

to make any payment of its funds rests upon the fact that such funds are public moneys acquired under the authority of the state for public purposes. The legislature has the same power of disposition over the public moneys in the custody of the municipality that it has over those in the state territory." I McQuillan, *The Law of Municipal Corporations*, 710.

We therefore wish to advise you that a municipally-owned water utility is required to pay the applicable fees for report forms and for the filing, examination and audit of them pursuant to N.J.S.A. 40:62-1.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: ANTHONY D. ANDORA
Deputy Attorney General

AUGUST 1, 1961

HONORABLE VINCENT P. KEUPER
Prosecutor, Monmouth County
Court House
Freehold, New Jersey

FORMAL OPINION 1961—No. 17

DEAR PROSECUTOR:

You have asked for my construction of the recent supplement to the Lottery Law (N.J.S. 2A:121-1 *et seq.*), Chapter 39 of the Laws of 1961, which redefines the term "lottery" to exclude giveaways. That enactment provides:

"As used in this chapter, the term 'lottery' shall mean a distribution of prizes by chance in return for a consideration which may be in the form of money or other valuable thing or in the form of an actual inconvenience. This definition shall not pertain to a distribution of prizes by chance when there is an intent to distribute prizes as a gift where the class of donees performs acts not exceeding those necessary to become a member of the class of donees or to receive the gift."

The statement of legislative purpose is significant:

"The purpose of this bill is to permit the distribution of prizes by chance when no actual price is paid or inconvenience suffered as a condition for participation. It will bring New Jersey in line with the more modern majority rule in this country which recognizes a liberal construction of the term 'consideration.' The bill does not violate the Constitutional prohibition against gambling, for it will merely define the term 'consideration' as it was probably understood when the Constitutional amendment was made in 1896."

Chapter 39 of the Laws of 1961 would infringe the State Constitution if its purpose was to legalize any activity which constituted common law gambling. The State Constitution is specific in Art. IV, Sec. VII, para. 2:

"No gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by, the people at a special election or shall hereafter be submitted to, and authorized by a majority of the votes cast thereon by, the legally qualified voters of the State voting at a general election, . . ."

The new enactment must be construed, if possible to render it constitutional, in accordance with a settled principle of statutory construction. *State v. Hudson County News Company*, 35 N.J. 284 (1961).

The only construction of Chapter 39 of the Laws of 1961 which meets the test of constitutionality is a readily available one, in obvious accord with the legislative intent. Gambling at common law comprised three elements: prize, chance and consideration. A giveaway lottery without consideration was a statutory violation, as determined by the Supreme Court in *Lucky Calendar Co. v. Cohen*, 19 N.J. 399 (1955). The new enactment circumvents *Lucky Calendar Co. v. Cohen* but without expanding legalized gambling, i.e., common law gambling, against the proscription of Art. IV, Sec. VII, para. 2 of the State Constitution.

You have asked whether Chapter 39 of the Laws of 1961 legalizes: (1) box top contests; (2) contests open to all patrons of a theatre or store and (3) contests open to all members of the public through a general distribution of entry blanks.

The answer to the first two questions is negative. The courts of this State have consistently ruled that the purchase of merchandise or a theatre ticket is consideration in law for a chance on a lottery prize. *State v. Berger*, 126 N.J.L. 39 (Sup. Ct. 1941); *State v. Shorts*, 32 N.J.L. 398 (Sup. Ct. 1868). A requirement of attendance at a drawing constitutes consideration in the suffering of an inconvenience. *Furst v. A. & G. Amusement Co.*, 128 N.J.L. 311 (E. & A. 1942). A box top entry blank is available only through the purchase of a commodity. To offer a chance on a prize in addition to merchandise or a ticket sold violates N.J.S. 2A:121-1 *et seq.* and is punishable as a misdemeanor, without any exemption or modification of the law through Chapter 39 of the Laws of 1961.

The final inquiry is answered in the affirmative. Contests open to the general public with entry blanks distributed in newspapers through widespread mailings and available in stores or other places of business both to customers and noncustomers are bona fide gift contests legalized by the new enactment. The acts of clipping and mailing the entry blanks fall short of inconvenience amounting to consideration as an element of common law gambling.

Sincerely yours,

DAVID D. FURMAN
Attorney General