

STATE OF INDIANA)
)ss:
COUNTY OF MARION)

MARION SUPERIOR COURT
CIVIL DIVISION 10
CAUSE NO. 49D10-0306-PL-1148

VETERANS OF FOREIGN WARS, et al.,)
)
) Plaintiffs,)
)
) vs.)
)
) INDIANA DEPARTMENT OF REVENUE, et al,)
)
) Defendants.)

FILED

6

AUG 09 2004

Debra Ann Fuller
CLERK OF THE
MARION CIRCUIT COURT

**FINAL ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND PERMANENT INJUNCTION**

Introduction

Both parties seek summary judgment regarding the validity of 45 IAC 18-3-7 and 8. The Court finds Defendant Indiana Department of Revenue ("Revenue") failed to submit the rules for Legislative Services Agency ("LSA") fiscal analysis in violation of I.C. 4-22-2-28 and 46. Therefore, Plaintiffs' motion for summary judgment is granted, the Court consolidates with trial on the merits, and permanent injunction is entered.

Issue

Is Revenue required to submit the rules to LSA?

Facts and Procedural History

Revenue has authority to regulate, administer, and enforce Indiana law regarding "charitable gaming" under I.C. 4-32-7 et.seq. The law also allows Revenue to grant

licenses to qualified charitable organizations, collect financial reports, and regulate allowable events. I.C. 4-32-9-5 et.seq.; I.C. 4-32-9-17; 45 IAC 18-4-1.

In 2002 and 2003, Revenue published an annual "charity gaming report" showing financial information of qualified charitable organizations state-wide, including annual gross and net gaming receipts, annual expenses, and percentage of profit from charitable gaming. The reports show average proceeds of qualified organizations exceeds \$500,000,000 per year, net proceeds average approximately \$74,000,000 per year, and over \$50,000,000 per year is retained.

On February 28, 2003, Revenue filed proposed Rules 45 IAC 18-3-7 and 8 ("Rules"). The Rules provide that a graduated percentage of charitable gaming gross receipts must be used for the lawful or religious charitable, community, or educational purposes for which the organization is specifically organized, but cannot include "Social or recreational activities, or for events, activities, or programs that are open primarily to organizations, members and their families." 45 IAC 18-3-8(d). The graduated percentages are:

1. Five (5) percent for organizations with annual gross receipts less than \$150,000.00.
2. Eight (8) percent for organizations with annual gross receipts between \$150,000.00 and \$500,000.00.
3. Ten (10) percent for organizations with annual gross receipts over \$500,000.00.

Revenue's annual charity gaming reports show most qualified charitable organizations use gaming proceeds to support their own activities.

Any department of state government, like Revenue, that proposes a rule "with an estimated economic impact greater than \$500,000" must submit the rule to LSA for a

fiscal analysis or the rule is invalid under I.C. 4-22-2-28(b) and 44 (emphasis supplied). Revenue did not submit the Rules to LSA.

Plaintiffs are qualified charitable organizations whose primary purposes are "social or recreational activities" for members and families disallowed by Revenue's Rules. Therefore, the Rules require Plaintiffs to spend the its applicable percentage outside their organizations for other charitable purposes, thus losing such revenue or losing their gaming license.

On June 27, 2003, Plaintiffs filed this action seeking injunctive and declaratory relief declaring the Rules invalid. Count 1 of the Complaint alleges there is an estimated economic impact greater than \$500,000, but Revenue failed to submit the rules to LSA as required by statute. Revenue argues the statutes only require it to make its own estimate and decide whether it finds any "predictable financial impact." It claims any such estimated impact is "speculative," and so it is not obliged to follow the procedure outlined by the statutes.

Both parties submit motions for summary judgment.

Discussion

Plaintiffs Are Entitled to Judgment As A Matter Of Law

Summary judgment is proper if the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. T.R. 56 (C). The moving party must establish the "absence of any genuine issue of fact as to a determinative issue." Jarboe v. Landmark Community Newspaper, Inc. (1994), Ind., 664 N.E.2d118, 123. If there is sufficient evidence to establish the elements of a

determinative defense, the burden shifts to the respondent to make sufficient showing to establish the existence of a genuine issue for trial regarding such defense. Shell Oil Co. v. Lovold Co. (1998), Ind., 705 N.E.2d 981. On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning Fiberglass Corp. v. Cobb (2001), Ind., 754 N.E.2d 905, 909. The parties all show the absence of any genuine issue of material fact, so there are only issues regarding which party is entitled to judgment as a matter of law.

Although the parties argue several issues, Revenue's failure to submit the Rules is alone dispositive.

