

**COMMONWEALTH OF MASSACHUSETTS
Massachusetts State Lottery Commission
Boston, Massachusetts**

In re: Appeal of FPS Libations, LLC, d/b/a Presidential Liquors

Appearance for the State Lottery Commission:

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RECOMMENDED FINDINGS AND DECISION

The issue presented by this case is a narrow one: whether the prohibition contained in G.L. c. 10, § 27 (“Section 27”), that “[n]o federal employee and no state, county or municipal employee, or member of the immediate family, as defined in section one of chapter two hundred and sixty-eight A, shall sell or be issued a license to sell lottery tickets,” applies equally to all applicants for a sales agent license, including members of a legal entity such as a limited liability company. Here, one member of FPS Libations LLC, d/b/a Presidential Liquors (“FPS Libations” or “Appellant”), has an immediate family member who is employed by the federal government. The parties agree that that sibling relationship is the sole basis for decision of the Massachusetts State Lottery (“Lottery”) to deny its application for a Lottery Sales Agent license, and there is no dispute that it would be the basis for denial of an applicant that was not a legal entity.

PROCEDURAL BACKGROUND AND EVIDENCE PRESENTED

FPS Libations has timely appealed to the MSLC the decision of the designee of the Executive Director of the Lottery (“Executive Director”), issued June 16, 2020 (“June 2020 Decision”).

The June 2020 Decision affirmed a decision issued March 4, 2020 (“March 2020 Decision”) that denied the application of FPS Libations. The hearing on this appeal was held on October 16, 2020, in accordance with G. L. c. 10 and c. 30A, 801 CMR 1.02 and 961 CMR 2.13. Because of the ongoing public health emergency, the hearing on this matter was conducted by videoconference. Gregory Polin, Esq., appeared on behalf of the Lottery, Carolyn Conway, Esq., appeared on behalf of FPS Libations.

A prehearing conference was held September 3, 2020, by telephone conference; Mr. Polin joined the call on behalf of the Lottery; and Ms. Conway joined on behalf of FPS Libations. At the conference, the parties reported that they anticipated that they would be able to develop an agreed statement of facts; they further agreed to submit any direct witness testimony by affidavit, and to share exhibits prior to the hearing. Their request to postpone the hearing to allow them to finalize these agreements was allowed. On September 24, 2020, the parties submitted an agreed statement of facts and exhibits. Those agreed facts are adopted herein. Each party submitted a memorandum on October 13, 2020.

Oral argument on the parties’ positions was heard October 16, 2020, by videoconference. The Hearing Officer requested an additional memorandum from FPS Libations on the issue of the fiduciary obligations of a member of an LLC, and it was submitted on November 5, 2020.

Exhibits

- Exhibit 1. Congressional Research Service, “Federal Workforce Statistics Sources: OPM and OMB,” CRS Report R43590, Jennings, J. and Nagel, J.; updated October 24, 2019 (10 pp.).
- Exhibit 2. US Census Bureau Annual Survey of State and Local Government Public Employment and Payroll released June 2020 (15 pp.).
- Exhibit 3. US Census Bureau Annual Survey of Local Public Employment and Payroll released June 2020 (117 pp.).
- Exhibit 4. Massachusetts Office of the State Comptroller, State Employment Statistics, September 12, 2020 (8 pp.).
- Exhibit 5. Application for Agent’s License, FPS Libations, LLC, d/b/a Presidential Liquors dated November 12, 2019 (4 pp.), MSLC Personal Data Form completed by Jonathan Sulkala (1 p.), MSLC Release Authorization Form dated January 9,

2020, (1 p.), photocopy of Massachusetts driver's license, Jonathan Sulkala (1 p.); certified mail receipts (3 pp.) (total, 10 pp.).

