

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

**T. HENLEY GRAVES**  
*RESIDENT JUDGE*

**SUSSEX COUNTY COURTHOUSE**  
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September 29, 2017

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**Re: *AmVets Post No. 2 v. The Delaware Board of Charitable Gaming;*  
C.A. No. S17A-02-003**

Date Submitted: June 27, 2017  
Date Decided: September 29, 2017

On Appeal from The Delaware Board of Charitable Gaming: **AFFIRMED**

Dear Counsel:

Pending before the Court is an appeal from the Delaware Board of Charitable Gaming. For the reasons set forth herein, the Delaware Board of Charitable Gaming's decision is **AFFIRMED**.

**Procedural Posture**

On March 3, 2016, the State of Delaware ("the State") filed a complaint with the Delaware Board of Charitable Gaming ("the Board") against AmVets Post No. 2 ("AmVets") alleging violations of Title 10 of the Delaware Administrative Code. A hearing officer from the Delaware Division of Professional Regulation ("DPR") held a hearing on the matter on August 24, 2016.

On December 7, 2016, the hearing officer issued her Recommendations to the Board. The hearing officer recommended the Board (1) fine AmVets for certain raffles it held prior to the obtaining a valid raffle permit; (2) fine AmVets for failing to include required information on the raffle tickets for the raffles for which it had valid raffle permits; (3) fine AmVets for failing to keep and maintain ticket stubs and other records from the raffles for which it had valid raffle permits; (4) fine AmVets for filing at least eight inaccurate or incomplete reports for the raffles for which it had valid raffle permits; (5) require AmVets to present a proposed plan for distribution of the funds seized as a result of the criminal investigation into AmVets' raffle procedure; and (6) require AmVets to submit all permit applications for gambling to the Board for review for the following twenty-four months.

The Board considered the Recommendations and approved them in substance on December 28, 2016, pending the preparation of a final order by legal counsel. That Order modified condition 5, above, to require that AmVets' proposed plan be approved by the Board prior to the issuance of any additional permits. The final Order is dated January 25, 2017, and was mailed to counsel on January 30, 2015.

AmVets filed a timely appeal with this Court on February 22, 2017. On March 23, 2017, the Court issued an Order staying the Board's decision pending the outcome of this appeal.

The issues have been briefed and the matter is now ripe for decision.

### **Summary of Evidence Presented Below**

DPR is responsible for "the administrative, ministerial, budgetary, clerical and exclusive investigative functions" of the Board.<sup>1</sup> On or about July 2, 2015, Thomas Phillips, a member of

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<sup>1</sup> 28 *Del. C.* § 1505(d).

AmVets, spoke with Amanda McAtee, a board liaison with DPR. Phillips told McAtee that AmVets was hosting a bingo event in which the winning pot was in the range of ten to fifteen thousand dollars. Phillips told McAtee he had recently become aware of DPR and the possibility that AmVets may need a permit given the size of the bingo award. While speaking with Phillips, McAtee was able to search DPR's database and determine AmVets had not been issued a bingo permit since 2011 and AmVets' instant bingo permit had expired just two days before on June 30, 2015. McAtee explained to Phillips how he could renew the instant bingo permit online. Phillips continued to speak of a "bar bingo situation" with a sizeable jackpot. McAtee referred Phillips to DPR's website for instructions on how to file an application for bingo. Phillips seemed anxious to obtain a permit and said he would come into the office on the next business day to discuss the application. There was no discussion of a raffle event at this time.

Following the discussion between Phillips and McAtee, McAtee submitted a memo to Ted Kimmey, a charitable gaming inspector with DPR, outlining her conversation with Phillips. Kimmey visited AmVets' Millsboro location on July 8, 2015, to see if AmVets was hosting bingo. It was not. Kimmey spoke with Thomas Jones, Commander for AmVets, who told Kimmey that AmVets was thinking about starting back up with bingo and that they were also thinking about submitting an application for a raffle. Kimmey left his contact information and encouraged Jones to contact him if Jones had any questions about the application process.

On July 14, 2015, Phillips and Jones appeared at DPR with two applications: one for charitable gambling and one for a periodic raffle. McAtee met with Phillips to review the applications. When McAtee told Phillips the gaming regulations did not permit as many dates as were listed on AmVets' application for charitable gaming, Phillips withdrew that application.

