

Opinion No. 61-20

February 23, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Boston E. Witt, Assistant Attorney General

TO: Honorable J. Penrod Toles, Chaves County, Senate Chambers, State Capitol, Santa Fe, New Mexico

QUESTION

QUESTION

You have submitted a bonus card for consideration by this office as to whether it constitutes a lottery under our statute. The card is made up of two separate sections. The left third of the card is known as the weekly store visit record and the right two-thirds of the card is known as the cash bonus card. On the latter portion is printed around the edge a series of money values ranging from 10 cents to \$ 2.00, totalling \$ 100.00. These money values are designed to be punched out with a hand punch each time a person makes a purchase and the amount of such purchase is punched along the edge of the purchase record side of the card. When the purchase record is completely punched, a flat fee of \$ 1.00 is given to the holder of the card. This amount is guaranteed and does not vary. On the weekly store visit side of the card is found a series of numbers from one to thirty which purports to be a record of store visits. Each number is punched out on a given day of each week when a person brings the card to the store. No purchase is required to obtain a weekly punch. When all thirty of the numbers are punched out, a seal on the left side of the card is broken by the store employee and under the seal is found a question to which the holder of the card must supply the answer in order to receive the prize indicated under the seal. The amount varies from 10 cents to \$ 1,000.00. On these facts you asked whether the use of these cards violate our lottery laws.

CONCLUSION

The card, as it is proposed to be used, does not violate our lottery statute.

OPINION

ANALYSIS

In arriving at our conclusion we have re-examined opinions of the Attorney General Nos. 60-5 and 60-77, which held similar punch card schemes illegal. In addition, we have referred to opinion of the Attorney General of Texas, No. WW-930 in which the plan under consideration was held legal in Texas.

The right portion of the card, the cash bonus portion, in and of itself is very similar to trading stamps and it is not objectionable. The person receives a \$ 1.00 gift after punching \$ 100.00 worth of merchandise which is recorded on that portion of the card. As indicated in the facts, the bonus of \$ 1.00 does not vary.

The left portion of the card is the one containing at least two elements of a lottery. **State vs. Jones**, 44 N.M. 623 sets forth the elements which must be found in order to constitute a scheme a lottery. These are prize, chance and consideration. There is a little question in our mind that the elements of prize and chance are present on the left portions of the card. Chance is involved to the extent that after completing the thirty store visits, a person is given a chance to win \$ 1,000.00 if he holds the lucky card. The prize element is the fact that he receives at least some amount of money for coming to the store for thirty visits.

The element which causes concern is that of consideration. In holding that this card does not violate the lottery statute, we are not unmindful of the language found in **State vs. Jones**, Supra, nor of the language of **Williams** on flexible participation lotteries wherein the element of consideration is given considerable discussion. However, the only possible consideration, in our opinion, that can be found under the present scheme is the economic betterment, if any, to the store dispensing these cards. In our view, this is too speculative by its nature to constitute the type of consideration discussed in **State vs. Jones**. It is our opinion that the Supreme Court will require something more in the way of actual legal consideration than this type of economic betterment.

We, therefore, find that the element of consideration is lacking and if the plan is operated according to the information submitted to us, the use of these cards by businesses will not violate our lottery statutes.