- Exhibit 6. Notice of Denial of License Application, to Jonathan Sulkala, Manager, FPS Libations, LLC., from Gregory Polin, Assistant Executive Director and General Counsel, MSLC, dated March 4, 2020 (2 pp.).
- Exhibit 7. Letter dated April 8, 2020 to FPS Libations, LLC, from Michael Sweeney, Executive Director, scheduling a Director-Level hearing for April 16, 2020 (2 pp.).
- Exhibit 8. Transcript of the Director-Level Hearing dated April 16, 2020 (26 pp.).
- Exhibit 9. Post-Hearing Memorandum of FPS Libations, LLC, submitted as part of the Director-Level hearing, dated May 29, 2020 (6 pp.).
- Exhibit 10. Post-Hearing Brief of Massachusetts State Lottery, submitted as part of the Director-Level hearing, dated May 29, 2020 (5 pp.).
- Exhibit 11. Director-Level Hearing Decision, issued by Director-level designee Lawrence P. Mayo, Esq., dated June 16, 2020 (4 pp.); including Director-level Hearing Exhibit 1, Notice of Denial of License Application issued March 4, 2020 (see Exhibit 6, above) (2 pp.); Director-level Exhibit 2 (see Exhibit 5, above); certified mail receipts, dated March 9, 2020.
- Exhibit 12. Letter to FPS Libations, LLC, Post-Director-Level Hearing Denial of License Letter dated June 26, 2020.

Findings of Fact.

1. FPS Libations applied for a Massachusetts State Lottery ("MSLC") sales agent license as a new applicant at an existing MSLC sales agent location at 25 Scammell Street, Quincy, MA 02169 (the "Application") sometime after the beginning of November 2019.
2. The Application disclosed that Jonathan Sulkala holds a membership interest in FPS Libations. The two others who hold membership interests in FPS Libations are Anh Pham and Joseph Franciosa. Mr. Sulkala has a one-third membership/ownership interest in FPS Libations, and he is a manager of FPS Libations.

3. As part of the Application, Mr. Sulkala was required to submit a Personal Data Form, which required him to disclose whether he is a federal, state, county or municipal employee, and whether anyone in his immediate family is a federal, state, county or municipal employee.
4. Mr. Sulkala submitted a Personal Data Form that was dated January 9, 2020 and which discloses that his sister, Alina Sulkala, is employed by the Internal Revenue Service ("IRS"). Exhibit 2.
5. Alina Sulkala is a Federal employee, employed as a Special Agent with the Criminal Investigations Division of the IRS. Alina Sulkala has no involvement with FPS Libations.
6. In correspondence dated March 4, 2020, the Lottery notified FPS Libations that the Lottery intended to deny FPS Libations' Application pursuant to G.L. c. 10, § 27 and 961 CMR 2.13 (3) because Jonathan Sulkala's Personal Data Form attached to the Application identifies his sister Alina Sulkala as a Federal employee. In this correspondence, the Lottery indicated that its intention to deny FPS Libations' Application was based on G. L. c. 10, § 27, which states in pertinent part: "No federal employee and no state, country or municipal employee, or member of the immediate family, as defined in section one of chapter two hundred sixty-eight A, shall sell or be issued a license to sell lottery tickets."
7. The sole basis of the Lottery's denial of the Application was that Jonathan Sulkala's sister, Alina Sulkala, works for the IRS.
8. Prior to November 2019, the Lottery had a practice of not looking through to the individual owners, partners, LLC members, LLC managers, or corporate officers of legal entities that applied for MSLC sales agent licenses for purposes of the public employee/immediate family member prohibition found in G.L. c. 10, § 27. Since approximately November 2019, the Lottery has consistently applied the public employee/immediate family member prohibition contained in G.L. c. 10, § 27 and denied new MSLC sales agent applications based on this prohibition.

9. On April 16, 2020 a hearing was conducted by Lawrence P. Mayo, Esq, a designee of the Director of the Lottery, regarding the Lottery's intention to deny the Application of FPS Libations.
10. Lawrence P. Mayo issued a written decision on June 16, 2020 that affirmed the Lottery's intention to deny the Application. In correspondence dated June 26, 2020, the Lottery formally notified FPS Libations that its application was denied.

