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March 26, 1980

ATTORNEY GENERAL OPINION NO. 80- 75

The Honorable Patrick Augustine
Representative, 110th District
Room 273-W
Statehouse

BUILDING MAIL

Re: Taxation -- Bingo -- Regulation of Minors' Participation

Synopsis: Through the exercise of the state's police power, the legislature is vested with broad discretion in controlling minors' participation in bingo games. Such discretion is limited only by the standard of reasonableness in protecting the health and morals of the community. Such standard would not be violated by the legislature's exercise of the police power so as to exclude minors' participation in bingo games or to exclude them from the premises where bingo games are conducted.

The secretary of revenue may not exceed the authority delegated to the secretary by the legislature. The laws regarding bingo games, K.S.A. 79-4701 et seq., do not empower the secretary to establish a separate class of persons subject to separate regulation. Thus, the secretary may not promulgate rules or regulations prohibiting minors' participation in or presence at bingo games. Statutes cited: K.S.A. 79-4701 et seq., 79-4702, 79-4708 and K.S.A. 1979 Supp. 77-416(a).

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Dear Representative Augustine:

You ask whether the legislature may prohibit minors from playing bingo or even being present where bingo games are conducted, and you also have inquired whether the secretary of revenue may adopt similar restrictions by regulation. Your inquiries require an examination of the respective powers of the legislature and its administrative agencies.

Your first question concerns whether the legislature may prohibit minors from participating in bingo games. It is firmly established in this state that bingo operations are subject to regulation. In 1972, the Kansas Supreme Court struck down legislation which would have allowed bingo to be played in Kansas. State v. Nelson, 210 Kan. 439 (1972). The Nelson court found bingo to be a lottery prohibited by the constitution. In 1974, however, the people of Kansas expressed their consent to bingo operations if conducted by designated organizations. The constitutional provision adopted by vote of the electorate appears in Article 15, Section 3a of the Kansas Constitution:

"Notwithstanding the provisions of section 3 of Article 15 of the constitution of the state of Kansas the legislature may regulate, license and tax the operation or conduct of games of 'bingo' as defined by law, by bona fide nonprofit religious, charitable, fraternal, educational and veterans organizations."

Pursuant to the 1974 amendment, the legislature may not only authorize bingo games, but retains exclusive power to regulate their operation, as well. K.S.A. 79-4702. In our judgment, such regulation may distinguish classes of persons and prescribe different treatment for each class, where such special treatment is necessary for the protection of the health, safety and morals of the community. Such regulatory legislation does not offend the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, if a reasonable distinction exists for each class. This principle was recognized in State ex rel. v. Redevelopment Authority of Kansas City, 176 Kan. 145 (1954):

"The legislature has power to pass laws which apply to and operate uniformly on members of the class, but the classification made must be a natural and genuine one, not arbitrary or fictitious, and based upon distinctions which have a reasonable and substantial relation to the subject matter involved." Id. at 149.

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In this regard, there is a strong presumption that the state's exercise of police power is permissible:

"Police power is the sovereign right of the state to enact laws for the protection of lives, health, morals, comfort, and general welfare. State ex rel. Municipal Bond and Inv. Co. Inc. v. Knott, 114 Fla. 120, 154 So. 143, 145 (1934). It is generally accepted that the state is the primary judge of, and may by statute or other appropriate means, regulate any enterprise, trade, occupation, or profession if necessary to protect the public health, welfare, or morals, and a great deal of discretion is vested in the legislature to determine public interest and measures for its protection." Carroll v. State, 361 So.2d 144 (Fla. 1978).

The state's police powers are controlled exclusively by the legislature. In City of Baxter Springs v. Bryant, 226 Kan. 383 (1979), the Kansas Supreme Court struck down portions of a municipal ordinance which prohibited dancing in taverns, holding that such regulations were not a valid exercise of the city's police power. In reaching this conclusion, the Court reiterated several well-established rules respecting the exercise of police power, including the following:

"Once a subject is found to be within the scope of the state's police power, the only limitations upon the exercise of such power are that the regulations must have reference in fact to the welfare of society and must be fairly designed to protect the public against the evils which might otherwise occur. Within these limits the legislature is the sole judge of the nature and extent of the measures necessary to accomplish its purpose." (Emphasis supplied.) Id. at Syll. 5.