McAtee then went over the application for periodic raffles with Phillips. As required, the application listed a “maximum retail cash value” for each raffle drawing. McAtee testified Phillips did not inform her the raffle was a progressive jackpot and there was no indication on the application itself that any money carried over from one raffle to another.

After McAtee confirmed all fields of the application were complete, including the area for designating a charitable purpose for the use of the funds generated by the raffle,<sup>2</sup> she added it to the Board’s July meeting agenda. The Board subsequently approved permits for weekly raffles beginning August 1, 2015, and extending through October 31, 2015.<sup>3</sup>

On October 10, 2015, Kimmey was inspecting a different bingo location when he heard that AmVets was holding a Joker’s Wild raffle at their Millsboro location with a large jackpot. Kimmey consulted Facebook and confirmed that the jackpot seemed to be increasing.<sup>4</sup> Kimmey researched and understood Joker’s Wild was played by placing a deck of cards in an envelope. When a winner is called, the winner draws a card from the envelope. If it is the joker, the winner takes home the jackpot. If it is not the joker, the card is displayed and the raffle continues until someone draws the joker and wins the jackpot.

Kimmey reviewed AmVets’ raffle application as well as the After Occasion Reports

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<sup>2</sup> The application indicated that funds generated from the raffle would be used for “Charity Contributions to needy Veterans, Local fire companys [sic], local Ambulance svcs and other charitable organizations both local and national.”

<sup>3</sup> AmVets’ initial application requested permits from August 1, 2015, through January 16, 2016, but McAtee was under the apparently mistaken impression that the Board could only grant applications for three months at a time and modified the application accordingly.

<sup>4</sup> The Facebook posts referenced herein were not attributed to AmVets but, rather, appear to have originated with a raffle ticket holder or observer. They have not been authenticated.

(“AORs”) it had submitted to date. Kimmey noticed that the receipts from raffle sales reported on the AORs did not appear to match the number of tickets sold as indicated on Facebook and from other sources. Kimmey also found the AORs to be inconsistent as to the total cash value of prizes to be awarded compared to the description of the jackpot as described on Facebook.<sup>5</sup>

Although no one testified as to when, exactly, it became clear to DPR that AmVets was operating a progressive raffle with an extraordinarily high jackpot, reason would point to October 10<sup>th</sup>.

Kimmey and another charitable gaming inspector decided to visit the AmVets’ Millsboro location as a result of the discrepancy between what they were hearing and AmVets’ application and AORs.

At AmVets, the inspectors spoke with Jones and asked to see the raffle ticket and the log of tickets sold. They were told the member sign-in sheet was being used as a log. This sheet was comprised solely of names of members and their guests. The inspectors observed that the raffle ticket itself was of the type commonly used for 50/50 raffles and contained no identifying information. The tickets were approximately 1” X 2” in size. One side contained four lines for the name, address, and telephone number of the purchaser and the other side read, “DROP THIS TICKET IN PROPER PLACE.” The amount of the prizes were posted in the hall but the rules of the game were not.

At 6:30 p.m., the second and third place winners were announced, winning \$330.00 and \$270.00, respectively. The first place winner was announced and given an opportunity to select an envelope containing one card of a fifty-four card deck in a display case. Approximately forty

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<sup>5</sup> To be clear, the unauthenticated Facebook posts were not used to substantiate allegations of violations.

cards were already exposed, face-up, in the case. The card selected by the winner was not a joker and her card was posted, face-up, along side the other cards chosen from previous weeks. Based on the number of cards left on the board, Kimmey estimated the game had been played for roughly forty weeks. If so, the weekly raffle would have originated sometime in December of 2014. James Bailey, the comptroller for AmVets, testified he estimated the Joker's Wild jackpot reached \$5,000.00 in March of 2015.

On October 10<sup>th</sup>, the jackpot was approximately \$140,000 and the permit application listed \$600.00 as the total cash value of prizes to be awarded at the October 10<sup>th</sup> raffle.

After the raffle, Kimmey followed up with his supervisor, Jean Betley, and drafted a complaint to be filed with DPR. The day before he filed the complaint, Kimmey called Phillips to relay his concerns about the discrepancy between the number of tickets actually sold and the revenue from tickets sold reported on the AORs.<sup>6</sup> Phillips expressed concern and a desire to comply with the rules. After October 10, 2015, the number of tickets sold and total sales recorded on the AORs began to align.

On October 16, 2015, Kimmey filed the complaint alleging that the prizes awarded exceeded the application/permit amounts, the tickets failed to contain the required information, the AORs did not contain accurate information, and the raffle had been conducted "unlicensed" since approximately December of 2014.