ANALYSIS AND CONCLUSIONS OF LAW

I. Introduction

The Massachusetts State Lottery was established by Chapter 813 of the Acts of 1971. Section 2 of Chapter 813 amended G.L. c. 10 by inserting fifteen sections, including Section 27. Section 27 states in pertinent part:

Section 27: Sale of tickets; agents; licensing; restrictions

Section 27. No person, other than a fraternal, veterans', or charitable organization, shall be licensed as an agent to sell lottery tickets or shares if such person engages in business exclusively as a lottery sales agent. Before issuing such license the director shall consider the financial responsibility and security of each applicant for licenses, his business or activity, the accessibility of his place of business or activity to the public, the sufficiency of existing licenses to serve the public convenience, and the volume of expected sales. Said director may refuse to issue a license to any person who has been convicted of a felony by a court of competent jurisdiction in the commonwealth or of any other state or of the United States and who, in the opinion of said director, is not of good moral character to act as a licensed agent to sell lottery tickets.

...

No federal employee and no state, county or municipal employee, or member of the immediate family, as defined in section one of chapter two hundred sixty-eight A, shall sell or be issued a license to sell lottery tickets. No person shall use a position in public service or a position of private employment in any manner so as to encourage the sale of tickets.

...

M.G.L. c. 10, § 27 ("Section 27") (emphasis added).

As stated above, the principal issue in this matter is the interpretation of the italicized provision of Section 27. Going forward, that provision will be referred to as the Public Employee Prohibition or the Prohibition. This sentence has been unchanged since its original enactment.

The Public Employee Prohibition incorporates by reference the definition of ‘immediate family’ that is set forth in G.L. c. 268A, known commonly as the “Conflict of Interest Law.” That incorporation reflects the Legislature’s intent to not just borrow a definition, but to permanently tie the Prohibition to the Conflict of Interest Law as it might evolve.¹ Section § 1 (e) of c. 268A (hereinafter “Section 1 (e)”) defines immediate family as “the employee and his spouse, and their parents, children, brothers and sisters.”

Thus, the Public Employee Prohibition unambiguously prohibits the Lottery from issuing a sales agent license to any federal, state, county or municipal employee (hereinafter collectively, “public employees”), or to any member of such a person’s immediate family. The statute offers no exemptions to this prohibition, and includes in its application all immediate family members. There is no dispute that an applicant who is not applying on behalf of a legal entity and has an immediate family member who is employed by the federal government must be disqualified from licensure under the Prohibition. Thus, there is no question that had Mr. Sulkala applied outside of the umbrella of a legal entity, his application would have been denied. The primary question is therefore whether the Lottery correctly interpreted the Public Employee Prohibition when it applied the same standard to members of the applicant legal entity, FPS Libations.

Prior to November 2019, the Lottery’s practice was to not look through to the individual owners, managers, members, officers, etc. of legal entities such as LLCs to determine whether the

¹ It likely also reflects a heightened concern about ethics issues in state government, following on as it did from the February 1971 news reports that later led to what has been called beginning of the “McKee - Burger - Mansueto Scandal,” which in turn led to the appointment of the Ward Commission. Final report to the General Court of the Special Commission Concerning State and County Buildings, Dec. 31, 1980, (accessed at <https://archives.lib.state.ma.us/handle/2452/122044?show=full>), MBM Scandal, Wikipedia, (accessed at https://en.wikipedia.org/wiki/MBM_scandal). See also, comments of then-House Speaker David Bartley. Jack Sullivan, *Brotherly Luck, Sibling Issues at the Massachusetts State Lottery*, Commonwealth Magazine, Winter 2015 (accessed at <https://commonwealthmagazine.org/economy/brotherly-luck>).

public employee/immediate family member prohibition should apply to an application.² Upon examination of the issue in 2019, Lottery staff concluded that failing to do so was contrary to the statutory intent, as it would render the prohibition meaningless. The Lottery applied this policy prospectively, to new applicants. *Biogen IDEC MA, Inc. v. Treas. & Receiver Gen.*, 454 Mass. 174, 190 (2009) (Regulatory and policy changes should, in general, be applied prospectively). FPS Libations was a new applicant at an existing MSLC location. Exhibit 5.