The principle that children may be the objects of special protection via the police power is widely recognized. In Bykofsky v. Borough of Middletown, 401 F.Supp. 1242 (M.D. Penn. 1975), aff'd., 535 F.2d 1245 (3rd Cir. 1976), the court upheld a curfew ordinance which restricted children's right to be out in public after 10:00 p.m. The court examined the nature and extent of police power in relation to children:

"The community has a special interest in the protection of children of immature years. Because of their lack of mature judgment, minors are subject to the continuing

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control and supervision of parents or guardians until they become of age or are emancipated. Minors are deprived of many privileges and rights - e.g., the fundamental right to vote, to enlist in the military forces, to contract, to operate motor vehicles, to purchase or consume alcoholic beverages, to work at certain jobs, or to marry without parental consent. The state has legitimate interest in protecting the moral, emotional, mental, and physical welfare of the minor and the safety, peace, and order of the community." (Emphasis supplied.) Id. at 1256.

Other jurisdictions have upheld statutes which prohibit minors' participation in public amusement enterprises, similar to bingo. In State v. Rosenfield, 111 Minn. 301, 126 N.W. 1068 (1910), a statute aimed at excluding minors from public dance halls was upheld. There, the court found police powers exercisable by the legislature to include the authority to exclude minors from the hall.

In our judgment, exclusion of children until such time as they reach the age of majority is a reasonable means to prevent children from suffering any ill effects attributed to bingo, and such classification would, in our opinion, represent a reasonable exercise of the state's police power. Moreover, courts are reluctant to interfere with legislative classification, and such class distinctions are presumed valid.

"Judicial examination of any law enacted by the legislature proceeds on the assumption that it is valid unless it contravenes an express inhibition of the constitution or one necessarily implied from some express affirmative provision of that instrument, and an act of the legislature is not to be stricken down on the ground it is unconstitutional unless infringement of the superior law is clear beyond reasonable doubt." State ex rel. v. Urban Renewal Agency of Kansas City, 179 Kan. 435, Syll. 1 (1956).

See also State, ex rel. Schneider v. Kennedy, 225 Kan. 13 (1978).

Thus, it is clear that the legislature may distinguish between minors and adults for the purpose of prescribing different privileges for each class. As long as the regulation bears a rational relationship to public health, morals, or safety of the community, such legislative discretion will be upheld. Within the context of your inquiry, therefore, it is our opinion that such legislative discretion includes the ability to prohibit minors from playing bingo and to ban them from the premises while bingo is played.

Your next question concerns the power of the secretary of revenue to regulate minors pursuant to K.S.A. 79-4708. This statute authorizes the secretary of revenue to administer the Bingo Act, K.S.A. 79-4701 et seq., and it specifically grants rule-making power thusly:

"The administration of this act shall be vested in the secretary of revenue who shall have power to adopt and enforce rules and regulations to regulate, license, and tax the management, operation and conduct of games of bingo and participants therein and to properly administer and enforce the provisions of this act." K.S.A. 79-4708.

Pursuant to the foregoing, the legislature has delegated to the secretary of revenue the authority to regulate the various aspects of bingo games. As to the legislature's prerogative to do so, it is a well-accepted principle of law that a proper legislative delegation must prescribe standards to guide agencies in performance of their duties. Although difficult to define, the Kansas Supreme Court has characterized sufficient guidelines as

"conditions, restrictions, limitations, yardsticks, guides, rules, broad outlines and similar synonymous expressions hereinafter set forth. It has been held that in the creation of administrative tribunals the power given them must be 'canalized' so that the exercise of the delegated power must be restrained by banks in a definitely defined channel. Ordinarily the standards must be sufficiently fixed and determined so that in considering whether a section of a statute is complete or incomplete the test is whether the provision is sufficiently definite and certain to enable one reading it to know his rights, obligations and limitations thereunder." State, ex rel. v. Hines, 163 Kan. 300, 309 (1974).

In this instance, however, it is our opinion that the legislature failed to delegate the necessary authority for the secretary of revenue to restrict the age of bingo participants. As required by the court in Hines, supra, instructions to the agency must be definite enough to enable one reading the statute to know his rights and obligations under it. K.S.A. 79-4708 allows the agency to "regulate, license, and tax . . . participants" within the provisions of the Bingo Act. In our judgment, however, such authorization cannot be construed as

providing the definite instructions or guidelines that would permit the secretary of revenue to segregate minors from those persons who are entitled to participate in bingo games. It is apparent that such classification effects a prohibition against participation by a select class of persons. However, the power to regulate participants in bingo games does not impart authority to classify those persons who may not be participants, since the power to regulate cannot be equated with the power to prohibit. Our office affirmed this standard in Attorney General Opinion No. 79-110, as follows:

"Is the power to regulate the power to prohibit? Most of the authority we find on this question impels a negative answer. The Kansas Supreme Court interpreting a constitutional provision and statute by which the holding of land by aliens was regulated, ruled that 'the words restrain and regulate are not synonymous with prohibit.' Madden v. The State, 68 Kan. 658, 661 (1904). Construction of the word 'regulate' in other jurisdictions is in general accord with the Kansas rule. See Words and Phrases, Permanent Edition, Vol. 36A, pp. 315-319, and supplement."