On November 5, 2015, representatives from DPR met with representatives from AmVets. Betley requested records of the numbers of tickets sold, the names of those who purchased

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<sup>6</sup> At this time, Kimmey did not mention any issue he had about the raffle tickets, themselves.

tickets, the amount of prizes awarded, the names and addresses of the winners, and checks, money orders or other receipts as proof of money given to charity. Kimmey and Betley testified the DPR representatives were told no such records existed. AmVets representatives present for the meeting denied any such requests were made and stated that records were readily available for inspection. The hearing officer found Kimmey and Betley's testimony more credible on this point. None of the "readily available" records were submitted to DPR or produced at the hearing. At this November 5<sup>th</sup> meeting, the AmVets representatives candidly admitted that, while AmVets donates to charitable causes year-round, the net proceeds from the raffles themselves did not go to charity; to the contrary, the proceeds rolled over into the growing jackpot.

Also on November 5, 2015, AmVets submitted another raffle application. Permits were granted for weekly raffles from November 7, 2015, through January 16, 2016. This application was identical in substance to the original application but covered a different date range. The Division of Gaming Enforcement ("DGE") seized the jackpot money before the raffle scheduled for November 7, 2015, could be held.

### **Standard of Review**

The Court has jurisdiction to entertain appeals from the Board pursuant to the Delaware Administrative Procedures Act.<sup>7</sup> In the absence of fraud, the Court's review is "limited to a determination of whether the [Board's] decision was supported by substantial evidence on the record before the [Board]."<sup>8</sup> When factual determinations are at issue, the Court must take "due account of the experience and specialized competence of the [Board] and of the purposes of the

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<sup>7</sup> 29 *Del. C.* §§ 10102, 10142, 10161.

<sup>8</sup> *United Water Del., Inc. v. Public Serv. Comm'n*, 723 A.2d 1172, 1173-74 (Del. 1999).

basic law under which the [Board] has acted.”<sup>9</sup> However, “[w]hen the issue is one of agency interpretation of statutory law, and application of that law to undisputed facts,” the Court’s review is plenary.<sup>10</sup>

## Discussion

### A. Applicable Law

Gambling is prohibited by the Delaware Constitution, except in limited circumstances.

The Constitution provides, “All forms of gambling are prohibited in this State except the following: ... (b) Lotteries (other than slot machines, roulette, craps and baccarat games) provided that each is sponsored and conducted under the limitations of Section 17B....”<sup>11</sup> Section 17B encompasses lotteries held by charitable organizations and reads, in relevant part:

Lotteries not under State control shall be lawful when sponsored and conducted by volunteer fire companies, veterans organizations, religious or charitable organizations, or by fraternal societies provided that said company, organization or society has been in existence a minimum of 2 years and provided the net receipts or profits arising from the conducting or operating of such lotteries by the aforementioned companies, organizations or societies are used solely for the promotion or achievement of the purposes of aforementioned companies, organizations or societies, and provided further that the aforementioned companies, organizations or societies are operated in a manner so as to come within § 170 of the United States Revenue Code and regulations promulgated thereunder by the United States Secretary of the Treasury.<sup>12</sup>

AmVets is in good standing with the nationwide American Veterans organization, which

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<sup>9</sup> 29 Del. C. § 10142(d).

<sup>10</sup> *Eastern Shore Nat. Gas Co. v. Delaware Pub. Serv. Comm’n*, 637 A.2d 10, 15 (Del. 1994), overruled on other grounds by *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378 (Del. 1999).

<sup>11</sup> Del. Const., art. II, § 17.

<sup>12</sup> Del. Const., art. II, § 17B.



is a tax-exempt 501(c)(19) national organization chartered by Congress in 1944 with approximately 250,000 members nationwide. AmVets is therefore authorized to conduct charitable gaming events and gambling under the administration of the Board and the Delaware Lottery Commission.