First, the law is clear. If a rule has an estimated financial impact exceeding \$500,000, it must be submitted to LSA for a fiscal analysis or else it is invalid. I.C. 4-22-2-28(b) and 44; Indiana Family and Social Services Administration v. Walgreen (2002), Ind., 769 N.E.2d 158. Second, the financial impact of Revenue's rules clearly exceeds \$500,000. Although both parties submit large amounts to data to support their claims, the Court finds such impact in just three examples of comparable organizations around the state. Revenue's 2003 Charity Gaming Report shows bingo license proceeds as follows:

1. Lake County:

<u>The Cesare Battisti Lodge No. 27</u>	
-Gross receipts:	\$2,322,840.00
-Ten percent (under new rules):	\$232,284.00
-2003 amounts given to other organizations (before rules):	<u>\$78,647.00</u>
-Impact under new rules:	\$153,637.00

2. Marion County:

<u>Royal Order of Moose Lodge No. 500</u>	
-Gross receipts:	\$4,420,510.00
-Ten percent (under new rules):	\$442,051.00
-2003 amounts given to other organizations (before rules):	<u>\$67,273.00</u>

-Impact under new rules: **\$374,778.00**

3. Vanderburgh County:

Order of Owls Nest No 30

-Gross receipts:	\$1,825,716.00
-Ten percent (under new rules):	\$182,571.00
-2003 amounts given to other organizations (before rules):	<u> \$0</u>
-Impact under new rules:	\$182,571.00

The total financial impact to these “social club” examples is \$710,886 if the Rules are enforced. Since Revenue’s 2003 Charity Gaming Report shows statewide charity gaming revenues consistently averaged over \$500,000,000 dollars since 1997, these figures are not unique.

Accordingly, the Court finds the “estimated financial impact” of Revenue’s rules exceed \$500,000 by looking at these three qualified charitable organizations alone. The consideration of the hundreds of qualified charitable organizations in Indiana’s 92 counties only makes the impact that much greater.

The Court further finds Revenue’s argument unavailing. An interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself. Indiana Dept of State Revenue v. Bulkmatic Transport, Co. (1995), Ind., 648 N.E.2d 1156, 1158. If an agency misconstrues a statute that it is charged with enforcing, then the trial court is entitled to give it no weight. Peabody Coal Co. v. Indiana Dept. of Natural Resources (1992), Ind.App., 606 N.E.2d 1306, 1308. Under Indiana law, a court must interpret a statute to ascertain and give effect to the intent of the legislature. A statute is to be examined and interpreted as a whole, given common and ordinary meaning to words used in English language and not overemphasizing a strict literal or

selective reading of individual words. Foremost Life Insurance Company v. Indiana Department of Insurance (1980), Ind., 409 N.E. 2d 102. An unambiguous statute must be held to mean that it plainly expresses, and that given its plain and obvious meaning. Indiana Department of State Revenue v. Horizon Bancorp (1994), Ind., 644 N.E. 2d 870. The Court finds Revenue misconstrued the statutes by assuming it could forego an LSA fiscal review by relying only on its own subjective analysis. This assumption is inconsistent with the statute's mandate to submit rules with an "estimated" impact over \$500,000. Revenue claims it cannot make any estimate at all, but that is contradicted in its own charity gaming reports. Since the objective designated data clearly shows a financial impact over \$500,000, the Rules must be submitted to LSA, regardless of Revenue's subjective claim.

Since Revenue did not submit the rules to LSA, they are invalid under IC 4-22-2-28(b) and 44.

Injunctive Relief

Generally, parties seeking a preliminary injunction must establish four elements by a preponderance of the evidence: (1) the remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action; (2) there is a reasonable likelihood of success on the merits; (3) the threatened injury outweighs any potential harm to the non-movants from the grant of the injunction; and (4) the public interest is not disserved by issuance of the injunction. Tilley v. Roberson (2000), Ind.App., 725 N.E.2d 150, 153-54; Sadler v. State ex.rel. Sanders (2004), Ind.App., 811 N.E.2d 936. Where the conduct sought to be enjoined is clearly in violation of a statute, courts have adopted a more relaxed standard that relieves a party moving for preliminary injunctive

relief from demonstrating two of these elements. Under this "per se" rule, the moving party need not demonstrate irreparable harm or that the balance of hardships is in his favor. Union Twp. School Corp. v. State of Indiana ex rel. Joyce (1998), Ind.App., 706 N.E.2d 183, 192.

The Court has found above that Plaintiff is entitled to judgment as a matter of law, so the merits are resolved. In addition, issuing an injunction that requires Revenue to submit the Rules to LSA before mandating a significant financial change in the way in which gaming licenses are regulated will not disserve the public service. Therefore, injunctive relief is appropriate.

Order and Permanent Injunction

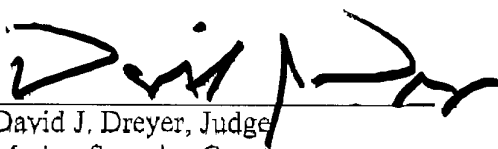
Plaintiff's motion for a summary judgment is granted.

Defendants' motion for a summary judgment is denied.

The Court finds facts and conclusions of law above and incorporates such findings herein.

Defendants are permanently enjoined from implementing 45 IAC 18-3-7 & 8 unless and until they comply with IC 4-22-2-28(b) or further order of this Court.

Dated this 9th day of August 2004.


David J. Dreyer, Judge
Marion Superior Court