Thus, were the secretary of revenue to adopt regulations as to the minimum age of bingo participants, such regulations would constitute a prohibition as to the participation by persons below such age. In our judgment, such regulations would exceed the authority vested in the secretary of revenue by the legislature. It would, in effect, constitute the exercise of authority residing solely in the legislature itself. As noted by the Court in Willcott v. Murphy, 204 Kan. 640 (1970), with respect to the authority of the director of alcoholic beverage control to implement the Kansas Liquor Control Act:

"Since the enactment of the Kansas Liquor Control Act we have repeatedly said the legislature has full and complete power to regulate and control all phases of traffic in alcoholic liquor. . . .

"We have also recognized that the director is clothed with broad discretionary powers to govern all phases of the traffic in alcoholic liquor and is authorized to adopt and promulgate such rules and regulations as shall be necessary to carry out the intent and purposes of the Liquor Control Act. (Chambers v. Herrick, 172 Kan. 510, 241 P.2d 748.) The power, however, must stem from the intent and purposes of the Act. . . . The power to regulate, though declared to be broad, nevertheless, falls short of the power to legislate." (Emphasis supplied.) Id. at 648.

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It is also to be noted that Kansas case law strictly limits administrative powers to those conferred either expressly or by necessary implication. City of Wichita v. Wyman, 158 Kan. 709 (1944). This is in accord with general authority. See Sutherland, Statutory Construction, §65.02, p. 150.

The fact that rules and regulations of administrative agencies must stem from and be consonant with statutory provisions has been recognized by the Kansas legislature. K.S.A. 1979 Supp. 77-416(a) provides in part:

"Every state agency shall file with the revisor of statutes every rule and regulation adopted by it and every amendment and revocation thereof. Such rules and regulations shall be filed in duplicate, and each section shall include a citation to the statutory section or sections being implemented or interpreted and a citation of the authority pursuant to which it, or any part thereof was adopted." (Emphasis supplied.)

Thus, the administrative agency may not make law, but may only enforce statutes passed by the legislature.

It is apparent that the legislature alone may control minors' participation in bingo games. Until such time as the legislature authorizes the secretary of revenue to preclude minors' participation in bingo games, the secretary is without authority to promulgate rules and regulations to that effect.

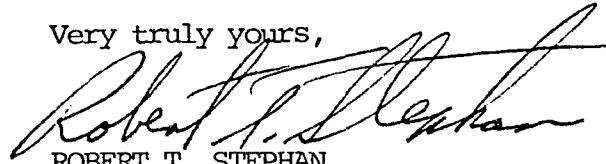
The question of excluding minors from the premises where bingo is played yields a similar result. Should the legislature direct that minors be excluded from the premises where bingo is played, we believe such exclusion would be upheld by the courts as a valid exercise of legislative discretion. However, as previously stated, it is our opinion that the legislature has not delegated rule-making authority to the secretary of revenue which would allow exclusion of minors' participation in bingo operations. The power to regulate does not include the power to prohibit. Madden v. The State, supra. If the secretary is not authorized to preclude minors' participation, it can hardly be said that the legislature directed the secretary to exclude minors from the premises.

In summary, the legislature alone may control bingo operations with respect to minors as a class. The discretion of the legislature is sufficiently broad to allow exclusion of minors from playing bingo or ban them from the premises. However, until such time as the

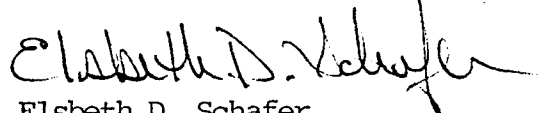
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legislature grants such regulatory powers to the secretary of revenue,
he may not exclude minors' participation in or presence at bingo games
by adopting rules or regulations to that effect.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Robert T. Stephan".

ROBERT T. STEPHAN
Attorney General of Kansas

A handwritten signature in cursive script, appearing to read "Elsbeth D. Schafer".

Elsbeth D. Schafer
Assistant Attorney General

RTS:TDH:EDS:may