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ATTORNEY GENERAL OPINION NO. 88- 120

The Honorable Alfred G. Schroeder, Chairperson
Kansas Racing Commission
128 North Kansas Avenue
Topeka, Kansas 66603-3621

Re: State Boards, Commissions and Authorities --
Parimutuel Racing; Kansas Parimutuel Racing Act
-- Organization Licenses to Conduct Races; Facility
Owner License and Facility Manager License

Synopsis: When a conditional license is granted to an applicant, competing applications are denied. At such time, the unsuccessful applicants are eligible for the process of refunding the deposit to commence. The refund is subject to set-off for administrative and investigative expenses incurred after April 7, 1988. The statutes and regulations do not preclude the applicant from refiling an application when the competing applicant's conditional license expires for lack of a financial commitment. Cited herein: K.S.A. 1987 Supp. 74-8804, as amended by L. 1988, ch. 315, sec. 3; K.S.A. 1987 Supp. 74-8813(e); K.S.A. 1987 Supp. 74-8813, as amended by L. 1988, ch. 317, sec. 1, ch. 318, sec. 1, ch. 319, sec. 1; K.S.A. 1987 Supp. 74-8815, as amended by L. 1988, ch. 317, sec. 2, ch. 319, sec. 2; K.S.A. 1987 Supp. 74-8828; K.S.A. 1987 Supp. 75-6202(b); K.S.A. 75-6204; K.S.A. 1987 Supp. 77-501, et seq., as amended by L. 1988, ch. 356; K.S.A. 77-601 et seq.; K.A.R. 112-3-1; L. 1988, ch. 316; L. 1988, ch. 317, sec. 6.

* * *

Dear Commissioner Schroeder:

As Chairman of the Kansas Racing Commission, you have requested our opinion concerning different aspects of the Kansas parimutuel racing act, K.S.A. 74-8801 et seq. The act has undergone several revisions in the 1988 legislative session. See L. 1988, chapters 315, 316, 317, 318 and 319. For brevity, if an amendment to a particular statute in the act is relevant, we will refer to the chapter of the session laws in which that amendment first appears. Otherwise we will refer to amended sections as being amended by chapter 319, as that chapter contains the amendatory language of chapters 316-18.

In general, your questions involve the application and disposition of certain applicant's deposits. Pursuant to K.S.A. 1987 Supp. 74-8813(b), as amended by L. 1988, ch. 319, sec. 1, and K.S.A. 1987 Supp. 74-8815(d), as amended by L. 1988, ch. 319, sec. 2, an applicant for an organization license or a facility owner license must deposit with the commission the sum of \$500,000 if the application is for 150 or more racing days per season, or \$250,000 if the application is for less than 150 racing days per season. The moneys are deposited in the state treasury, and credited to the racing applicant deposit fund, which is created by K.S.A. 1987 Supp. 74-8828. If an application is denied, then the deposit, plus any interest accrued, is to be refunded to the applicant.

You first ask at what time the deposit should be refunded to an applicant if a conditional license is granted to a competing applicant. When the commission determines that an applicant should be granted an organizational license, then that applicant is issued a conditional license, conditioned on submission of a commitment for financing the construction of the racetrack facility. If the commitment for financing is not timely submitted, the conditional license expires. K.S.A. 1987 Supp. 74-8813(r), as amended by L. 1988, ch. 319, sec. 1.

As we previously stated, the deposit in question is to be returned if an application is denied. We note that previously, denials of applications were to be in accordance with the Kansas administrative procedure act, K.S.A. 1987 Supp. 77-501 et seq., as amended by L. 1988, ch. 356. K.S.A. 1987 Supp. 74-8813(e). Reference to that act was

deleted, and replaced with a separate procedure. See L. 1988, ch. 318, sec. 1(e) and (v). The new procedure provides in relevant part:

"The grant or denial of an original organization license shall not be subject to the Kansas administrative procedure act. Such grant or denial shall be a matter to be determined in the sole discretion of the commission, whose decision shall be final upon the grant of a license to one of two or more competing applicants without the necessity of a hearing on the denial of a license to each other competing applicant." K.S.A. 1987 Supp. 74-8813, as amended by L. 1988, ch. 318, sec. 1(v).

The amended procedure allows a party to seek review in accordance with the Kansas judicial review act, K.S.A. 77-601, et seq., by an accelerated appeal to the Kansas Supreme Court.

The language of chapter 318 states that the final agency action which denies a license occurs when a competing applicant is granted a license. No distinction is made between a conditional and any other license. By reading these provisions in conjunction with the judicial review act, this is also the time when the order denying an application must be made. The order denying the application makes the unsuccessful applicant eligible for the refund procedure to commence.