In support of its denial of FPS Libations' application, the Lottery makes two arguments. First, it argues that Section 27 and the Public Employee Prohibition clearly and unambiguously prohibit licensure of applicants who are employed by federal, state, or municipal governments and of those who have certain close family members who are so employed, and equally clearly denies the Director any discretion on this issue. Second, it argues, by linking this prohibition to the Conflict of Interest Law, the Legislature showed that the intent of the Prohibition was to promote public trust and confidence in the Lottery, and to prevent conflicts between private interests and public duties. The Lottery argues that adhering to the prior practice would effectively allow applicants to circumvent the Prohibition, and thereby render it meaningless. The Lottery also argues, in the alternative, that the discretion granted to the Executive Director of the Lottery by G.L. c. 10, § 26 provides an independent basis for denying FPS Libations' application.

FPS Libations argues that the Lottery's prior interpretation of the Public Employee Prohibition was correct, and that the Prohibition does not apply to the members or owners of applicant legal entities. It puts forth two arguments to support this interpretation. First, it focuses on the specific language of Section 27, and argues that when reviewed critically they show that the drafters did not intend to include legal entities in the Prohibition. Second, FPS Libations points to a series of factors that it contends show the unreasonableness and impracticality of the Lottery's interpretation of the statute. It argues other laws related to public employees and to corporate responsibility are sufficient to protect against potential unethical conduct. It concludes that the facts demonstrate that Mr. Sulkala's relationship with his sister does not implicate a

² The Lottery licenses four types of business structures: sole proprietorships, partnerships, limited liability companies, and corporations. The application for a Lottery agent sales license requires a list of all current owners, partners, LLC members and managers, and corporate officers. Exhibit 5. Each listed individual must complete an MSLC release authorization, and must submit an MSLC personal data form which asks if they or an immediate family member is a federal, state, county or municipal employee. Exhibit 5.

conflict of interest that would prevent FPS Libations from complying with the law as a licensee. All of these arguments center on the correct interpretation of the Public Employee Prohibition, and are examined in turn.

II. *Whether the Public Employee Prohibition in Section 27 applies to the individual members of a legal entity.*

a. *Whether Section 27 is ambiguous*

The first question is whether there is any ambiguity in the statutory provision at issue here. With regard to its application in general, the Public Employee Prohibition is unambiguous, direct and straightforward. It bars any public employee and any of their immediate family members from selling or being issued a license to sell lottery tickets. It offers no exemptions, and does not grant the Director any discretion to waive this Prohibition. With respect to whether the Prohibition applies to applicants that are legal entities, however, Section 27 does not make an affirmative statement either way, and some ambiguity on this point can be inferred from the fact that the Lottery interpreted it differently prior to November 2019. The Lottery Commission must therefore assess how it interprets the statute and related Lottery regulations.

The fundamental principles of statutory interpretation that apply to both the statute and regulations at issue here are well settled.

[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.” *Hanlon v. Rollins*, 286 Mass. 444, 447 (1934). See *Sullivan v. Brookline*, 435 Mass. 353, 360 (2001). Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense. See *Champigny v. Commonwealth*, 422 Mass. 249, 251 (1996); *Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Comm’n*, 394 Mass. 233, 240 (1985); *Tilton v. Haverhill*, 311 Mass. 572, 577–578 (1942). A properly promulgated regulation is to be construed in the same manner as a statute. See *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 769, (1980).

Harvard Crimson, Inc. v. President and Fellows of Harvard Coll., 445 Mass. 745, 749 (2006).

Although the Public Employee Prohibition makes no reference to legal entities, Lottery regulations explicitly require parallel and consistent treatment of individuals and legal entities. As stated in 961 C.M.R. 2.03:

Person means and includes any individual, association, corporation, club, trust, estate, society, company, joint stock company, receiver, trustee, designee, referee, executor, administrator, commissioner, charitable institution, fraternal organization, guardian, custodian, any legal entity created by law, all natural individuals in all capacities whether appointed by a court or otherwise and any other combination of individuals or legal entities. Person shall also be construed to mean and include all departments, commission, agencies, and instrumentalities of the Commonwealth of Massachusetts, including counties and municipalities, agencies, and instrumentalities thereof.

See 961 C.M.R. 2.03.

