



The Florida Senate

Issue Brief 2011-220

September 2010

Committee on Governmental Oversight and Accountability

ADMINISTRATIVE PROCEDURES OF THE DEPARTMENT OF THE LOTTERY

Statement of the Issue

Due to the unique nature of state lottery operations, the Legislature granted to the Department of the Lottery administrative authority not given to other executive agencies. For example:

- The department may adopt all of its rules as emergency rules without the findings required of other agencies, regardless of the subject of the rule.
- If the department finds by rule that compliance with state laws pertaining to public property, state-owned personal property, or procurement would impair or impede the effective operation of the lottery, the department may adopt rules providing alternative procurement procedures.

Most of the approximately 1100 emergency rules adopted by the department since 1995 pertain to instant ticket games, but some of those rules address rules for retailers, a code of ethics, overtime compensation, the procurement of commodities and services, and facility leases.

Discussion

In 1987, the Department of Lottery (“department”) was established “to maximize revenues in a manner consonant with the dignity of the state and the welfare of its citizens.”¹ In order to maximize revenues and respond quickly to changing market conditions, the department was given the authority to adopt emergency rules under s. 120.54, F.S. The Legislature determined that the department is not subject to s. 120.54(4)(a), F.S., which requires finding an immediate danger to the public health, safety, or welfare before an emergency rule is adopted.² In addition, emergency rules adopted by the department do not expire unless replaced by other emergency rules, or by rules adopted under the nonemergency rulemaking procedures of the Administrative Procedure Act.³

The department was also given authority⁴ to perform the functions of the Department of Management Services under chapters 255, 273, 281, 283, and 287, F.S.,⁵ if the department finds by rule that compliance with any such chapter would impair or impede the effective or efficient operation of the lottery. The statute does not contain further guidance as to the meaning of “effective and efficient operation,” nor is it clear whether the authority to adopt alternative procurement procedures includes the ability to adopt alternative rules for other requirements within Ch. 287, F.S., like the contract documentation requirements of s. 287.058, F.S.

From 1995 through September 23, 2010, the Department has only adopted 19 permanent rules, but has used its emergency power to enact 1,087 rules.⁶ The majority of the emergency rules pertain to instant

¹ Section 24.104, F.S.

² Section 120.54(4)(a), F.S.

³ Section 24.109(1), F.S.

⁴ Section 24.105(13), F.S.

⁵ Relating, respectively, to Public Property and Publicly Owned Buildings, State-Owned Tangible Personal Property, Safety and Security Services, Public Printing, and Procurement of Personal Property and Services.

⁶ Florida Administrative Weekly & Florida Administrative Code, Department of Lottery, <https://www.flrules.org/gateway/Division.asp?DivID=421>.

ticket games offered by the department; however, it has adopted by emergency rule provisions relating to Powerball, Lotto, retailer bonus commissions for certain games, retailer accountability, retailer responsibility, retailer contracts, a code of ethics, overtime compensation, procurement of commodities and contractual services, and facility leases.⁷ The chart below shows the adoption of emergency rules for instant games, non-instant games, and activities not related to games:⁸

