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ATTORNEY GENERAL OPINION NO. 2015- 6

Robert W. Challquist
Kansas Department of Revenue
Legal Services Bureau
915 SW Harrison Street, Room 230
Topeka, Kansas 66612-1588

Re: Constitution of the State of Kansas—Legislative—Legislative Power

Constitution of the State of Kansas—Miscellaneous—Lotteries; Regulation of “Raffles” Authorized

Synopsis: Article 15, § 3d of the Kansas Constitution is not self-executing. Only after the Legislature has exercised its constitutional authority to legislate on the licensing, conduct and regulation it deems appropriate will charitable raffles by certain nonprofit, religious, charitable, fraternal, education and veterans organizations be legal in Kansas. Further, the Kansas Department of Revenue is without authority to promulgate rules and regulations without the Legislature enacting a law authorizing charitable raffles. Cited herein: Kan. Const., Art. 2 § 1; Kan. Const., Art. 15 § 3d.

* * *

Dear Mr. Challquist:

On behalf of the Kansas Department of Revenue (KDOR), you ask our opinion on two questions related to the recently approved amendment to the state constitution allowing the Legislature to authorize charitable raffles held by certain nonprofit groups.¹

¹ Kan. Const., Art. 15 § 3d, approved November 4, 2014.

Article 15, § 3 of the Constitution of the State of Kansas provides, “[l]otteries and the sale of lottery tickets are forever prohibited.” “[T]he term lottery, as used in Art. 15, § 3 of the Kansas Constitution, has been defined by [the Kansas Supreme Court] as any game, scheme, gift, enterprise, or similar contrivance wherein persons agree to give valuable consideration for the chance to win a prize or prizes.”²

However, there are four voter-approved exceptions to the prohibition on lotteries and the sale of lottery tickets.³ The one pertinent to your question is in Article 15, § 3d, which authorizes the regulation of “raffles” and provides:

Notwithstanding the provisions of section 3 of article 15 of the constitution of the state of Kansas, the legislature may authorize the licensing, conduct and regulation of charitable raffles by nonprofit religious, charitable, fraternal, educational and veterans organizations. *A raffle means a game of chance in which each participant buys a ticket or tickets from a nonprofit organization with each ticket providing an equal chance to win a prize and the winner being determined by a random drawing.* Such organizations shall not use an electronic gaming machine or vending machine to sell tickets or conduct raffles. No such nonprofit organization shall contract with a professional raffle or other lottery vendor to manage, operate or conduct any raffle. Raffles shall be licensed and regulated by the Kansas department of revenue, office of charitable gaming or successor agency.⁴

The Kansas courts have established a test for determining whether a provision in the Kansas Constitution is self-executing.

It is a settled rule of constitutional construction that prohibitive and restrictive constitutional provisions are self-executing and may be enforced by the courts independent of any legislative action, unless it appears from the language of the provision that the enactment of legislation is contemplated as a requisite to give it effect.⁵

² *State ex rel. Stephan v. Finney*, 254 Kan. 632, 644 (1995).

³ Kan. Const., Art. 15 § 3a, adopted in 1974, authorizes bingo; § 3b, adopted in 1986, authorizes parimutuel wagering; § 3c, adopted in 1986, authorizes state-owned and -operated lottery; and § 3d, adopted in 2014, authorizes “raffles.”

⁴ Kan. Const., Art. 15, § 3d. Based on this definition and the judicially-created definition of “lottery”, we believe a “raffle” is a type of “lottery.”

⁵ *State ex rel. Frizzell v. Highwood Serv., Inc.*, 205 Kan. 821, 825 (1970) (citing *Higgins v. Cardinal Manufacturing Co.*, 188 Kan. 11, 18 (1961)).

Your first question is:

“Does the constitutional amendment legalize charitable raffles without legislation?”

