

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE GAMBLING CONTROL BOARD

In the Matter of the Proposed Rules of the
Gambling Control Board Governing Lawful
Gambling;

**ORDER ON REVIEW OF
RULES UNDER MINNESOTA
STATUTES, SECTION 14.26**

Minnesota Rules, Chapters 7861, 7863,
7864, and 7865

The Minnesota Gambling Control Board (Board) is seeking review and approval of the above-entitled rules, which were adopted by the agency without a hearing. Review and approval is governed by Minn. Stat. § 14.26. On December 15, 2010, the Office of Administrative Hearings received the documents that must be filed by the agency under Minn. Stat. § 14.26 and Minn. R. 1400.2310. Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

1. The agency has the statutory authority to adopt the rules.
2. With one exception, the rules were adopted in compliance with all procedural requirements of Minnesota Statutes, Chapter 14, and Minnesota Rules, Chapter 1400. As to the one exception, the undersigned concludes, as set forth in the Memorandum below, that it was a harmless error.
3. The rules are needed and reasonable, with the exception of the following rule parts:
 - a. 7861.0210, subparts 27 and 31a;
 - b. 7861.0220, subpart 8, item C;
 - c. 7863.0220, subpart 16, item A;
 - d. 7863.0260, subpart 7, item A; and,
 - e. 7864.0240, subpart 7, item A.

Accordingly, these rule parts are **DISAPPROVED** as not meeting the requirements of Minn. Stat. § 14.06 (a) and Minnesota Rules part 1400.2100, items D and E.

4. Pursuant to Minnesota Statutes, section 14.26, subdivision 3(b), and Minnesota Rules, part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: December 29, 2010


ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

Pursuant to Minnesota Statutes, section 14.26, the agency has submitted these rules to the Administrative Law Judge for a review as to legality. The rules adopted by the Office of Administrative Hearings¹ identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. These circumstances include situations in which a rule was not adopted in compliance with procedural requirements, unless the judge finds that the error was harmless in nature and should be disregarded; the rule is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule; the rule is substantially different than the rule as originally proposed and the agency did not comply with required procedures; the rule grants undue discretion to the agency; the rule is unconstitutional² or illegal; the rule improperly delegates the agency's powers to another entity; or the proposal does not fall within the statutory definition of a "rule."

In the present rulemaking process, the Administrative Law Judge (ALJ) has found four defects in the rules, one of which is a harmless procedural error. The Administrative Law Judge has also recommended several technical corrections, which are discussed below. The technical corrections do not reflect defects in the rules, but are merely recommendations for clarification to the rules that the Board may adopt if it chooses to do so. All other rule parts are approved.

¹ Minn. R. 1400.2100 (2007).

² In order to be constitutional, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. See, *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980).

Procedural Defect under Minn. R. 1400.2100, Item A

Minn. Stat. § 14.131 requires an agency to include in the Statement of Need and Reasonableness (SONAR), among other components, “a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.” The Board’s SONAR did not directly address this requirement. This omission is a procedural defect in the rules.

A procedural defect can be considered a harmless error under Minn. Stat. § 14.26, subd. 3(d), if: “(1) the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.”

In addressing one of the other regulatory requirements in the SONAR – namely, whether there are less costly or less intrusive methods for achieving the purpose of the rules – the Board did address alternative methods for achieving the purpose of the proposed rules. Accordingly, the Administrative Law Judge finds that the procedural error did not deprive anyone of the opportunity to meaningfully participate in the rulemaking process. The defect is a harmless error.

Substantive Defects under Minn. R. 1400.2100, Items D and E

Part 7861.0210, subparts 27 and 31a

In 2009, the Legislature enacted Minn. Stat. § 349.181, a statute that places restrictions on who may participate in lawful gambling.³ Under the statute, a “lessor’s immediate family may not participate directly or indirectly as a player in a pull-tab, tipboard, or paddlewheel game conducted at that premises.”⁴ The statute does not, however, define the terms “immediate family.”

“Immediate family” is defined in the Board’s current rules as a person’s “spouse, children, parents, and siblings.”⁵

In response to public comment, the Board proposes to delete the definition of “immediate family” and replace it with the terms “Lessor’s immediate family.” The Board proposes to define “Lessor’s immediate family” as “any person residing in the same residence as the lessor of a leased permitted premises.”

In its SONAR, the Board reasons:

³ See, Minn. Laws 2009, chapter 124, section 45, codified at Minn. Stat. § 349.181.

⁴ Minn. Stat. § 349.181, subd. 5 (2010).

⁵ See, Minn. R. 7861.0210, subp. 27 (2007).

