

0800-8592-2

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

In the Matter of the Lawful  
OF FACT,  
Gambling License of VFW Post 323,  
CONCLUSIONS, AND  
Oak Park Heights, License No. 00380  
RECOMMENDATION

FINDINGS

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on Friday, February 25, 1994, at 10:00 a.m. in Courtroom 3 of the Office of Administrative Hearings in Minneapolis, Minnesota. N. Missy Olson-Elm, Assistant Attorney General, Suite 1200, NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Minnesota Gambling Control Board. James Lund, Attorney at Law, 120 South Sixth Street, Suite 910, Minneapolis, Minnesota 55402, appeared on behalf of the Respondent, VFW Post 323. The record closed on February 28, 1994, the deadline for submission of post-hearing briefs.

This report is a recommendation, not a final decision. The Gambling Control Board will make the final decision after a review of the record which may adopt, reject, or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Rules pt. 7861.0040, subp. 10(D)(1) (1992 Supp.), the Board must issue its final decision within 30 days after receipt of the report of the Administrative Law Judge and subsequent exceptions and argument under Minn. Stat. 14.61. Pursuant to Minn. Stat. 14.61, the final decision of the Gambling Control Board shall not be made until this report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and to present argument to the Board. The parties should contact Harry Baltzer, Director, Minnesota Gambling Control Board, Rosewood Plaza South, 3rd Floor, 1711 West County Road B, Roseville, Minnesota 55113, to ascertain the procedure for filing exceptions or presenting argument.

While the parties discussed at the hearing the possibility of waiving the usual ten-day waiting period, no formal stipulation waiving the ten-day period was placed on the record in this matter. The parties may wish to discuss this possibility further after they receive the report of the Administrative Law Judge.

#### STATEMENT OF ISSUE

Pursuant to Minn. Rules pt. 7861.0040, subp. 10(D)(1) (1992 Supp.), "[t]he sole issue at the hearing is whether the applicant submitted a complete application at least 60 days before the expiration of the applicant's existing premises permit."

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. The Respondent, VFW Post 323 in Oak Park Heights, Minnesota currently holds a license and premises permits which allow it to conduct various types of lawful gambling (bingo, tipboards, and pull-tabs) at two locations in the state: the VFW Post Building in Oak Park Heights (premises permit number 001) and the Washington County Fairgrounds (premises permit number 002). At issue in this proceeding is the application for renewal of the premises permit for the VFW Post Building location.

2. The license and premises permit of the Respondent will expire on February 28, 1994.

3. The parties agree that, pursuant to the rules promulgated by the Board, Post 323's application for renewal was due on December 30, 1993, if Post 323 were to receive a renewal of its premises permit effective March 1, 1994.

4. David I. Carlsen became the gambling manager for Post 323 in January 1990. Mr. Carlsen attended seminars for gambling managers sponsored by the Board in 1990 and approximately 1992. Mr. Carlsen and Thomas Childs, the Post Commander, have also attended other seminars relating to the proper conduct of gambling operations.

5. The Board typically sends out to licensed organizations a complete renewal package 173 days prior to the expiration of the organization's license and premises permits. Mr. Carlsen received a package of renewal materials with instructions in approximately October of 1993 and read the instructions. The instructions indicated in large type at the top that a delay in submission of the application "COULD PUT YOUR ORGANIZATION OUT OF GAMBLING FOR A MINIMUM OF 30 DAYS!" Ex. 15 (emphasis in original). The instructions included the following discussion of the Board's then "seventy-five day rule":

If the renewal applications are not submitted or are incomplete 75 days before the expiration of the existing organization license or premises permits the Gambling Control Board will not issue the renewal until the first day of the month following the expiration of 75 days after the Board has received the complete application. For example: your license will expire 2/28/94. You must have the complete application back to this office by 12/16/93.

