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STATE OF MINNESOTA

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert St.
St. Paul, Minnesota 55101

OAH Docket No. 82-9017-36565

In the Matter of the Petition of the Shakopee Mdewakanton Sioux Community for a Declaration that the Minnesota Gambling Control Board Engaged in Unlawful Rulemaking

PETITIONER'S POST-HEARING REPLY BRIEF

Introduction

The purposes of the Minnesota Administrative Procedure Act ("MAPA") are: "[T]o provide oversight of powers and duties delegated to administrative agencies; to increase public accountability of administrative agencies; to ensure a uniform minimum procedure; to increase public access to governmental information; [and] to increase public participation in the formulation of administrative rules …." Minn. Stat. §§ 14.001(1)–(5).

In this case, the Gambling Control Board ("Board") argues that its approval of hundreds of multi-row electronic pull-tab games with "open all" features is simply hundreds of "case-by-case" determinations and thus, cannot be the basis for an unpromulgated rule. As the Shakopee Mdewakanton Sioux Community ("Community") has shown, over the past seven years the Board adopted an interpretive rule on this issue behind closed doors, changed its interpretation several times without going through MAPA's formal rulemaking procedures, and secretly communicated its rules to gaming vendors. If this Court denies the relief sought by the Community, it would have the effect of allowing the Board to engage in back-door rulemaking with the only input coming from the parties it is supposed to be regulating. This result would be contrary to the express purposes of MAPA. Public participation in the rulemaking process is a hallmark of MAPA and administrative law in general, and the Board should not be allowed to

implement interpretive rules that have general applicability and future effect without the public's knowledge and opportunity for input.

Argument

I. The Community Has Standing to Bring its Petition.

The Board argues that *Petition of Prop. Cas. Insurer's Ass'n of Am.*, Order, OAH 8-1000-33787 (Dec. 7, 2016), stands for the proposition that the Community must show an injury-in-fact under Minn. Stat. § 14.381. The Board is wrong. In that case, the Administrative Law Judge analyzed whether there was an injury-in-fact to determine whether the petitioner trade association had associational standing to petition, on behalf of its members, the Office of Administrative Hearings ("OAH"). *Id.* at 9–10. Here, the Community has petitioned OAH under Minn. Stat. § 14.381 on behalf of itself, as it may do under the statute and relevant case law.

Minnesota law is clear: demonstrating an "injury-in-fact" is unnecessary when a statute grants standing. *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 18 (Minn. Ct. App. 2003). *See also Vermillion State Bank v. State*, 895 N.W.2d 269, 271 (Minn. Ct. App. 2017) (analyzing statutory standing, and not whether there was an injury-in-fact, because the statute at issue granted certain persons the ability to petition for an award of attorney fees); *Save Mille Lacs Sportfishing, Inc. v. Minn. Dep't of Nat. Res.*, 859 N.W.2d 845, 848–49 (Minn. Ct. App. 2015) (declining to dismiss for lack of standing because of "the broad statutory language establishing a right to challenge regulations before enforcement"). The legislative grant of standing here could not be broader: "a person" may petition OAH for a cease and desist order. Minn. Stat. § 14.381. Because Chapter 14 does not define "person," a "person" includes "bodies politic." Minn. Stat. § 645.44, subd. 7. As a sovereign nation organized under the authority of its Constitution, the Community is a body politic and has standing under Minn. Stat. § 14.381.

II. The Board's Actions Are Not Case-By-Case Determinations.

The Board relies principally on *L&D Trucking v. Minn. Dept. of Transp.*, 600 N.W.2d 734 (Minn. Ct. App. 1999) to argue that the Board's blanket application of an interpretive policy is really just a conglomeration of hundreds of case-by-case determinations. Such reliance is misplaced. As a threshold matter, the process outlined in Minn. Stat. § 14.381 for challenging agency action as unpromulgated rules was enacted in 2001, two years after the decision in *L&D Trucking*, as a relatively quick and efficient tool to ensure that agencies properly promulgate rules under MAPA. The Community chose to petition OAH under § 14.381 rather than pursuing other relief because the unadopted rulemaking petition process is the statutorily-preferred method of challenging an agency enforcing a policy as if it was a duly adopted rule.