Because the regulatory definition of “person” resolves the issue, it would not be unreasonable to conclude the analysis there. FPS Libations has argued for a closer reading of the statutory language.

Specifically, FPS Libations argues that by referring to ‘employees’ rather than ‘persons,’ the sentence in Section 27 that creates the Public Employee Prohibition contemplates a more narrow restriction. It argues that Section 27 and Lottery regulations use the word ‘person’ when incorporating LLCs into consideration and ‘employees’ when not. In support of this argument, FPS Libations points to the language in 961 CMR 2.08 (2) (b) and (c), one of a series of Lottery regulations applicable to licensing sales agents..

In full, 961 C.M.R. 2.08 (2) states:

Eligibility.

(a) No person shall be licensed as a Sales Agent who is engaged exclusively in selling Lottery tickets.

(b) No applicant shall be granted a license as a Sales Agent if the applicant or any employee of the applicant who holds a position of substantial authority in the applicant's business or at any location to be licensed has at any time been convicted of a felony or any violation of M.G.L. c. 271 or of any other anti-gambling statute or law relating to the taxation of gambling or the proceeds thereof, unless the Director in his or her discretion decides otherwise.

(c) No applicant shall be granted a license as a Sales Agent to sell the game of Keno if the applicant or any employee of the applicant who holds a position of substantial authority in the applicant's business or at any location to be licensed has at any time

been convicted of a felony or any violation of M.G.L. c. 271 or of any other anti-gambling statute or law relating to the taxation of gambling or the proceeds thereof.

Although the term ‘employee’ does indicate a narrower group than the term ‘person,’ prohibitory language must necessarily be narrow. There is nothing in either the text of this regulation or its context to suggest that it is inapplicable to legal entities. Rather, the language in subsections (b) and (c) is intended to bar not just any applicant who has been convicted of one of the listed offenses, but also one who has an employee in a position of substantial authority who has such a conviction. By incorporating employees into its prohibition, its reach clearly is intended to extend beyond the principals in the application. It would make little sense if it applied only to employees, not to the principals themselves. There is no contradiction between 961 C.M.R. 2.08 (2) and 961 C.M.R. 2.08 (3).

More importantly, examining Section 27 itself shows that the term “person” is used consistently as an overarching and conclusive category, and its application to more narrow categories that include or exclude legal entities are revealed by the context. For example, the leading sentence clearly applies broadly to both natural individuals and legal entities, qualified by an exemption for a limited group of legal entities, stating, “No person, other than a fraternal, veterans’, or charitable organization shall be licensed as an agent . . . if such person engages in business exclusively as a lottery sales agent.” Section 27’s penultimate provision, by contrast, clearly directs its focus to a small subset of natural individuals, prohibiting sales of lottery tickets to “persons committed to any state or county correctional facility, or any state hospital.”

With respect to the text of the Public Employee Prohibition, the focus on public employees is essential to establishing the prohibition itself. Public employees and members of their immediate families are certainly ‘natural individuals’ and therefore qualify as ‘persons’ under the regulation. There is nothing in this, however, to support the argument that by barring licensure to those who are or are related to public employees, the prohibitory language therefore excludes the owners, members and principals of legal entities. To the contrary, while legal entities cannot be public employees or family members, absent other conflicts of interest their owners, members and principals may be either or both. Further, the sentence that follows the Public Employee Prohibition makes clear that the Legislature sought to create a clear barrier between public

employees and Lottery sales, barring any person from using a position of public employment to encourage the sale of Lottery tickets.

Examining all the words of Section 27, it is clear the Legislature intended the Public Employee Prohibition as a preventive measure that would help ensure both the integrity of Lottery operations and public confidence in it. The Legislature clearly intended it to apply to all applicants, and Lottery regulations offer no basis to discriminate between types of business organizations, or to exempt legal entities from the Public Employee Prohibition. To the extent there is any ambiguity, such ambiguity is best resolved by adoption of the Lottery's interpretation of the statute, and full enforcement of the Public Employee Prohibition.

b. Whether the Lottery's interpretation produces an unreasonable result.