Title 28 of the Delaware Code establishes the Board and charges the Board with “protect[ing] the public through the regulation of activities which involve charitable gaming.”<sup>13</sup> The Board is directed to “develop standards assuring professional competence; ... develop rules and regulations; and ... impose sanctions where necessary against persons or occupational groups regulated by the Board.”<sup>14</sup> In order to do so, the Board is authorized to adopt rules and regulations to govern the issuance of permits and licenses to conduct games and these rules and regulations have the force of law.<sup>15</sup> As provided in the Constitution, these permits and licenses may be issued to qualified charitable organizations and the Board “shall prevent the game from being conducted for commercial purposes or private profit” except as otherwise authorized by law.<sup>16</sup> Title 28 also delineates the details of the financial records that must be submitted to the Board after a game is held.<sup>17</sup>

The Board has, in fact, adopted a number of regulations concerning the administration of charitable gambling and raffles, in particular. The Regulations apply to any raffle held under Title

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<sup>13</sup> 28 *Del. C.* § 1505(a).

<sup>14</sup> 28 *Del. C.* § 1505(b).

<sup>15</sup> 28 *Del. C.* § 1508(a)(2).

<sup>16</sup> *Id.*

<sup>17</sup> 28 *Del. C.* § 1521(a).

28 “in which the value of the prize or prizes to be awarded is \$5,000 or more ....”<sup>18</sup> No raffle tickets may be sold before the charitable organization has obtained a permit from the Board.<sup>19</sup> Raffle tickets must contain the following information: (1) a full and fair description of the prize; (2) the appraised value of the prize; (3) if there is a minimum number of tickets to be sold, what the minimum is and the procedure to be employed to secure a refund in the even the minimum is not reached; (4) the drawing date of the raffle; and (5) the exact nature of the charitable purpose for which the proceeds will be used.<sup>20</sup> The sponsoring organization has several financial and bookkeeping responsibilities, including maintaining (1) a log of raffle ticket purchasers; (2) records with respect to the sale and distribution of the raffle tickets; and (3) an account of the proceeds and expenses of the raffle.<sup>21</sup> Within thirty days of the date of a raffle, the record keeper must “furnish in writing to the Board, the name and address of each person to whom a prize was awarded, the gross receipts derived from the selling of the raffle tickets, and the total expenses incurred for the raffle.”<sup>22</sup> This report is the aforementioned AOR. Failure to comply with the Regulations subjects the violator to suspension or revocation of its license<sup>23</sup> and fines.<sup>24</sup>

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<sup>18</sup> 10 *Del. Admin. Code* § 102.

<sup>19</sup> 10 *Del. Admin. Code* § 102-3.9.

<sup>20</sup> 10 *Del. Admin. Code* § 102-2.1.

<sup>21</sup> 10 *Del. Admin. Code* §§ 102-4.2, 102-4.3.

<sup>22</sup> 10 *Del. Admin. Code* § 102-7.0.

<sup>23</sup> 28 *Del. C.* § 1523; 10 *Del. Admin. Code* § 102-5.0.

<sup>24</sup> 28 *Del. C.* § 1523.

**B. The Findings of Fact and Conclusions of Law**

The hearing officer made several findings of fact. The majority of the findings are laid out, *supra*, as evidence presented below. However, a number of findings are worth emphasizing. First, the hearing officer found McAtee credible when she testified that during the application process the rules of the raffle would have been disclosed to her and, if a jackpot or carryover had been mentioned, she would have directed the applicant to fully explain that process on the application. McAtee did not see any written game rules at the time the application was filed on July 14<sup>th</sup>. Although no individual raffle's cash value exceeded \$5,000, the total cash value over the time period covered by the application was \$6,930 and, therefore, permits were deemed necessary. The hearing officer also found that the Regulations did not require that an applicant submit a game's rules with its application and that the Board approved AmVets' application without the inclusion of the rules of Joker's Wild.

Although AmVets timely filed all of its AORs from 8/1/15 through 10/31/15, there was no evidence that AmVets filed the names and addresses of the winning raffle ticket holders to the Board, in violation of Regulation 7.0. The hearing officer also concluded it was unclear when the jackpot exceeded \$5,000. After weighing the witnesses' testimony, she discerned that the \$5,000 threshold was met at some point between March and July of 2015 but, at a minimum, was met by July of 2015.