We believe the answer to this question is no. Put simply, the general prohibition in Article 15, § 3 remains in effect; thus, no one has any constitutional right to operate a raffle, charitable or otherwise. The legality of a lottery or raffle in Kansas is dependent on whether it falls within any of four exceptions mentioned above.

The verbiage in § 3d is plain and unambiguous. It is clear that § 3d is not self-executing and that ancillary legislation is a necessary condition precedent to make this exception to the general prohibition against lotteries effective. The amendment gives the Legislature the discretion to take legislative action to authorize charitable raffles, but it does not mean the Legislature has to take any action. Only after the Legislature has exercised its new constitutional authority to legislate on the licensing, conduct and regulation it deems appropriate will such authorized charitable raffles by certain nonprofit, religious, charitable, fraternal, education and veterans organizations be legal in Kansas.

In addition to the plain reading of the provision, we also note that when confronted with the same question of whether another exception was legal without legislation, the Kansas Supreme Court found that Article 15, § 3c of the Kansas Constitution regarding state-owned and –operated lotteries was not self-executing.⁶ Implementation of additional forms of state-owned and -operated gambling had to be enacted by the Legislature to make the provision effective.⁷

Your other question is:

“Whether the word ‘shall’ in the last sentence requires the KDOR (or a successor agency) to license and regulate raffles regardless of the passage of legislation authorizing them, or is the KDOR only required to license and regulate raffles in the event that the legislature creates laws authorizing the raffles?”

Because of our conclusion on your first question, we believe the KDOR is without authority to promulgate rules and regulations without the Legislature enacting a law authorizing charitable raffles. To conclude otherwise would be tantamount to granting an executive branch agency the authority to legislate⁸ because the agency has not been

⁶ *State ex rel. Stephan v. Finney*, 254 Kan. 632, 656 (1994).

⁷ *Id.*

⁸ Article 2, § 1 of the Constitution of the State of Kansas provides, “[t]he legislative power of this state shall be vested in a house of representatives and senate.”

provided sufficient standards with which to promulgate rules and regulations that promote the manner and circumstances of exercise of that power.⁹

Moreover, if the last sentence were read as an independent grant of power to the Department of Revenue to license and regulate raffles regardless of whether such licensing and regulating first had been authorized by the Legislature, then the first sentence of the new constitutional provision would be meaningless.¹⁰ Words in the Constitution are “entitled to significance and weight,”¹¹ and thus a construction of the new constitutional provision that would render parts of its first sentence mere surplusage would not be favored. Therefore, we conclude that the correct reading of the new constitutional provision empowers, but does not require, the Legislature to authorize certain raffles, and the power granted to the Department of Revenue is limited to subsequently licensing and regulating what the Legislature may have authorized.

Sincerely,

Derek Schmidt
Kansas Attorney General

Athena E. Andaya
Deputy Attorney General

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⁹ *U.S.D. No. 279 v. Secretary of Kansas Department of Human Resources*, 247 Kan. 519, Syl. ¶ 6, (1990) (“Legislative authority may be delegated to an administrative body where guidelines are set forth in the statute that establish the manner and circumstances of the exercise of such power. Where the legislature enacts general provisions for regulation and grants a particular state agency the discretion to fill in the details, [the court] will not strike down the legislation as constitutionally impermissible unless such provisions fail to fix reasonable and definite standards to govern the exercise of such authority.”).

¹⁰ Under such a construction, the first would be rendered meaningless at least insofar as it grants the Legislature power to “authorize the licensing ... and regulation of charitable raffles...” because precisely the same power would have been granted by the last sentence to the Department of Revenue. Notably, the first sentence also appears to grant a broader authority to the Legislature to authorize the “conduct” of such raffles, and no parallel authority is granted by the last sentence to the Department of Revenue. We do not opine on what constitutes this apparent difference in scope between the broader power granted to the Legislature and the narrower power granted to the Department of Revenue.

¹¹ *State ex rel. Dole v. Kirchner*, 182 Kan. 622, 625 (1958).