Id. (emphasis in original). The instructions also indicated that, "[i]f the local unit of government does not prepare a resolution document, we [the Board] will accept a certified copy of the meeting minutes detailing the approval vote . . . . Remember do not send a premise permit to this office without attaching a resolution document or certified copy of the city council or county board minutes approving the application to conduct lawful gambling in their jurisdiction" Id. (emphasis

in original). Mr. Carlsen became aware that the Board's rule had been changed from seventy-five days to sixty days by reading a 1993 edition of The Gaming News, a publication of the Board.

6. The Board conducted a compliance audit with respect to Post 323 during the fall of 1993. The audit occupied much of Mr. Carlsen's time during the fall.

7. Mr. Carlsen and other Post members working with him gathered much of the necessary paperwork relating to the renewal application in November or December of 1993. Leo J. Smith, the Assistant Gambling Manager, was given the responsibility of obtaining the required resolution from the City of Oak Park Heights

8. In a meeting held by the City Council of the City of Oak Park Heights on December 13, 1993, the City Council voted to adopt Resolution 93-12-51 "granting the VFW a Bingo License in the manner and form applied for by them with the Minnesota Charitable Gambling Commission." (Ex. 2.) The minutes of the December 13, 1993, meeting were published in The Stillwater Courier on December 23, 1993. (Ex. 1.)

9. Mr. Smith called the City on several occasions to inquire about the written resolution.

10. While the parties dispute the exact date on which Post 323 submitted its renewal application, it is agreed that the Board received a renewal application from Post 323 on or before December 30, 1993. The application materials initially submitted by Post 323 did not include a copy of the resolution of the appropriate local unit of government approving the premises permit, but was otherwise complete. In his cover letter submitted with the initial application materials, Mr. Carlsen indicated that the resolution from the City of Oak Park Heights would be submitted as soon as the Post received it and noted that the resolution should be available within a week after the December 13, 1993, meeting. (Ex. 16.)

11. In a letter dated December 28, 1993, the Board notified Thomas Childs, Commander of the Post, that the renewal application lacked a signed a dated resolution of approval from the local unit of government and stated that a certified copy of the minutes of the council meeting would be acceptable. (Ex. 18.) The Board's letter again mentioned the seventy-five day rule and stated that the missing information should be submitted immediately in order to avoid "put[ing] your organization in the position of having a lapse in your premises permit."

12. Post 323 did not receive a copy of the resolution of the City of Oak Park Heights regarding the Post's premises permit until January 5 or 6, 1994. The Post submitted the resolution to the Board in a letter dated January 6, 1994. The resolution of the City was received by the Board on January 7, 1994. (Exs. 20, 24.)

13. The Director of the Gambling Control Board determined that Post 323 did not submit a complete premises permit renewal application for the VFW site until January 7, 1994, and that the renewal of its premises permit for that site could not take effect until April 1, 1994, thereby causing a one-month lapse in its permit. The determination of the Director would have the effect of prohibiting the Post from conducting lawful gambling operations at its Oak Park Heights location during the month of March, 1994.

14. Post 323 received a letter from the Director of the Gambling Control Board on Friday, February 4, 1994, or Monday, February 7, 1994, indicating that the Board had determined that its application was incomplete as of the application deadline and notifying the Post of its appeal rights.  
(Ex. 21.)

15. On February 8, 1994, Mr. Carlsen called the Board to discuss the situation. He was not permitted to talk to the Board and was not told that he could appear before the Gambling Control Board at its meeting scheduled for February 15. Mr. Carlsen was instead referred to the Office of the Attorney General.

16. On February 11, 1994, Mr. Carlsen filed with the Board a timely request for a contested case hearing.

17. The City of Oak Park Heights employs only about three or four office employees. LaVonne Wilson, the City Clerk/Administrator, was on vacation at the time of the December 13, 1993, meeting, and the City's attorney, Mark Vierling, was Acting Clerk in her absence. Ms. Wilson was not aware that the written resolution was to be prepared in a hurry and therefore processed it in the normal manner. (Ex. 23.) In a letter to Mr. Carlsen dated February 16, 1994, Ms. Wilson indicated that the City of Oak Park Heights had received Post 323's application on December 8, 1993, with a request that the City act promptly upon it since the Post needed to file it and other materials with the Gambling Control Board before year-end. Ms. Wilson stated that the City was unable to make the resolution available to the Post until early January 1994 "[d]ue to the busy time of the year, the weather, and the need to coordinate several persons' efforts (attorney, mayor and undersigned) . . . ." (Ex. 22.)