On the night of October 10<sup>th</sup>, Kimmey did not advise Jones of any concerns he had regarding the handling of the raffle. Thus, the hearing officer concluded it was reasonable for Jones – and AmVets, in general, by extension – to assume there were no issues with the manner in which the raffle was being held. Concerning the follow up visit to AmVets by the DPR

representatives, the hearing officer made the following findings of fact:

No subpoena or written request for records was made of AmVets 2 but during the November 5, 2015 meeting Ms. Betley requested records as to the number of tickets sold, the list of ticket purchasers, amount of prizes given, name and address of winners, and checks, money orders or other receipts showing what was paid to charity. The members claimed they did not recall a request for records being made. Mr. Kimmey recalled Ms. Betley making the request at the meeting. Ms. Betley testified to asking and clearly recalled Mr. Phillips' response: "What are you talking about?" I find Mr. Kimmey's and Ms. Betley's testimony more credible on this point, and I find that no records were kept.<sup>25</sup>

The hearing officer carefully reviewed the AORs and noted discrepancies between the prize amounts listed on the application and the submitted AORs. During September, the listed total cash value of prizes on the AORs matched the maximum amounts for which AmVets applied and were permitted to award. On October 3, 2015, AmVets did not hold the raffle. The hearing officer observed the following:

A review of the AmVets 2 October 10, 2015 raffle paints a true picture of what occurred week-to-week. Ticket sales were \$13,865 on that date. AmVets 2 applied to award \$600 in prizes on that date as its permit reflected. According to Mr. Kimmey they awarded \$600 in cash prizes on that date, which complied with the permit. However, the first [place] prize of \$500 was not actually awarded on the date since no joker was drawn by the woman choosing a card. The \$500 was thus added (on paper) to the \$600 that was awarded on that date, and the total cost of prizes listed on the AOR was \$1,100. The AOR was thus not accurate in that the \$500 was never awarded. Instead the \$500 amount was "carried over" to the next week to add to the jackpot with no indication to the Board of what was actually occurring. There was no line on the AOR forms to list a carryover amount so it was simply not delineated on the AOR[] or disclosed by [AmVets].

Moreover, net profits each week were being added to the jackpot, and net profits grew exponentially over time. ... This was the process that had been occurring since December 2014 and continued through October 31, 2015, causing the jackpot to grow to well over \$100,000. While AmVets insisted the net proceeds went to charity at some point, the amount of net proceeds listed on the

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<sup>25</sup> Recommendations of Hearing Officer, Case No. 22-04-15, dated Dec. 7, 2016, at p. 40 (hereinafter, "Rec. H.O. at p. \_\_").

AOR's did not specifically match records of any charitable contributions made. In addition, the representatives of AmVets 2 admitted that they did not make those specific contributions after each raffle.

AmVets 2 admitted to conducting the raffles on a weekly basis in an effort to increase its overall monies in ticket sales, as well as bar and food sales. By all accounts (and based on the AOR's) net profits increased. The increase would in turn provide [AmVets] with greater funds to ultimately give to charity, which is after all the primary purpose of a charitable gaming event. There were no records produced prior to or at the hearing to show specific donations matching the amount of the net profits on the AOR's. [AmVets] admitted that it did not make the specific donations of the weekly net proceeds. Thus, the AOR's falsely stated that the net proceeds from each raffle event were given to charity.<sup>26</sup>

Although AmVets produced a typed list of donations made between January and October of 2015, it did not provide any proof of donations via check, money order, etc.

With respect to AmVets' submission of the raffle application, the hearing officer concluded:

While AmVets 2 believed it included the rules for Joker's Wild in its original application, I have found it was not part of the application on file with the State and that none of the State's witnesses saw the rules prior to the hearing. Notably the rules state that if the winner pulls a joker "they get the whole pot", but no amount of the "pot" is indicated. If the joker is not chose there were three "constellation prizes [sic]: #1-\$100.00, #2-\$50.00, #3-\$25.00" and "for every \$1,000.00 dollars the Prize structure goes up \$5.00 or until \$500.00 dollars is reached, then topped off at that. After the first draw. [sic]" Even if these rules had been disclosed in advance, they do not seem to comport with the application amounts or amounts AmVets 2 was awarding and accruing.<sup>27</sup>

In conclusion, the hearing officer did not find any ill intent to deceive but concluded AmVets "was not completely honest about the raffle it was conducting and the way in which it

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<sup>26</sup> Rec. H.O. at pp. 41-42 (citations omitted).

<sup>27</sup> Rec. H.O. at p. 43 (citations omitted).

was played.”<sup>28</sup> Moreover, AmVets had an obligation to educate itself on the permitting process if its representatives lacked such an understanding. On the other hand, the hearing officer found as mitigators (1) AORs do not seem to be routinely reviewed and (2) Kimmey did not immediately inform AmVets representatives of issues or violations discovered during his inspection and give AmVets an opportunity to pursue corrective action.