FPS Libations has also argued, in essence, that the result of the Lottery's interpretation is unreasonable. It raised a series of points in support of that argument: that the automatic disqualification of so many is unreasonable; that the Prohibition does not make sense given the Lottery Director's discretion to allow licensure of felons; and that the prohibition is unnecessary as other laws provide sufficient protection to the public.

First, FPS Libations argues that it would be illogical for the Legislature to automatically disqualify hundreds of thousands of potential licensees, including those with only a minority interest in an applicant, from holding a Lottery sales agent license because they happen to be related to a government employee. FPS Libations is correct that nationwide there are many public employees: The Congressional Research Service estimates that in 2020, there were approximately 2.8 million federal executive branch civilian employees, and with the inclusion of the federal legislative branch, federal judicial employees, and the uniformed military, the total grows to an estimated 4.3 million employees. Exhibit 1, p.6. Census data show that overall in the United States, there are approximately 15 million state and local public employees; of which approximately 305,000 full-time and 90,000 part-time employees reside in Massachusetts. Exhibit 2, pp 1 and 7. Although the evidence presented does not offer a method to determine the number of Massachusetts residents who are or are related to such public employees, it seems very likely that there are many who have an immediate family member who works in government service somewhere in the United States.

That many would be disqualified, however, does not change the fact that the breadth of the prohibition is for the Legislature to choose, and that the broad prohibition it chose applies indisputably to applicants that are not legal entities. The strictures the Legislature imposed in the statute, which clearly apply to applicants that are not legal entities, are no more or less strict as those the Lottery's interpretation imposes on legal entities. While the Legislature may well have crafted this prohibition in a way that would affect fewer people, it did not, and this argument does not provide a basis for a different interpretation of the statute.

FPS Libations also points to the fact that Section 27 gives the Director of the Lottery discretion to grant licenses to convicted felons. It argues that it makes little sense to interpret Section 27 as disallowing the Director comparable discretion to grant licenses to applicants who have committed no crimes, but have family members in public service.

The specific provision regarding felons was not original to Section 27, but was added to it by Chapter 619 of the Acts of 1989, which inserted the following sentence after the second sentence:

Said director may refuse to issue a license to any person who has been convicted of a felony by a court of competent jurisdiction in the commonwealth or of any other state or of the United States and who, in the opinion of said director, is not of good moral character to act as a licensed agent to sell lottery tickets.

See G.L. c. 10, § 27.

At the time the Legislature enacted Chapter 619, it was clearly aware of the long-established Public Employee Prohibition. The Legislature chose to explicitly grant the Director discretion to license those with a felony conviction. While it might have been reasonable for the Legislature to use Chapter 619 as an opportunity to extend discretion to the Director to temper the Public Employee Prohibition, it did not do so. Contrary to FPS Libations' argument, this adds further support to the Lottery's position that the Legislature intended to do precisely what it did.

FPS Libations also argues that the Lottery's interpretation of Section 27 and the Prohibition is not only overbroad, but also unnecessary as, it contends, other statutory provisions and sanctions provide adequate protection to the Commonwealth's interest, rendering the Prohibition unnecessary as applied to legal entities. It points out, for example, that G.L. c. 268A § 23 penalizes state employees for actions associated with conflicts of interest. The Lottery would

have available a simple remedy to any violation of law, as the Lottery can revoke a sales agent license for any violation of law. On this issue, FPS Libations also references the Special Commission Relative to the Conflict of Interest Laws and the Financial Disclosure of Certain Public Officials and Employees (known as “The Special Commission on Ethics”), which was created as part of the Campaign Finance Reform Law, Chapter 43 of the Acts of 1994. The Special Commission on Ethics issued its report on June 12, 1995, and concluded, *inter alia*, that the basic framework of the conflict of interest laws is sound. See, State Ethics Commission 1995 Annual Report.³ Further, citing *Demoulas v. Demoulas*, 428 Mass. 555 (1998), FPS Libations argues that each member of a legal entity owes a fiduciary duty of care to the organization and their fellow owners, and therefore has an incentive to avoid a conflict of interest that would result in the forfeiture of a license.