18. Post 323 derives revenues of approximately \$1 million per year from its gambling operations. It contributes approximately \$50,000 per year to a variety of charitable and other organizations. In the past, Post 323 has supported veteran's organizations, public school activities, local police and fire departments, and other community and youth activities. Fifty to one hundred people engage in gambling at the Post every Tuesday and Sunday. If the Post were to lose its premises permit during the month of March, the Post would suffer a reduction in gambling, liquor and food revenues, would have to reduce its contributions to other organizations, and would be likely to

experience the temporary and/or permanent loss of customers.

19. When Mr. Carlsen submitted the Post's last renewal application package in 1991, he did not file all of the paperwork until late in January 1992. The primary reason for the delay was the fact that the Post was waiting to receive the resolution from the City. Despite the delay, the Post's application was renewed without any lapse.

20. The Board handles approximately 300 application renewals each month. The process is time-consuming for Board staff. The Board is required, inter alia, to ensure that the organization's fifty-fifty expenditures are in line with state requirements, the local governmental unit is aware of and has approved their gambling operation, there are no applicable criminal violations, and the entity is a non-profit organization in good standing.

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

CONCLUSIONS

1. The Administrative Law Judge and the Gambling Control Board have jurisdiction over this matter pursuant to Minn. Stat. 14.50, 349.151, and 349.165 (1992) and Minn. Rules pt. 7861.0040, subp. 10(D) (1992 Supp.).

2. The Notice of and Order for Hearing in this case was proper and all relevant substantive and procedural requirements of law or rule have been satisfied.

3. Minn. Stat. 349.165 (1992) provides in pertinent part that "[a licensed organization may not conduct lawful gambling at any site unless it has first obtained from the board a premises permit for the site . . . . An application for a premises permit must contain . . . information the board deems necessary to carry out its purposes."

4. Minn. Stat. 349.213, subd. 2 (1992), provides as follows:

Local approval. Before issuing or renewing a premises permit or bingo hall license, the board must notify the city council of the statutory or home rule city in which the organization's premises or the bingo hall is located or, if the premises or hall is located outside a city, the county board of the county and the town board of the town where the premises or hall is located. The board may require organizations or bingo halls to notify the appropriate local government at the time of application. This required notification is sufficient to constitute the notice required by this subdivision. The board may not issue or renew a premises permit or bingo hall license unless the organization submits a resolution from the city council or county board approving the premises permit or bingo hall license. The resolution must have been adopted within 60 days of the date of application for the new or renewed permit or license.

5. Minn. Rules pt. 7861.0040, subp. 9(A) (1992 Supp.), provides as follows:

The director shall issue a premises permit to any organization that submits the information required in subparts 3 and 4, pays the premises permit fee required by subpart 7, and obtains local approval in the manner required by subpart 8. A permit issued by the director pursuant to this part is effective on the first day of a month . . . .

(Emphasis added.)

6. Minn. Rules pt. 7861.0040, subp. 8 (1992 Supp.), provides as follows:

Local approval or denial. The following items apply to local approval or denial of premises permits:

A. The organization must take the premises permit application to the appropriate local unit of government under Minnesota Statutes, section 349.213, subdivision 2, and request that the local unit of government pass a resolution approving the premises permit application.

B. The resolution must have been adopted no more than 60 days before the date the application is received by the board.

C. The organization must attach a copy of the resolution approving the premises permit to the application when submitting the application to the board.

D. The director shall not issue a premises permit to an applicant that has been denied by the local unit of government.

(Emphasis added.)