Based on the hearing officer’s findings of fact, she made several conclusions of law. First, she concluded as a matter of law that AmVets sold raffle tickets during the month of July 2015 before necessary permits were issued in violation of Regulation 3.9 and 28 *Del. C.* § 1501. Second, she found AmVets’ application as it described the prizes to be awarded and their cash value was either inaccurate or incomplete. Moreover, the existence of a carryover jackpot created additional inaccuracies in the application.

The hearing officer also decided AmVets violated Board Regulation 2.1 in its entirety by failing to include the legally required information on its raffle tickets. In so doing, she found AmVets’ “impossibility” defense untenable. Furthermore, the hearing officer found no evidence that anyone at AmVets maintained any records at all with respect to the weekly raffles.

The hearing officer found AmVets violated the Regulations because it failed to provide to the Board the names and addresses of each person to whom a prize was awarded.

Finally, the hearing officer concluded as a matter of law that AmVets had violated Board Regulation 3.7 by failing to donate the specific net proceeds in the AORs to charity.

The hearing officer noted several facts in aggravation and in mitigation before making her recommendations.

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<sup>28</sup> Rec. H.O. at p. 44.

The Board accepted the hearing officer's findings of fact and conclusions of law and ordered as follows:

1. AmVets be fined \$4,000 (\$1,000 per violation) for the four raffles held in July of 2015 with no valid raffle permit having been issued;
2. AmVets be fined \$6,500 (\$500 per violation) for failing to include all required information on the raffle tickets for 13 raffles occurring on 8/1, 8/8, 8/15, 8/22, 8/29, 9/5, 9/12, 9/19, 9/26, 10/10, 10/17, 10/24 and 10/31 of 2015;
3. AmVets be fined \$6,500 (\$500 per violation) for failing to keep and maintain ticket stubs and other records for the 13 raffles occurring on 8/1, 8/8, 8/15, 8/22, 8/29, 9/5, 9/12, 9/19, 9/26, 10/10, 10/17, 10/24 and 10/31 of 2015;
4. AmVets be fined \$2,000 (\$250 per violation) for filing at least eight inaccurate or incomplete AOR reports for the following dates: 8/8, 8/15, 8/22, 8/29, 10/10, 10/17, 10/24 and 10/31 of 2015;
5. AmVets shall present a proposed plan as to the distribution (including a list of specific charitable donations to be made) of the \$130,000 in funds seized by the DGE in 2015 and that the Board shall approve the plan and work with the DGE to release said funds and to ensure that the monies are distributed accordingly. No new permits, licenses or approvals of any kind will be issued to AmVets until such time as the plan required by this paragraph is approved by the Board;
6. That all permit applications (for bingo, raffles, charitable gaming, etc.) filed by [ ] AmVets within the next twenty-four (24) months shall be presented directly to the Board and that a representative of AmVets shall appear before the Board if requested to do so prior to any approval or issuance of permits shall occur.<sup>29</sup>

The Board is authorized by statute to impose a fine of up to \$1,000 per violation of any regulation.<sup>30</sup>

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<sup>29</sup> Board Decision, Case No. 22-04-15, mailed Jan. 30, 2017.

<sup>30</sup> 28 *Del. C.* § 1523.

### C. The Arguments

On appeal, AmVets argues:

1. The Board erred in concluding that Joker's Wild is a game prohibited by Delaware law;
2. The AORs did not allow for accurate reporting of Joker's Wild's finances;
3. The Board erred in finding AmVets failed to comply with the AORs when compliance was impossible for the game of Joker's Wild; and
4. The penalty imposed by the Board was excessive.

To reiterate, the Court reviews only for errors of law and lack of substantial evidence in the record.

#### 1. *Legality of a Progressive Jackpot*

AmVets makes much of the State's alleged determination that Joker's Wild was, in and of itself, a prohibited game under Delaware law. However, both the hearing officer and the Board clearly did not consider the underlying validity of the game. The conclusions of law and findings of fact are premised solely on the fact that AmVets sought and obtained a permit for a periodic raffle pursuant to the Delaware Code and the Regulations. In so doing, AmVets designated the "maximum cash value" of the prizes at each drawing. AmVets argues that there is "no place" for a progressive jackpot to be noted. However, the form "Application for Raffle Permit Addendum A: Raffle Prizes & Values" contains the following language:

The retail cash value must be entered for each prize listed on *Addendum A*, including prizes that are donated. Entering "varies," "50/50," "depends on the number of players" or any other indeterminate amount will result in a delay in processing and possible denial of your application.

