



GENTNER DRUMMOND
ATTORNEY GENERAL

May 15, 2024

Via Email

Oklahoma Horse Racing Commission
C/o Keith Sanders, Chairman
KeithSanders.ohrc@gmail.com

Re: Proposed Resolution 2023-XX

Dear Chairman Sanders:

Thank you for your February 23, 2024, letter, wherein you request advice regarding the Governor's proposed "Resolution 2023-XX" ("the Resolution"), pertaining to tribal gaming compacts. Upon review, the Resolution unsurprisingly perpetuates the Governor's open bias against tribal gaming compacts and, even worse, is fraught with legal landmines. Taken together and for the reasons set forth below, the Oklahoma Horse Racing Commission ("the Commission") must deny the Governor's request and not approve the Resolution.

The Resolution, in an effort to negotiate compact renewal terms effective in 2035, calls for the current composition of the Commission to "... express its intent to take all steps necessary to ensure compacts entered pursuant to the model gaming compact ... not be automatically renewed." Further, the Resolution provides, "...to avoid the potential automatic renewal of compacts entered pursuant to the model gaming compact, [the Commission] shall not allow organization licenses to be effective on, or after, January 01, 2035, unless and until expressly authorized to do so by the Governor of the State of Oklahoma." For the following reasons, the Resolution is unlawful, procedurally inaccurate, and unenforceable.

A. The Commission may not delegate or abdicate its statutory responsibility to license and supervise all organization licenses.

The Legislature, when enacting the Oklahoma Horse Racing Act ("the Act"), 3A O.S. § 200, *et seq.*, and the State-Tribal Gaming Act ("STGA"), 3A O.S. § 261, *et seq.*, vested in the Commission powers and duties to ensure "forceful control of race meetings" held in the State. 3A O.S. § 203.7. Okla. Stat. tit 3A, § 204 sets out nineteen distinct powers and duties the Commission must exercise. Relevant among these are the licensure and supervision of all Organization Licenses¹ and Racetrack Gaming Operator Licenses² (collectively, "organization

¹ An Organization License "authorizes the Licensee to conduct a race meeting in Oklahoma and accept pari-mutuel wagers on the outcome of live and simulcast horse racing." Okla. Admin. Code 325:80-3-1(a).

licenses”), supervision of race meetings held in this state, authority to promulgate rules for enforcement of the Act and rules related to granting or disciplining licenses, adjudication of controversies arising under the Act, and the general administration and enforcement of the Act. *Id.* Once these powers were delegated to the Commission, the Commission cannot further delegate any power which is not merely ministerial³.

In reaching its holding in *Anderson v. Grand River Dam Authority*, the Oklahoma Supreme Court cited 73 C.J.S. *Public Administrative Bodies and Procedure* § 57,

Administrative officers and bodies cannot alienate, surrender, or abridge their powers and duties, or delegate authority and functions which under the law may be exercised only by them; and, although they may delegate merely ministerial functions, in the absence of statute or organic act permitting it, they cannot delegate powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment.

Anderson v. Grand River Dam Auth., 1968 OK 143, ¶ 15, 446 P.2d 814, 818 (citing 73 C.J.S. *Pub. Admin. Bodies and Procedure* § 57). *See also Teeter v. City of Edmond*, 2004 OK 5, ¶ 17, 85 P.3d 817, 822-823.

Here, the Resolution’s language clearly constitutes an unlawful delegation of the Commission’s statutory obligations. Specifically, the statement: “[the Commission] shall not allow organization licenses to be effective on, or after, January 01, 2035, *unless and until expressly authorized to do so by the Governor of the State of Oklahoma*,” requires the Commission to unlawfully abandon its responsibility to license organization licenses. (Emphasis added). Moreover, it abdicates or delegates to the Governor its responsibility to license and supervise organization licenses. This function is not merely ministerial but instead requires discretion and judgment of the Commission and is a quasi-judicial function. Thus, the Resolution constitutes an unlawful delegation of the Commission’s statutory obligations.

B. Professional or business licenses, once granted, do not expire without due process.

A professional or business license, once granted, creates a property interest that cannot be revoked without due process of law. *Bowen v. State ex rel. Oklahoma Real Estate Appraiser*

² A Racetrack Gaming Operator License “authorizes an Organization Licensee to conduct Authorized Games as defined by the [STGA] under the regulation, implementation and enforcement of the Commission...” Okla. Admin. Code 325:80-3-1(b).