The concept of what is considered “immediate family” has changed significantly in these modern times. Depending on the defining party, definitions abound for immediate family, joint family, extended family, nuclear family, communal family, etc. It could include spouse, separated spouse, ex-spouse, significant other, partner, parents, grandparents, children, step children, grandchildren, brothers, sisters, in-laws, adopted children, step members, nieces, nephews, other relatives, roommates, and so on. Boundaries and definitions are obviously changing, and the Board needs to ensure that its rules do not place outdated and undue burdens on the organizations.⁶

The Board also states that the proposed rule would apply only to the lessor of permitted premises, but that licensed organizations retain the ability to impose additional restrictions on player participation through house rules or internal procedures.⁷

While the Board’s proposed restrictions on gaming by those who reside with the lessor of permitted premises may be reasonable, they are at odds with the underlying statute. The Administrative Law Judge finds that this language is defective under Minn. R. 1400.2100, items D and E.

In comparison to the authorizing statute, the proposed restrictions are both under-inclusive and over-inclusive. As proposed, the rules would permit a child of the lessor to participate in gaming on permitted premises, so long as the child does not reside with the lessor⁸ – in contravention of the prohibition in Minn. Stat. § 349.181, subdivision 5. Likewise, the rule would bar the lessor’s roommate from such gaming, notwithstanding that this kind of relationship is not referenced in the statute.

Importantly, when the Legislature enacted the restriction in Minn. Stat. § 349.181, in 2009, the terms “immediate family” were defined in Chapter 7861. The Administrative Law Judge presumes that legislators knew and understood the then-current definition of “immediate family” in the Board’s rules and drafted its amendatory law accordingly.⁹ Furthermore, when the Minnesota Legislature has used these same terms in other statutes, immediate family refers to persons who are closely-linked by blood or marriage.¹⁰ The Board may not narrow the prohibition found in Minn. Stat. § 349.181, subdivision 5, by rulemaking.

⁶ SONAR at 21.

⁷ *Id.*

⁸ SONAR at 21 (“The proposed change would allow family members who are not living in the same residence as the lessor to participate in lawful gambling . . .”).

⁹ *Compare* generally, Minn. Stat. § 645.31, subd. 1 (“When a section or part of a law is amended, the amendment shall be construed as merging into the original law, becoming a part thereof, and replacing the part amended, and the remainder of the original enactment and the amendment shall be read together and viewed as one act passed at one time . . .”).

¹⁰ See, e.g., Minn. Stat. §§ 58A.02 (“Immediate family means a spouse, child, sibling, parent, grandparent, or grandchild. This includes stepparents, stepchildren, stepsiblings, and adoptive relationships”); 124D.10 (“immediate family means an individual whose relationship by blood, marriage,

This defect can be cured by deleting the definition of "Lessor's immediate family" and restoring the definition of "immediate family." If the Board decides to pursue the regulatory choice in its proposed definition, it must first seek authorization from the Legislature.

Amending the proposed rule as described above is needed and reasonable and would not result in rules that are substantially different from those originally published in the State Register.

Part 7861.0220, subpart 8, item C

Subpart 8 establishes the information that must appear in a termination plan to be approved by the Board. Item C, states: "~~an acknowledgement of compliance with by the organization that it will resolve any pending compliance issues to the satisfaction of the board~~ as a condition of license reapplication in the future." As written, the language creates uncertainty for licensees and grants the Board undue discretion in its determinations regarding the resolution of pending compliance issues. Accordingly, this language is defective.

To correct this defect, the Board must delete the phrase "to the satisfaction of the board" and replace it with the following, or substantially similar, language: "as noted in the termination plan as approved by the Board." This action is needed and reasonable and would not render the proposed rules substantially different.

Part 7863.0220, subpart 16, item A

Part 7863.0260, subpart 7, item A

Part 7864.0240, subpart 7, item A

These proposed rule parts address the manner in which distributors, linked bingo providers, and manufacturers are to notify the Board of an organization that is delinquent in its payments. The Board proposes to amend the current rules as follows: "the distributor [or linked bingo provider or manufacturer] must report the delinquency to the board in writing, ~~by e-mail, or by facsimile~~ a manner prescribed by the board."

The Board's intent in making this proposed change is to be flexible in the method of reporting as electronic technology changes over time.¹¹ The Board also seeks to discourage the regulated industry from reporting delinquencies by U.S. mail, which would prevent the industry from making these reports in a timely manner under the proposed rule language. But the proposed language actually disguises the methods of

adoption, or partnering is no more remote than first cousin"); 181.947 ("immediate family member means a person's parent, child, grandparents, siblings, or spouse"); 181.948 ("Immediate family means a person's grandparent, parent, legal guardian, sibling, child, grandchild, spouse, fiancé, or fiancée"); and 190.19 ("immediate family means the individual's spouse and minor children and, if they are dependents of the member of the military, the member's parents, grandparents, siblings, stepchildren, and adult children") (2010).