This language explicitly contemplates a situation like AmVets' raffle. The application was



inaccurate and incomplete because AmVets did not inform DPR that it was holding a progressive jackpot or carrying over funds from week to week. Although AmVets contends its representatives informed DPR that it was, in fact, holding a progressive raffle, the hearing officer found DPR was not so informed. That issue is one of credibility and not for this Court to disturb.

In any event, when Kimmey reviewed AmVets' application and saw that the award for the October 10<sup>th</sup> raffle was supposed to max out at \$600 but the award was allegedly in the tens of thousands of dollars, he was more than justified to inspect. It was, of course, this inspection that revealed AmVets' extreme failure to comply with the Regulations, for which it has been fined. AmVets had a duty to educate itself about the Regulations and explicitly flouted the legal requirements that enabled it to hold the permit.

There is no indication in the record that AmVets was targeted because the Board believed a progressive jackpot to be illegal.

## 2. *Accurate Reporting in the AORs*

AmVets argues the AORs did not allow for accurate reporting of Joker's Wild finances in the AORs because the Board does not recognize that certain prize money can be deferred or carried over. Again, AmVets attempts to divert attention from the fact that it was disciplined for failing to comply with the application *it actually submitted to the Board*. Each permit stated, "This permit is valid only if the entire net proceeds are devoted to the following specified purpose: Charity Contributions to Needy Veterans, Local fire Company, Local Ambulance Svs and Other Charitable organizations both local and national." There was no evidence of any contribution made to a charitable organization with any of the net proceeds of the raffles - even assuming the net proceeds did not include the money rolled over into the jackpot.

Board Regulation 3.7 provides, “The sponsoring organization shall structure the raffle in such a way that it may be reasonably be anticipated the sponsoring organization will retain a percentage of the gross proceeds which is reasonable under the circumstances and shall retain all of the net proceeds (gross proceeds minus the direct expenses of the raffle) for the purpose specified in their application under Title 28 of the Delaware Code.”

The hearing officer made the following findings of fact,

While AmVets 2 insisted the net proceeds went to charity at some point, the amount of net proceeds listed on the AOR’s did not specifically match records of any charitable contributions made. In addition, the representatives of AmVets 2 admitted that they did not make those specific contributions after each raffle.

...

There were no records produced prior to or at the hearing to show specific donations matching the amount of the net profits on the AOR’s. [AmVets] admitted that it did not make the specific donations of the weekly net proceeds. Thus, the AOR’s falsely stated that the net proceeds from each raffle were given to charity.<sup>31</sup>

AmVets violated the reporting requirements for the application it submitted. Any question of how the rules of Joker’s Wild could have been entered into the Board-created forms is irrelevant because the hearing officer found that AmVets did not disclose the rules of Joker’s Wild to McAtee when applying for a periodic raffle permit.

AmVets also argues there is no dollar-for-dollar requirement for donations. This allegation flies in the face of the language of the Constitution and the Regulations. The Court does find AmVets has a valid point in that the net proceeds need not be donated to charity *immediately* following the drawing. However, in this instance, there was no evidence of any charitable contributions, at all.

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<sup>31</sup> Rec. H.O. at p. 42.

The Board's finding that AmVets violated the charitable reporting requirements is supported by substantial evidence and free from legal error.

3. *Record-Keeping and Ticket Procedures*

AmVets posits that the Board's record-keeping and ticket requirements were not conducive to the game of Joker's Wild. Specifically, AmVets argues it would be impossible to put the information required by Regulation 2.0 on a ticket because there is simply too much. Kimmey testified that other organizations use raffle tickets that are approximately 3" by 6" and contain all the necessary information. The hearing officer weighed the testimony against AmVets arguments and concluded "the size and type of ticket could have been easily changed by those in charge to accommodate the amount of information that was legally required to be placed on them and [AmVets] had an obligation to know what was required."<sup>32</sup> AmVets also contends that the sheer volume of tickets needed would prohibit compliance with Regulation 2.0. These concerns should have been taken to the Board for consideration after AmVets reviewed the Regulations and made a good faith effort to comply with them.

AmVets claims that it had no need to retain the half of the ticket with the purchaser's name, address, and telephone number as required by Regulation 4.2. Regulation 4.2, as all of the other Regulations, has the force of law. "Because it doesn't make sense," is not a legal defense. Again, if AmVets' representatives had fully disclosed to the Board what type of game they were playing, they could have worked together to find a solution. The hearing officer's findings are admitted by AmVets and are therefore completely supported by the evidence.