³ “[W]here personal trust of confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another ...” *Anderson v. Grand River Dam Auth.*, 1968 OK 143, ¶ 14, 446 P.2d 814, 817 (quoting 2 AM. JUR. 2D *Admin. Law* § 222).

Bd., 2011 OK 86, ¶ 13, 270 P.3d 133, 137⁴; OKLA. CONST. ART. II, § 7. Consistent with this fundamental principle, 3A O.S. § 205.2(J) sets out criteria for revoking an organization license. Specifically, § 205.2(J) mandates that organization license revocation proceedings shall be conducted pursuant to the Administrative Procedures Act (“APA”), 75 O.S. §§ 302 through 323. The APA requires proceedings before an administrative body, such as the Commission, ensure minimum standards of due process, including notice and opportunity to be heard prior to revocation or other action on a professional or business license. *Bowen* at ¶ 15; 75 O.S. § 309(A). The Notice must also include the date, time, place, and nature of the hearing, along with notice of the legal authority and plain statement of the matters involved, as well as an opportunity to respond, present evidence, and arguments. 75 O.S. § 309(B) and (C). Uncoincidentally, the Resolution fails to account for the protections afforded by the APA.

Similarly, upon passage of the STGA, the Commission was empowered to license organization licensees to conduct authorized gaming under the STGA. These licenses are referred to as Racetrack Gaming Operator Licenses. The Commission, via its plenary power to promulgate rules and regulations to regulate horse racing in this state, created rules governing the supervision of Racetrack Gaming Operator Licenses. Notably, “[d]isciplinary actions against a Racetrack Gaming Operator Licensee ... shall be conducted, after required written notice and hearing before the Commission, in the same manner as conducted in regard to Organization Licensees and in accordance with the Oklahoma Administrative Procedures Act.” OKLA. ADMIN. CODE 325:80-19-4.

Furthermore, any notion that the licensee, at the time of the license’s expiration in 2034, will no longer maintain a license and, therefore, not have any due process protections is misguided and in error.

Except as otherwise prohibited by law, if a licensee has made timely and sufficient application for renewal of a license ... the existing license does not expire until the application has been finally determined by the agency. In case the application for renewal ... is denied or the terms of the new license limited, the existing license does not expire until the last day for seeking review of the final agency order or a later date fixed by order of the reviewing court.⁵
75 O.S. § 314(B).

“[M]erely calling a [license] a privilege does not free the state agencies from due process requirements in licensing.” *Oklahoma Alcoholic Beverage Control Bd. v. Seely*, 1980 OK 189, ¶ 5, 621 P.2d 534, 535. A license, once granted, does not simply expire when the clock strikes

⁴ See also *Johnson v. Bd. of Governors of Registered Dentists of the State of Oklahoma*, 1996 OK 41, ¶ 19, 913 P.2d 1339, 1345; *State ex rel. Oklahoma State Bd. of Embalmers & Funeral Dirs. v. Guardian Funeral Home*, 1967 OK 141, ¶ 19, 429 P.2d 732, 736 (citing *Moore v. Vincent*, 1935 OK 763, 50 P.2d 388).

⁵ The issuance or denial of a new license does not typically require an individual proceeding. 75 O.S. § 314(A). See also *Cavett v. State ex rel. Bd. of Exam’rs of Psychologists*, 2013 OK CIV APP 11, ¶ 6, 295 P.3d 610, 612 (citing *Boyer v. State Bd. of Exam’rs of Psychologists*, 1992 OK CIV APP 80, 834 P.2d 450).

midnight if the licensee files a timely and sufficient renewal application. Instead, the license continues until all elements of due process provided under the APA are satisfied, including a hearing and final resolution before the Commission and potentially during the pendency of any appeals thereafter. The Commission cannot waive this due process requirement.