In *L&D Trucking*, the Court of Appeals concluded that the Minnesota Department of Transportation ("MNDOT") was enforcing the prevailing wage law on a case-by-case basis because MNDOT applied the statute to specific facts and parties. 600 N.W.2d at 736–37. *L&D Trucking* is distinguishable for at least two reasons. First, the court concluded that MNDOT made five specific factual findings to determine that the prevailing wage law's statutory exemption for "commercial establishments which have a fixed place of business" did not apply to one of the respondents. *Id.* at 737. In contrast, other than conclusory allegations, the Board has offered no evidence that it has made specific factual findings with respect to whether an "open all" feature in a game is statutorily compliant. Instead, the Board's interpretation of the statute — that such games are permissible — is a blanket policy that has general applicability and future effect because it is applied to all games in the same way. The best evidence of this is found in the 2019 email correspondence, where the Board revoked its earlier rule allowing "open-all" features, which made all multi-row games with "open-all" features non-compliant. Brodeen Aff.,

Ex. F at 4. And shortly thereafter, the Board went back to its original interpretive rule, which made those same games once again compliant (at least in the Board's eyes). Brodeen Aff., Ex. H.

Second, in reaching its conclusion, the Court noted that MNDOT did not have the authority to promulgate rules in *L&D Trucking* and was instead limited to enforcing the prevailing wage law on a case-by-case basis. *Id.* at 736. In contrast, the Board *does* have rulemaking authority and has in fact promulgated rules for other game features not at issue here. The Board should be required to comply with MAPA's rulemaking procedures. To allow the Board to institute a blanket policy that meets MAPA's definition of a rule surreptitiously, without the public's knowledge and input, flies in the face of the letter and purposes of MAPA.

III. The Board Engaged in Unlawful Rulemaking.

The Board makes several arguments as to why its conduct did not constitute unlawful rulemaking. First, it argues the Community failed to allege how the Board disseminated its interpretive rule, apparently suggesting that if the Community cannot prove the actual dissemination of a rule by the Board, then no unpromulgated rule must exist. *See* Post-Hearing Brief of the Board at 3, OAH 82-9017-36565 (Mar. 11, 2020). Not surprisingly, the Board cites no authority for this novel proposition, and in fact, oftentimes it will be impossible to pinpoint when and how an unpromulgated rule was adopted — that is the very nature of an unpromulgated rule. But here, the Community has shown that the Board's interpretative rule was disseminated via email with vendors and through its approval of games.

At least as recently as August 2012, then-Executive Director Barrett shared the Board's interpretation that subd. 12b(3) required a player to take some unique action near each row of an electronic pull-tab game to open it. Brodeen Aff., Ex. D at 1–3. It is self-evident from then-Executive Director Barrett's affirmative statement and the context of the discussion that he believed the swipe feature to be compliant with state law because it required a finger to pass over

each row of a pull-tab game individually. *See id.* It is also clear from the Board's game approvals spreadsheet that at some point between August 2012 and May 2015, the Board's interpretation of subd. 12b(3) shifted, as it began approving multi-row games with "open all" features like Wild Walleye. *See* Greenberg Aff., Ex. A.

In addition, the Board clearly communicated two other shifts in its interpretation of subd. 12b(3) through email correspondence with gaming vendors. On March 13, 2019, the Board stated that it would no longer approve multi-row games with "open all" features and would work with gaming vendors to bring existing games into compliance with the plain meaning of the statute. Brodeen Aff., Ex. F at 4. As part of this email correspondence, a vendor from Compliant Gaming remarked that the Board's initial approval of "single-touch action" for a competitor was a "slippery slope" that Compliant Gaming had been forced to follow to remain competitive. *Id.* at 3. Then, just nine days later, the Board reinstated its earlier policy of approving multi-row electronic pull-tab games with "open all" features. Brodeen Aff., Ex. H. Whether the Board's initial interpretative shift between 2012 and 2015 was disseminated through other email correspondence, through oral discussions with vendors, or whether it was simply disseminated through game approvals, is irrelevant. Either way, gaming vendors such as Compliant Gaming took notice and the floodgates opened, with the Board approving hundreds of multi-row electronic pull-tab games with "open all" features. Greenberg Aff. ¶ 5, Ex. A.