Your next inquiry is whether an applicant for an organization license whose deposit has been refunded subsequent to an application denial may refile an application when a competing applicant's conditional license has expired for lack of a financial commitment. Applications for organization licenses are authorized and governed by K.S.A. 1987 Supp. 74-8813, as amended by L. 1988, ch. 319, sec. 1. We find no limitation on the number of times an organization may submit an application. Rather, the statute states that applications must be "filed with the commission at a time and place prescribed by rules and regulations of the commission." K.S.A. 1987 Supp. 74-8813(a), as amended by L. 1988, ch. 319, sec. 1(a). Effective October 1, 1988, the commission will require applications for organization licenses to be filed not later than 120 days prior to the first proposed

race. K.A.R. 112-3-1. It would appear that the applicant could submit a new application in accordance with the statutory and regulatory requirements.

Your final questions involve the additional administrative and investigative expenses which the commission is authorized to collect. Pursuant to K.S.A. 1987 Supp. 74-8813(a), as amended by L. 1988, ch. 317, sec. 1, and K.S.A. 1987 Supp. 74-8815(c), as amended by L. 1988, ch. 317, sec. 2, if the \$5,000 organization license fee or facility owner or facility manager license fee is insufficient to pay processing and investigation expenses, the commission must require the applicant to pay necessary additional amounts.

You ask whether the recoupment provisions are to be applied retrospectively. The fundamental rule of statutory construction in this regard is that acts of the legislature will not be applied retrospectively unless such legislative intent is clearly expressed. Davis, Administrator v. Union Pacific Railway Co., 206 Kan. 40 (1970) Syl. ¶ 1. This rule is modified if the amendment is procedural or remedial, but not if the new act creates a new liability or changes substantive rights of a party. Davis v. Hughes, 229 Kan. 91 (1981) Syl. ¶¶ 6,7. The amendatory language of chapter 317 does not clearly express an intent that the recoupment provisions are to be applied retrospectively. Rather, these provisions were to become effective upon publication in the Kansas Register. L. 1988, ch. 317, sec. 6. See 7 Kan. Reg., No. 14, April 7, 1988 at 611-12. We believe the legislative intent is clear. Expenses incurred in processing and investigating after April 7, 1988 may be recouped by the commission. Expenses incurred prior to that date, however, may not be charged by the commission.

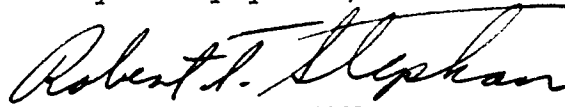
You also ask whether the commission may offset these application expenses against the deposits to be refunded the unsuccessful applicants. Authority to set-off against a debtor of a state agency appears at K.S.A. 75-6204. A debt is defined by K.S.A. 1987 Supp. 75-6202(b) as a liquidated sum due through operation of law, regardless of whether there is a judgment for that sum. A liquidated sum is one which is certain as to amount and time due. See Phelps Dodge Copper Products Corp. v. Alpha Construction Co., 203 Kan. 591, 595 (1969). It is therefore our opinion that if an unsuccessful applicant has not reimbursed the commission for expenses incurred from processing and investigating which are ascertainable as to amount and time due, then that amount may

be set off against the deposit refund in accordance with the statutes.

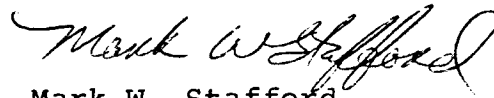
Finally, you ask to what extent the expense items associated with the recoupment provisions must be identified with particularity for the applicants. As we previously stated, the debt to be set off against the deposit refund, the debt owed to the agency, must be sufficiently ascertainable as to the amount owed and time that amount becomes due. It appears that, like the set-off provisions, before an applicant may be charged for the additional expenses, those expenses should be identifiable as pertaining to the applicant. One applicant should not be required to pay those expenses incurred which rightfully should be attributed to another. The statute is otherwise silent as to the degree of specificity which must attend the demand for additional payment. It should be noted, however, that an itemization of costs should not reveal criminal history records, criminal intelligence, or criminal and background information, the disclosure of which is prohibited by law. See K.S.A. 1987 Supp. 74-8804(n), as amended by L. 1988, ch. 315, sec. 3.

In conclusion, when a conditional license is granted to an applicant, competing applications are denied. At such time, the unsuccessful applicants are eligible for the process of refunding the deposit to commence. The refund is subject to set-off for administrative and investigative expenses incurred after April 7, 1988. The statutes and regulations do not preclude the applicant from refiling an application when the competing applicant's conditional license expires for lack of a financial commitment.

Very truly yours,



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