Inexplicably, AmVets also maintains there is no evidence that it did not comply with the

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<sup>32</sup> Rec. H.O. at p. 50.

record-keeping requirements of Regulations 4.3 and 4.4. It is undisputed that AmVets did not provide Betley, the hearing officer, or the Board with any records relating to the raffle. AmVets argues that “[t]o suggest that no such records ever existed is simply not reasonable” and the State had an obligation to subpoena them if they wanted to see them. The State was under no legal obligation to subpoena these records. Nevertheless, the hearing officer explicitly found that Betley requested these records and AmVets failed to turn over any evidence of record-keeping for the raffle.

Betley and Kimmey both testified they requested to see records. Kimmey testified he asked to see the raffle ticket and the log of tickets sold on October 10<sup>th</sup>. He was shown both. The log did not meet the requirements of Regulation 4.3.4. On November 5<sup>th</sup>, Betley requested to see evidence of donations to charity. She was shown none. She reviewed with the representatives the requirement that a log be maintained with the ticket purchasers’ information. She was told that would be impossible. Moreover, tickets were not sold in consecutively-numbered blocks. There was no evidence presented to challenge any of these findings. Rather than store its half of the raffle tickets as required by the Regulations, AmVets admitted to burning the ticket stubs after each raffle.

The Board’s conclusion that AmVets failed to comply with the Regulations governing record-keeping and ticketing is supported by substantial evidence and free from legal error.

#### *4. Penalties*

Finally, AmVets contends that the resolution and penalties recommended by the hearing officer and imposed by the Board are excessive and disproportionate to any actual violations. The Court disagrees.

The Board imposed three sanctions on AmVets. First, it imposed a fine, totaling \$19,000 for 36 violations of the Regulations. This amount breaks down to \$527.78 per violation. The Board is, as noted previously, permitted by statute to impose a fine of \$1,000 per violation. Second, the Board has required AmVets to submit a plan to distribute the seized funds. Third, the Board has directed AmVets to present all applications for gaming filed within the next twenty-four months directly to the Board.

AmVets argues these penalties are excessive and disproportionate.

The choice of a penalty by an administrative agency is a matter of discretion to be exercised solely by the agency, as long as it is based on substantial evidence and not outside of its statutory authority. In reviewing the penalty imposed by the Board, the question for the Court is not whether this Court would have imposed the same penalty as that imposed by the Board, but whether such punishment is so disproportionate to the offense in light of all of the circumstances as to be shocking to one's sense of fairness.<sup>33</sup>

In this case, the hearing officer and the Board considered aggravating and mitigating circumstances surrounding the raffle. The hearing officer noted several facts in aggravation and in mitigation. In mitigation, the hearing officer found: (1) no ill intent on the part of AmVets; (2) nothing in the regulations prohibiting the raffles; (3) the legality of a progressive raffle was undecided at the time AmVets conducted it; and (4) the Board should timely and fully review AORs to avoid issues that may be dealt with prior to the filing of a complaint. In aggravation, the hearing officer concluded: (1) the net proceeds should have been donated to charity as the Regulations and Constitution require; (2) AmVets had a duty of candor to the Board; and (3) AmVets had previously been issued permits and knew there were laws and regulations in place to

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<sup>33</sup> *Villabona v. Board of Med. Practice*, 2004 WL 2827918, at \* 7 (Del. Super. Apr. 28, 2004).

govern charitable gaming. In the end, the Board imposed a fine well below the \$30,000 fine requested by the State.

AmVets makes much of an alleged lack of public harm. Veterans organizations are uniquely positioned to raise money for charitable causes and have been given latitude not afforded others to host charitable gaming events in order to further their ability to give back to society. AmVets relied upon this status to conduct a raffle where none of the proceeds ultimately went to charity. The veterans organizations, fire departments, ambulance services, etc., that would have benefitted from the contributions were harmed as a result of AmVets' violations of the Delaware Constitution and the Regulations.

AmVets' argument that the penalties imposed by the Board were excessive and disproportionate is without merit.

### **Conclusion**

For the foregoing reasons, the Court finds the Board's decision is supported by substantial evidence in the record and is free from legal error. The decision is AFFIRMED.

Very truly yours,

*/s/ T. Henley Graves*

T. Henley Graves

cc: Prothonotary