

OPINION NO. 88-002

Syllabus:

1. The Ohio State Lottery Commission has no authority to promulgate rules under R.C. 3770.03 authorizing the Director to enter into agreements with other states for the operation of a joint lotto game.
2. Article XV, §6 of the Ohio Constitution prohibits a lottery which is operated in conjunction with other states.

To: Ronald L. Nabakowski, Executive Director, Ohio State Lottery Commission, Cleveland, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, January 25, 1988

I have before me your request for an opinion on whether R.C. 3770.03 allows the Ohio State Lottery Commission to adopt rules authorizing the Director to enter into agreements with other states for the operation of a joint lotto game.

The state lottery exists as an exception to the overall constitutional prohibition against lotteries. The Ohio Supreme Court, in *Mills-Jennings, Inc. v. Dept. of Liquor Control*, 70 Ohio St. 2d 95, 99, 435 N.E.2d 407, 410 (1982), summarized the early history of this prohibition:

The first Constitution of Ohio, adopted in 1802, made no direct reference to lottery or gambling. In 1805, the General Assembly passed an Act making various forms of gambling illegal. [1 Chase, Statutes of Ohio], at page 503. In 1807, it was made an offense to conduct a lottery "without a special act of the legislature." 5 Ohio Laws 91. From 1807 to 1828 the General Assembly passed a number of Acts providing for the raising of money, by way of lottery, to make public improvements. In 1830, the General Assembly prohibited the further use of lotteries or schemes of chance for any purpose, 28 Ohio Laws 37, and this prohibition was carried over into the Constitution adopted in 1851. Section 6, Article XV of the Constitution of 1851 provided that "lotteries, and the sale of lottery tickets, for any purpose whatever shall forever be prohibited in this State."

From 1851 to 1973, the constitutional prohibition was total. In 1973, the constitution was amended to allow an exception for state-run lotteries, provided all net proceeds were paid into the general revenue fund. 1971-1972 Ohio Laws, Part II, 2494; 1973 Ohio Laws, Part I, 2107 (Am. S.J.R. 28, amendment eff. July 1, 1973). A second amendment allowing charitable bingo passed in 1975. 1975-1976 Ohio Laws, Part II, 4008; 4116 (Am. H.J.R. 16, amendment eff. Nov. 4, 1975). The most recent amendment has designated that the net proceeds of the state lottery be used solely for the support of education programs. Am. S.J.R. 9, 117th Gen. A. (1987) (amendment eff. Jan. 1, 1988). Thus, in over one hundred years, only two narrowly defined forms of lottery have been able to gain acceptance.

With regard to the state-run lottery, article XV, §6 of the Ohio Constitution currently provides:

Except as otherwise provided in this section, lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State.

The General Assembly may authorize an agency of the state to conduct lotteries, to sell rights to participate therein, and to award prizes by chance to participants, provided that the entire net proceeds of any such lottery are paid into a fund of the state treasury [to be used solely for the support of education].... (Emphasis added).

Statutory authority for the operation of the state lottery is set forth in R.C. Chapter 3770. The Ohio State Lottery Commission, created by R.C. 3770.01, is

directed in R.C. 3770.03 to promulgate rules for the operation of the lottery. R.C. 3770.03 provides, in pertinent part:

The state lottery commission shall promulgate rules under which a statewide lottery may be conducted pursuant to Chapter 119. of the Revised Code. Subjects covered in such rules shall include but need not be limited to:

- (A) The type of lottery to be conducted;
- (B) The prices of tickets in the lottery;
- (C) The number, nature, and value of prize awards, the manner and frequency of prize drawings, and the manner in which prizes shall be awarded to holders of winning tickets;
- (D) The locations at which lottery tickets may be sold and the manner in which they are to be sold. Such rules may authorize the sale of lottery tickets from traveling show wagons.
- (E) The manner in which lottery sales revenues are to be collected;
- (F) The amount of compensation to be paid licensed lottery sales agents;
- (G) The substantive criteria for the licensing of lottery sales agents consistent with section 3770.05 of the Revised Code, and procedures for revoking or suspending such licenses consistent with Chapter 119. of the Revised Code.

As a creature of statute, the Lottery Commission possesses only such powers as are expressly conferred by statute or necessarily implied therefrom. *See, e.g., Burger Brewing Co. v. Thomas*, 42 Ohio St. 2d 377, 329 N.E.2d 693 (1975); *State ex rel. Funtash v. Industrial Commission of Ohio*, 154 Ohio St. 497, 96 N.E.2d 593 (1951); *State ex rel. Clarke v. Cook*, 103 Ohio St. 465, 134 N.E. 655 (1921). As there is no express authority conferred upon the Lottery Commission in the above provisions to promulgate rules establishing a joint lottery game with other states, I must determine if such authority may be reasonably implied.

While R.C. 3770.03 grants the Lottery Commission wide discretion in the development of lottery rules, the scope of the Lottery Commission's authority is limited by the terms of the statute to the operation of a "statewide" lottery. I am persuaded that the term "statewide" must be interpreted narrowly in light of the historical constitutional limitations on the operation of a lottery.

Article XV, §6 of the Ohio Constitution is a self-executing declarative limitation upon the plenary power of the General Assembly with respect to lotteries. *Columbus v. Barr*, 160 Ohio St. 209, 212, 115 N.E.2d 391, 393 (1953). I must presume that the General Assembly had art. XV, §6 in mind when passing this legislation, therefore "the presence of such constitutional provision is as necessarily implied in the statute as if the same were expressly written into it." *State ex rel. Clarke v. Cook*, 103 Ohio St. 465, 470, 134 N.E. 655, 656 (1921); R.C. 1.47(A) ("In enacting a statute, it is presumed that...[c]ompliance with the constitutions of the state and of the United States is intended").

Article XV, §6 categorically prohibits all lotteries with the exception that the General Assembly may designate "an agency of the state" to conduct and operate a lottery, the "entire net proceeds" of which are paid into the state treasury. Given this constitutional limitation, I discern no basis upon which to imply the authority for the Lottery Commission to join other states in the operation of a lottery. To the contrary, participation of other states in the actual conduct and operation of a joint lottery, and in sharing the proceeds of such a lottery, would violate the express constitutional limitations which define a permissible lottery. Ohio Const. art. XV, §6 ("The General Assembly may authorize an agency of the state to conduct lotteries, provided that the *entire net proceeds* of any such lottery are paid into a fund of the state treasury")(emphasis added).

It is, therefore, my opinion, and you are hereby advised as follows:

1. The Ohio State Lottery Commission has no authority to promulgate rules under R.C. 3770.03 authorizing the Director to

enter into agreements with other states for the operation of a joint lotto game.

2. Article XV, §6 of the Ohio Constitution prohibits a lottery which is operated in conjunction with other states.