7. Minn. Rules pt. 7861.0040, subp. 10(A) (1992 Supp.), as amended (see 18 State Reg. 1189 (Nov. 1, 1993) and 18 State Reg. 500-502 (Aug. 9, 1993)), provides in pertinent part as follows:

A. To renew a [premises] permit at the end of a term, an organization must submit to the board a complete renewal application on a form prescribed by the board at least 60 days before the expiration of the organization's existing permit. A renewal application is not complete until it contains the information required by subparts 3 and 4, the fee required by subpart 7, and local approval in the manner required by subpart 8.

Complete applications received by the board less than 60 days before the expiration of the applicant's existing permit will be considered pursuant to this part but the permit will not be renewed by the director until the first day of the month following the expiration of 60 days after the board has received the complete application. An organization shall not conduct gambling at a site where an existing permit has expired unless and until it receives a renewed permit.

(Emphasis added.)

8. Neither the Board's current "sixty day" rule nor its predecessor, the "seventy-five day" rule, applied to the Respondent's application for renewal in 1991.

9. The Respondent did not submit a complete renewal application at least sixty days before the expiration of its existing premises permit on March 1, 1994, due to the Respondent's failure to provide to the Board by December 30, 1993, a written resolution of the City of Oak Park Heights giving its approval to the renewal application or a certified copy of the meeting minutes detailing the approval vote.

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

#### RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Gambling Control Board issue Respondent a premises permit with an effective date of April 1, 1994, in accordance with the applicable statute and rules.

Dated this 28th day of February, 1994.

BARBARA L. NEILSON  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail .

Reported: Tape Recorded (Tapes No. 19,877 and 19,811)

#### MEMORANDUM

At the hearing, the Administrative Law Judge requested that the Respondent proceed to present its evidence first. The Judge also expressed the view that the burden of proof in this matter should be borne by the Respondent but invited the parties' comments on this issue. The Respondent pointed out for the first time in its post-hearing submission that the Notice of and Order for Hearing issued by the Board prior to the hearing indicated that the Board would present its case first at the hearing. Based only on the language of the Notice of and Order for Hearing, without citing further authority, the Respondent contends that the Board necessarily has the burden of proof in this matter. The Respondent alleges that requiring the Respondent to present its case first "confused" the Respondent and violated the Respondent's constitutional rights.



Had the parties reminded the Judge at the hearing of the language of the Notice of and Order for Hearing, the Respondent would have been permitted to present its case after the Board concluded. The language contained in the Notice of and Order for Hearing, however, does not, in the Judge's view, compel the conclusion that the Board bears the burden of proof in this proceeding. The Judge continues to believe that it is appropriate to place the burden of proof on the applicant for a premises permit since it is the applicant who seeks to have the agency issue the permit. See, e.g., Minn. Rules pt. 1400.5600, subp. 1 (1991) (the rules of the Office of Administrative Hearings indicate that "[t]he party proposing that certain action be taken must prove the facts at issue.... unless the substantive law provides a different burden"); Minn. Rules pt. 7861.0040, subp. 10(B) (1992 Supp.) (the rules of the Board provide that "[a]n application for renewal of a premises permit must be considered in the same manner as an application for an initial permit"); In re City of White Bear Lake, 311 Minn. 146, 247 N.W.2d 901 (1976) (a city seeking a state permit to encroach on public waters had the burden of proving that the application should be granted; the Court noted that the general rule in administrative proceedings is that "an applicant for relief, benefits, or a privilege has the burden of proof"). In any case, under the circumstances of this case, it is evident that the same conclusion would be reached regardless of which party bears the burden of proof because the essential facts were undisputed. Furthermore, the Respondent has not provided any persuasive evidence that it was in any way prejudiced by proceeding first to present the facts surrounding its renewal application.