C. Due process demands an impartial tribunal.

Through the Resolution, the Governor transparently propagates his bias against tribal compacting and seeks do so by exercising undue influence over the Commission. Accordingly, for a complementary reason, the Commission must reject the Resolution. Oklahoma law is clear that “[t]he judicial power of this State shall be vested in ... such Boards, Agencies and Commissions created by the Constitution or established by statute as exercise adjudicative authority or render decisions in individual proceedings.” OKLA. CONST. ART. VII, § 1. When the Commission determines whether to renew, suspend, or revoke an organization license, it functions in its quasi-judicial capacity and due process requires the right to an impartial and disinterested tribunal. *Bowen v. State ex rel. Oklahoma Real Estate Appraiser Bd.*, 2011 OK 86, ¶ 12 n.9, 270 P.3d 133, 137. *See also Johnson v. Bd. of Governors of Registered Dentists of the State of Oklahoma*, 1996 OK 41, ¶ 32, 913 P.2d 1339, 1347-1348. “Independence and impartiality are required of the courts.” *Bowen* at ¶ 16 (citations omitted). “The important point [before the Commission is each] party be accorded a full and fair hearing on all points at issue.” *Corp. Comm’n v. Oklahoma State Pers. Bd.*, 1973 OK 94, ¶ 14, 513 P.2d 116, 120 (citing *State ex rel. Oklahoma State Bd. of Embalmers & Funeral Dirs. v. Guardian Funeral Home*, 1967 OK 141, 429 P.2d 732).

Equally clear is that the Resolution predetermines that the Commission will not grant any renewal request unless and until the Governor so approves. Under this scenario, the Commission is incapable of operating independently and unable to provide a fair and impartial hearing. This is something the Commission must not do.

And, the independence and impartiality requirements extend to individual commissioners. Unambiguously, the APA requires a commissioner to withdraw from any individual proceeding in which they cannot provide a “fair and impartial hearing or consideration...” 75 O.S. § 316. Any party to an individual proceeding under the APA may also “request the disqualification of a hearing examiner or agency member, on the ground of his inability to give a fair and impartial hearing ...” *Id.* The rule regarding disqualification of a judge when circumstances and conditions surrounding litigation are such that they might cast doubt as to the impartiality of the judgment applies equally to administrative boards acting in an adjudicatory capacity as it does to judges. *Cherokee Data Computer Parts & Serv., Inc. v. Oklahoma Dep’t of Labor*, 2005 OK CIV APP 81, ¶ 15, 122 P.3d 56, 60 (citations omitted).

In the event the Resolution were adopted, the Commission must disqualify from presiding over any individual proceeding pertaining to the renewal, suspension, or revocation of an existing organization licensee that timely and sufficiently applies for renewal of its license. Failure to do so will likely lead to legal action, first before the Commission and then to a higher court, to compel disqualification. “[P]remature judicial review is permissible when administrative remedies are inadequate.... Remedies are inadequate when unavailable,

ineffective, or futile to pursue.” *Double “LL” Contractors, Inc. v. State ex rel. Oklahoma Dep’t of Transp.*, 1996 OK 30, ¶ 17, 918 P.2d 34, 39 (citations omitted). Such a disqualification request will unnecessarily prolong a final determination on renewal, suspension, or revocation, all while the organization licensee’s license remains active. In summary, the Resolution is the Governor’s attempt to improperly exercise undue influence over appointed board members, and its poor calculus needlessly exposes the state to protracted litigation. If adopted, the result will assuredly be a loss for the state at a significant expense to taxpayers.

D. A Resolution approved in 2024 is unenforceable on a future Commission.

Finally, the Resolution as presented calls for the 2024 composition of the Commission to approve a resolution that would prove non-binding on the Oklahoma Horse Racing Commission in 2034. The proposed Resolution is of little value and unenforceable as a future Commission need only amend or revoke the Resolution. *See Haynam v. Ohio State Bd. of Educ.*, 2011 WL 6365144 (Ohio Ct. App. 2011).

Beyond legal considerations, the Commission should also evaluate whether the Resolution supports or negates the purpose and intent of the Act itself. Okla. Stat. tit 3A, § 203.7 sets out the purpose and intent, including “encourag[ing] agriculture and breeding of horses in this state”, maintaining high-quality horse racing that is “free of any ... practices which are corrupt, incompetent, dishonest, or unprincipled”, “dissipat[ing] any cloud of association with the undesirable and maintain[ing] the appearance as well as the fact of complete honesty and integrity of horse racing in this state”, and “generat[ing] public revenues”.

We look forward to discussing this analysis at the May 16th Commission meeting and to answering questions the Commissioners may have. Should you need information in the interim, please do not hesitate to contact me.

Respectfully,

A handwritten signature in blue ink, appearing to read 'Gentner Drummond', written in a cursive style.

GENTNER DRUMMOND
Attorney General