¹¹ See, SONAR at 72.

communication which are acceptable to the Board and leaves the regulated industry without clear instruction as to the Board's intent.

To correct this defect, the Board can reinstate the current language or make the following, or a substantially similar, change: "the distributor [or linked bingo game provider or manufacturer] must report the delinquency to the board in writing in an electronic format authorized by the board."

This modification more clearly conveys the reporting methods that are acceptable to the Board, is needed and reasonable, and would not render the proposed rules substantially different.

Other Technical Concerns

The Administrative Law Judge recommends the following technical corrections to the rules. The technical corrections are not defects in the rules, but are recommendations for corrections to the rules that the Board may adopt if it chooses to do so to aid in the administration of the rule. Each of the changes recommended below is needed and reasonable and would not be a substantial change from the rules as proposed.

1. Part 7861.0270, subpart 3a, item H

The Administrative Law Judge recommends a change to Subpart 3a, item H as follows:

An organization must not modify the assembly or operational functions of an electronic bingo device or any of its components. If the electronic bingo device has an audio function, the organization may activate the audio function for all players or may limit the use of the audio function to players who are visually impaired.

As proposed, the Board's rule language is unclear. The Administrative Law Judge recommends the wording above so as to avoid confusion among regulated parties.

2. Part 7861.0310, subparts 1, item E and 2, item D

The Administrative Law Judge recommends a change to Subparts 1 and 2, as follows: "The invoice for the printing of the tickets must show the quantity of tickets printed for each price level, list the range of the sequential numbers, and the selling price printed on the tickets."

This suggested change improves the grammar and readability of the proposed rules.

3. Part 7861.0320, subpart 1, item D, subitem 11

The Board has indicated that it wishes to make the following modification to the proposed rules at Subpart 1, item D, subitem 11: “reconciling bank statements to the checks, electronic transfers and payments transactions, and deposits listed in the check register”

The Board’s suggested modification to the proposed rules makes the terminology consistent throughout the proposed rules.

4. Part 7863.0220, subpart 7a, item B

The Administrative Law Judge recommends the following change to Subpart 7a, as follows:

B. name of the business entity to whom the tickets are sold, the business entity’s Minnesota tax identification number and federal employer identification number, and the address of the site where the tickets were delivered. If the tickets are sold to an individual, the sales invoice must contain the individual’s name and address and the address of the site where the tickets were delivered.

This suggested change improves the grammar and readability of the proposed rules.

5. Part 7864.0230, subparts 1 and 1g

In Part 7861.0210, subpart 43, the Board defines “promotional pull-tab or tipboard ticket.” Later on in the proposed rules the Board uses the phrase “promotional tickets.” This inconsistency was brought to the Board’s attention, and the Board now wishes to make the subsequent rule language consistent with the term “promotional pull-tab or tipboard ticket” as defined in Part 7861.0210, subpart 43. The Board has indicated that it will make this change at lines 92.12, 92.15, 93.21, 94.1, 108.1 (subpart title only), and 108.12.¹²

This suggested change makes the terminology consistent throughout the proposed rules.

6. Part 7864.0230, subpart 1a, item G

The Board wishes to correct the following typographical error in Subpart 1a, item G, as follows: “tickets with an unopened, overall area of less than 1.6 square inches or less are exempt from items D, E, and F.”

¹² The page and line number references are to the Revisor’s draft of the rules dated October 14, 2010.

This suggested change clarifies the proposed rules.

7. Part 7864.0240, subpart 1a, item D

The Board wishes to make the following clarification to Subpart 1a, item D, subitem 5: "a statement that if the agreement is terminated and the permanent gambling equipment is sold or leased by the manufacturer to other distributors or linked bingo game providers, the distributor or linked bingo game provider is not entitled to any royalty or sales or lease residuals."

In addition, the Board wishes to correct an omission in the proposed rules by inserting the following language between proposed item D, subitems 5 and 6, thereby creating new subitems 6 and 7:

(6) a statement that if a distributor's or linked bingo provider's license is terminated for any reason, the agreement becomes null and void, and any permanent gambling equipment in the distributor's or linked bingo provider's inventory that was purchased or leased on an exclusive basis must be returned to the manufacturer or destroyed by the distributor or linked bingo provider. If the permanent gambling equipment is returned to the manufacturer upon termination of the distributor's or linked bingo provider's license, that equipment may be resold by the manufacturer to other distributors or linked bingo game providers.

These suggested changes correct inadvertent omissions in the proposed rules.

8. Part 7865.0260, subpart 4

The Board wishes to make the following clarification to Subpart 4: "A licensed entity distributor, linked bingo game provider, or manufacturer may appeal the denial of a renewal application."

This suggested change clarifies the proposed rules.

E. L. L.