Regardless of how it was disseminated, the Board's application of its interpretation that "open all" features are statutorily compliant by approving hundreds of games with "open all" features constitutes a rule because the interpretive policy has general applicability and future effect and adds meaning to the plain language of the statute. *See* Minn. Stat. § 14.02, subd. 4. The Board's approval of Wild Walleye in 2015 signaled a new interpretation of subd. 12b(3) (as

evidenced by the gaming vendor's "slippery slope" comment in 2019, and contrasted with the Barrett email in August 2012) and application of that interpretation had general applicability and future effect because all submitted multi-row games with "open all" features have been approved by the Board, without an individualized determination. Similarly, the Board's March 13, 2019 policy announcement had the immediate effect of rendering hundreds of electronic pull-tab games statutorily non-compliant, and the Board's reversion back to its earlier policy allowing multi-row games with "open all" features had general applicability and future effect because it made those games once again compliant with the Board's interpretation.

Second, the Board argues that, according to the Community, any statutory interpretation by an agency to reach an approval or denial decision must be a rule. *See* Post-Hearing Brief of the Board at 3. This argument misconstrues the Community's claim. The issue here is that the Board has consistently applied an interpretation that is contrary to the plain meaning of Minn. Stat. § 349.12, subd. 12b(3). The plain language of that provision clearly requires a player to take an action to open *each individual* row. The truly absurd result would be if this Court allows the Board to carry out rulemaking under the guise of making case-by-case determinations on such a wide-scale basis. Under the Board's theory of this proceeding, any agency could avoid MAPA's rulemaking requirements so long as it characterizes its actions as case-by-case determinations. This is particularly troubling given that the Board never solicited public input on the "open all" issue and reverted back to its policy of approving multi-row electronic pull-tab games with "open all" features in March 2019 following pressure from the regulated gaming vendors. *See* Brodeen Aff., Ex. F at 1–3, Ex. G, Ex. H.

Finally, the Board argues that because it applies other properly promulgated rules when considering whether to approve or deny a game, this somehow negates the fact that it also has

adopted an unpromulgated rule. *See* Post-Hearing Brief of the Board at 3–4. The Board is wrong. The Board's properly promulgated rules do not address the "open all" issue. Additionally, the Board states that it approves or denies games based on whether a game meets a "standards checklist." However, this "standards checklist" merely re-states the language in Minn. Stat. § 349.12, subd. 12b(3) without adding any additional meaning and thus, does not address the issue that the Board's consistent application of an interpretive policy that runs counter to the plain meaning of the statute constitutes unlawful rulemaking.

IV. The Board's Policy of Approving Multi-Row Electronic Pull-Tab Games with "Open All" Features Violates Minn. Stat. § 349.12.

As a threshold matter, the Board mischaracterizes the Community's Petition as a rehashing of the Community's attempt to prohibit animations in electronic pull-tab games. The Community does not dispute in this matter that animations in electronic pull-tab games are *generally* permissible. However, Judge Lafave *expressly* reserved ruling on the validity of the Community's claim that Wild Walleye and other multi-row games with "open all" features violate Minn. Stat. § 349.12. *See* Report of the Administrative Law Judge, OAH Docket No. 60-0917-35616, at ¶¶ 83, 86 (May 28, 2019). Just because electronic pull-tab games contain animations does not mean that an animation does not otherwise violate other statutory provisions. That is exactly the case here, as multi-row electronic pull-tab games with "open all" features violate Minn. Stat. § 349.12, subds. 12b(3), (5), and 12c(9).

The Board next argues that because subd. 12b applies to electronic pull-tab "devices," rather than "games," the Community's Petition must be dismissed. This argument is over-simplistic and contradicts the Board's own treatment of Minn. Stat. § 349.12. An "electronic pull-tab device" is defined as a "handheld and portable electronic device that … requires that a player must activate or open … each individual line, row, or column of each electronic pull-tab

ticket." Minn. Stat. § 349.12, subd. 12b(3). This "open all" prohibition clearly imposes requirements for gameplay functionality because the statute requires a player to open or activate each individual row of an electronic pull-tab ticket. An electronic pull-tab game contains "facsimiles of pull-tab tickets that are played on an electronic pull-tab device." Minn. Stat. § 349.12, subd. 12c(1). Thus, an electronic pull-tab game cannot be played without an electronic pull-tab device. A game that allows a player to activate all rows with an "open all" feature necessarily violates subd. 12b(3) because the tickets within the electronic pull-tab game cannot be played without a device and subd. 12b(3) requires a player to open *each individual* row of each ticket. Minn. Stat. § 349.12, subds. 12b(3), 12c(1).