Pursuant to Minn. Rules pt. 7861.0400, subp. 10(D), the sole issue at this hearing is whether the Respondent submitted a complete application at least sixty days before the expiration of the Respondent's existing premises permit. The statute governing the conduct of lawful gambling in Minnesota specifies that the Board "may not.... renew a premises permit..... unless the organization submits a resolution from the city council or county board approving the premises permit . . . ." Minn. Stat. 349.213, subd. 2

(1992). The Board is empowered by statute to regulate lawful gambling, issue licenses and premises permits, establish criteria for the issuance of licenses and premises permits, and promulgate rules authorized by Chapter 349. Minn. Stat. 349.151, subd. 4(a)(1), (2), (5), (10), and (11) (1992). The rules promulgated by the Board and the instructions accompanying its renewal form further provide that a renewal application is not "complete" until it includes, among other things, a copy of the resolution approving the premises permit or a certified copy of the minutes of the meeting at which the resolution was approved. Minn. Rules pt. 7861.0040, subp. 10(A) (1992 Supp.). It is undisputed here that the Respondent did not submit the required local approval to the Board until January 7, 1994. The Respondent's application thus was not complete as of December 30, 1993.

The Respondent's Gambling Manager testified at the hearing that Post 323 had done everything within its power to complete the application on time and that it should not be held responsible for the failure of the City of Oak Park Heights to be expeditious in producing the written resolution. The rules promulgated by the Board do, however, place upon the applicant the burden of obtaining the requisite local approval and submitting evidence of such local approval with its application. It is unfortunate that the Respondent apparently overlooked the possibility of submitting a certified copy of the minutes in lieu of the written resolution. The mere fact that the minutes

were published in the City's official newspaper on December 23, 1993, does not satisfy the rule requirement that evidence of local approval be submitted to the Board prior to the renewal application deadline. Because the Respondent did not provide any evidence that a printer's affidavit relating to the publication of the minutes was provided to the Board on or before December 30, 1993, Minn. Stat. 600.11 (1992) is inapplicable here. Moreover, the mere fact that the Respondent suffered no adverse effect when it filed the local government approval in late January during its last application for a premises permit is irrelevant since the parties agree that the sixty-day rule did not apply to the Respondent's previous application.

The rules of the Board specify that, where an application is not complete at least sixty days before the expiration of the applicant's existing permit, the permit will not be renewed until the first day of the month following the expiration of 60 days after the Board has received the complete application. Thus, applying the rule to the present case, the Respondent's permit may not be renewed until April 1, 1994. Because the Respondent's current premises permit expires on February 28, 1994, and it is unlawful to conduct gambling without a valid premises permit, the Respondent faces a one-month lapse in its gambling operations. The Administrative Law Judge does not agree with the Respondent that the failure of the Board to renew its premises permit as of March 1, 1994, by operation of the above-cited rules under these circumstances exceeds the Board's authority or amounts to the imposition of a "civil penalty" or to the "suspension" of the Respondent's permit. As discussed above, the Legislature has expressly granted the Board the authority to promulgate rules and establish criteria for the issuance of premises permits. The rules promulgated by the Board specify that appeals involving the Board's determination that an application is incomplete shall be handled as contested case hearings before an Administrative Law Judge. Minn. Rules pt. 7861.0040, subd. 10(D)(1) (1992 Supp.). The Board thus was not required to afford the Respondent an opportunity to appear before the Board prior to the hearing in this matter. The Respondent will, of course, have an opportunity to file exceptions and present argument to the Board following its receipt of the report of the Administrative Law Judge. Minn. Stat. 14.61 (1992).

The Administrative Law Judge agrees with the Respondent that the one-month delay in the effective date of its permit is a harsh consequence, particularly where the Respondent was otherwise diligent in providing the necessary paperwork and the Board in fact received the written resolution one week after the deadline. The Administrative Law Judge is, however, constrained by the mandatory language of the Board's rule and accordingly must

recommend that the Board's proposed action be sustained. The Board might wish

to consider revising the rule in the future to incorporate criteria to guide the exercise of agency discretion while ensuring that the Board may properly take into account such extenuating circumstances as a minimal delay in completion of the application, a delay beyond the control of the applicant, or a minor inadvertent omission.

B.L.N.