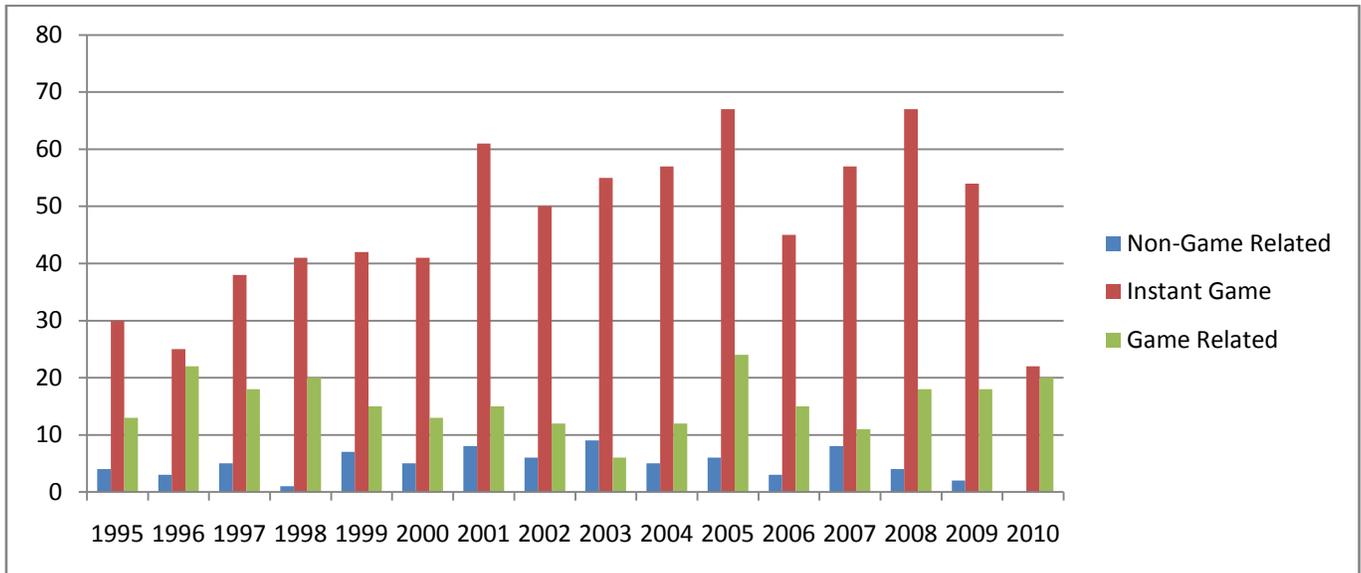


Chart 1: Disparity between non-game related, instant game, and game-related emergency rules.

Since 1995, the department has enacted seven emergency rules regarding alternative procurement procedures and facility leasing. For example, in 2008, the department enacted an emergency rule outlining its procedure for the purchase of commodities or contractual services that have a total contract value in excess of \$65,000 provided for in s. 287.017, F.S.⁹ Though each agency must develop its own procurement procedures for commodities and services above the \$65,000 threshold, it may not be necessary for the department to enact the procedure through its emergency rulemaking authority.

In both 2008 and 2009, the department has also used its rulemaking authority to develop an alternative procedure for leasing office or warehouse space of less than 10,000 square feet. Although the department still requires competitive offers to be solicited, the negotiation of the terms will be conducted by either the department or a contracted Tenant Broker. This removes the approval needed from the Department of Management Services for leases over 5,000 square feet.¹⁰ Although the department has the authority to change the procedure for obtaining facility leases under s 24.105, F.S., it is not clear that it is necessary to do so by emergency rule.

In addition to using its emergency rulemaking authority to develop alternative procurement procedures, the department has also used this authority to enact rules regarding compensation and its workforce. The department enacted at least thirty-one emergency rules relating to incentive leave, leave payment, sick leave, administrative leave for mentoring and tutoring activities, administrative leave for family

⁷ *Id.*

⁸ Game-related emergency rules consist of the Florida Lottery, Powerball, retailer incentives, retailer sales contests, procedures for awarding prizes, retailer commissions, ticket sales, and other retailer-related rules. Non-game emergency rules consist of procurement commodities and services, facility leases, salaries, benefits, codes of ethics, leave, and other workforce-related rules.

⁹ Section 287.017(3), F.S., provides that the Category Three threshold is \$65,000.

¹⁰ Section 255.25(3)(b), F.S..

activities, reduction in workforce, overtime compensation, salary, benefits, and codes of ethics. Although these rules may be necessary for the management of the department, it is probably unnecessary to adopt these rules with emergency rulemaking authority.

Although it may have been reasonable and necessary to grant the department emergency rulemaking authority at its inception in 1987 for it to respond quickly to the market and to establish the lottery system, the department has been fully functional for twenty-three years and may no longer require such overarching rulemaking authority. Now that the department is fully operational, the Legislature could consider whether its emergency rulemaking authority should be limited to rules only regarding lottery games, and consider whether rules pertaining to retailers, a code of ethics, overtime compensation, administrative leave, procurement of commodities and services, facility leases, and other similar rules should be enacted only by the default rulemaking procedures followed by other agencies.