The Board's own interpretation of the statute supports subd. 12b imposing requirements on "electronic pull-tab games." In email correspondence dated May 20, 2016, Board Compliance Officer Gary Danger discusses with a gaming vendor from Pilot Games the legality of the artwork for an electronic pull-tab game called "Triple Ea$y Money." Brodeen Aff., Ex. E at 1–3. In explaining why having lines between symbols on the game was a potential point of criticism for the game not being statutorily compliant, Compliance Officer Danger cited Minn. Stat. § 349.12, subds. 12b(3) and 12b(5) as imposing requirements for *the game* despite subd. 12b defining an "electronic pull-tab device." *Id.* at 1. It is clear from this email correspondence that the Board itself understands the interwoven nature of subd. 12b and subd. 12c. A multi-row electronic pull-tab game containing an "open all" feature is not statutorily compliant because the game must be played on an electronic pull-tab device, which requires a player to activate or open each individual row of each ticket. Minn. Stat. § 349.12, subd. 12b(3).

Even if subd. 12b(3) was ambiguous, the Board cannot show that its interpretation allowing "open all" features is longstanding because the Board has shifted its interpretation of

12b(3) several times. Additionally, the canons of construction support the Community's interpretation of the statute. At oral argument, the Board argued that this Court should treat the phrase "each individual" as a colloquialism. However, colloquialisms are not an exception to the canons of construction, and this Court must read subd. 12b(3) so as to give every word a distinct meaning. *See State v. Thonesavanh*, 904 N.W.2d 432, 437 (Minn. 2017). Such a reading prohibits games with "open all" features, as a player is required to activate *each individual* row.

Not only do multi-row electronic pull-tab games with "open all" features violate the plain language of subd. 12b(3), but games with such features also violate the statutory prohibition on representations that mimic video slot machines. Minn. Stat. § 349.12, subds. 12b(5), 12c(9). The Board's argument that an "open all" feature does not mimic a video slot machine is meritless. First, the Board argues that "in totality," an electronic pull-tab system (the device and game, together) does not mimic a video slot machine because an electronic pull-tab system has differing features, such as the lack of a cabinet and no use of coins. This, however, is not the required metric. The statute prohibits for both devices and games "spinning reels or other *representations* that mimic a video slot machine." Minn. Stat. § 349.12, subds. 12b(5), 12c(9) (emphasis added). Thus, the question is whether an "open all" feature is a representation that mimics a video slot machine, not whether all features of a pull-tab system considered in the aggregate mimic a video slot machine. A side-by-side comparison confirms that "open all" features do mimic video slot machines, because both games reveal all symbols with the push of a single button. *See* Second Brodeen Aff. ¶¶ 4–6, https://youtu.be/fnbLWohNKNc.

Finally, the Board argues that because it has prohibited by rule a variety of other features that do mimic video slot machines (such as non-straight-line win determinations) that "open all" features cannot mimic video slot machines. This argument lacks merit, and only means the Board

has done *part* of its duty to regulate against features that violate § 349.12. The Board's rules are not an exhaustive list of features that mimic video slot machines. Moreover, the Board fails to mention a single other type of game containing an "open all" feature, despite its contention that such a feature is not "unique or proprietary" to slot machines. This does not matter, however, because the statute does not prohibit features unique to slot machines. It prohibits all representations that mimic video slot machines, including "open all" features. Minn. Stat. § 349.12, subds. 12b(3), 5, 12c(9).

Conclusion

This Court should issue a Cease and Desist Order directing the Board to cease approving all multi-row electronic pull-tab games with "open all" features and revoke approvals of any such games already existing.

Respectfully Submitted on March 27, 2020.

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CERTIFICATE OF SERVICE

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Petitioner's Post-Hearing Reply Brief

I declare under penalty of perjury that everything I have stated in this document is true and correct.

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