FPS Libations is correct that these penalties for violations of state ethics laws do all exist. However, these laws also apply to all other applicants for a Lottery sales agent license that are not legal entities. Further, the Public Employee Prohibition in Section 27 has incorporated part of the basic framework of the conflict of interest laws since the creation of the Lottery. The Special Commission on Ethics was by no means calling for a modification of the laws to reduce their impact, or to consider the efforts to stem corruption to be fully accomplished on a going-forward basis. With respect to the fiduciary duty of members of legal entities, the duties and obligations members owe to one another and to the organization provide protection to the general public in only an indirect or secondary way. Every licensee, regardless of legal structure, surely has a comparable incentive to protect a valuable license.

The FPS Libations argument on this point also overlooks a key feature of the Legislature’s proscription: By enacting the Prohibition, the Legislature sought to *prevent* situations which presented conflicts of interest, not to impose an additional punishment. The sanctions cited by FPS Libations are all after-the-fact penalties. There is no reason to conclude that after-the-fact penalties would be sufficient for all applicants who established a legal entity to act as licensee, and not for all other applicants.

³ Accessed at

<https://www.mass.gov/files/documents/2017/11/06/Fiscal%20Year%201995%20Annual%20Report.pdf>.

c. Conclusion

In conclusion, it is clear that to interpret Section 27 in the manner FPS Libations urges would create two classes of licensees: one for which the Prohibition was effective, and one for which it was nullified. The steps to establish a legal entity are simple, and it appears that businesses that have done so already represent a majority of the Lottery's licensees. This construction would effectively nullify the Legislature's proscription. An interpretation that produced such a result would be clearly contrary to the legislative intent and cannot be supported. *Casseus v. E. Bus Co., Inc.*, 478 Mass. 786, 801–02 (2018), citing *Com. v. Diggs*, 475 Mass. 79, 83 (2016) (An interpretation that thwarted the statute's purpose would be absurd).

III. Whether the Lottery Director May Exercise His Discretion to Deny FPS Libations' Application.

Even apart from the prohibitions of Section 27, G.L. c. 10, § 26 accords the Lottery Executive Director much discretion in the exercise of his duties, and he has broad discretion to deny or revoke a license if it is in the best interest of the Commonwealth. As stated in 961 C.M.R. § 2.13 (3):

A Sales Agent's license may be revoked, suspended or an application may be denied or its renewal rejected by the Director, or Sales Agent's privilege to sell tickets or shares in one or more of the Lottery games operated by the Commission may be revoked or denied by the Director, for one or more or all of the outlets listed thereon for any one or more of the following reasons.

....

(3) If, in the discretion of the Director, such denial, revocation, suspension or rejection of renewal is in the best interests of the Lottery, the public welfare, or the Commonwealth of Massachusetts;

961 C.M.R. § 2.13.

The Lottery has argued that that discretion provides an independent basis for the denial of FPS Libations' application. As pointed out by the Lottery, the majority of applicants for a Lottery license are legal entities. It is a simple proposition for an individual to create a legal entity such as an LLC. Given the direct prohibition against granting a license to public employees or to those whose immediate family includes a public employee, to avoid potential conflicts of

interest, it is clearly in the best interest of the Commonwealth to avoid establishing or codifying what would be, effectively, an end-run around the Legislature's clear prohibition. A large part of the Lottery's success is due to its reputation, and it would be damaging to that reputation to send a signal that a prohibition established by the Legislature to protect against corruption could be easily disregarded.

Despite the absence of any allegation of any wrongdoing by either Mr. Sulkala or his sister, it would not be an abuse of the Lottery Director's discretion to deny the FPS Libations application on the basis of the Public Employee Prohibition. Beside the absolute nature of the Prohibition itself, Ms. Sulkala, an FBI agent who works in criminal investigations, holds precisely the sort of position that could give rise to an appearance of impropriety. Further, as pointed out above, the Prohibition serves as a preventive, not a punitive, measure.

RECOMMENDATION

For all the reasons set forth above, the Hearing Officer recommends the Lottery Commission affirm the decision to deny the application of FPS Libations, LLC, pursuant to G.L. c. 10, § 27, and alternatively, G.L. c. 10, § 26.



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Dated: August 20, 2021