlewheel that is currently being used and has been approved for use by the Board in the State of Minnesota. The Board's SONAR states that these criteria are necessary to ensure that the game will be played within regulatory parameters intended by the Legislature.

Calvin L. Aldrich, President of American Paddlewheel located in Moorhead, Minnesota, argues that the Board does not have statutory authority to establish design parameters for paddlewheels, especially in light of the paddlewheel moratorium enacted by the Legislature in 1991. That legislation reads as follows:

349.163 LICENSING OF MANUFACTURERS.

Subd. 6a. Paddlewheel moratorium. The Board must not approve new types of paddlewheel equipment for sale in this state until July 1, 1993. This subdivision applies to new types of paddlewheel equipment, samples of which are submitted to the board after March 15, 1991.

In addition to the moratorium, the 1991 Legislature enacted specific rulemaking provisions authorizing the Board to "promulgate rules governing paddlewheels before July 1, 1992." The legislation provided additionally that, "the rules must provide for operation procedures, internal control standards, posted information, records, and reports." 1991 Laws, Ch. 336, Art. 2, §§ 15 and 18. Mr. Aldrich submitted letters from Senator Joe Bertram and Representative Steve Sviggum into the record which state that it was not the intent of the Legislature to restrict paddlewheel game designs to one single game past the expiration of the moratorium statute. Rather, it was the intent of the rulemaking authorization to allow the Board to have rules in place for approximately one year and to evaluate the effectiveness of the rules before approving new types of paddlewheels for use in the State.

The Board admits that the effect of the proposed rules would be to limit "approved" paddlewheels to only the type now currently being used in the State. Until the rules are changed, no other type of paddlewheel could be approved for use in Minnesota despite the expiration of the moratorium. The Board argues, however, that this result is consistent with both the moratorium and the statute authorizing rule promulgation set forth above.

The statutory definition of "paddlewheel" is "a wheel marked off into sections containing one or more numbers, and which, after being turned or spun, uses a pointer or marker to indicate winning chances." Minn. Stat. § 349.12, subd. 29. Minn. Stat. § 349.151, subd. 4a. authorizes the Board to promulgate rules for paddlewheels which include "operation procedures" and "internal control standards". As a practical matter, it would be difficult for the Board to comply with those directives without, in some way, dealing with or regulating the design of the paddlewheel itself. Consequently, the

Judge has concluded that the Board does have statutory authority to set design parameters for paddlewheels. However, the Judge has also concluded that it was clearly the intent of the Legislature that other types of paddlewheel games could be approved for use in Minnesota after the expiration of the moratorium. Consequently, the rule is in violation of the statute because it restricts the type of paddlewheel game which can be approved for use in Minnesota to only the type presently in use even after the moratorium expires. To correct this defect, the Board could add a provision to the proposed rule which states that after July 1, 1993, the Board will consider the approval of paddlewheel games whose design does not comply with these rules but does comply with all applicable statutory criteria. The Board may, at some later time, adopt more generic design criteria which will provide manufacturers with some indication of standards for approval without restricting approval to only one type of paddlewheel as was done herein. With the above modification, the Judge finds that the need for and reasonableness of the proposed rule has been demonstrated by the Board.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Board gave proper notice of the hearing in this matter.
2. That the Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.
3. That the Board has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Finding 12.
4. That the Board has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Finding 11.
5. That the amendments and additions to the proposed rules which were suggested by the Board after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.
6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusions 3 and 4 as noted at Findings 11 and 12.
7. That due to Conclusions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.
8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

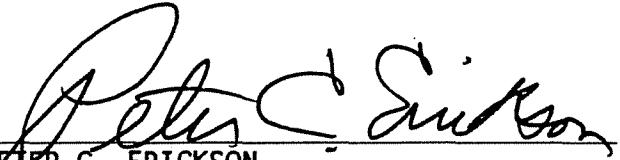
9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above.

Dated this 22 day of January, 1993.



PETER C. ERICKSON
Administrative Law Judge