

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
TRIBAL COURT

Barry Milligan,
Appellant,

v

Little Traverse Bay Bands
of Odawa Indians
Gaming Regulatory Commission,
Appellee

File No. GRL-002-1206
Hon. Jenny Lee Kronk

Michael B. Buckingham, P#32801
Attorney for Appellant
321 East Lake Street
Petoskey, MI 49770
231.348.9595

Matthew Lesky, P#69418
Attorney for Appellee
7500 Odawa Circle
Harbor Springs, MI 49740
231.242.1508

OPINION AND ORDER

This matter is an appeal of a decision by the Appellee, Little Traverse Bay Bands (LTBB) of Odawa Indians Gaming Regulatory Commission (GRC), following its November 20, 2006 hearing at which it upheld its October 31, 2006 suspension of Appellant Barry Milligan's gaming license. Oral arguments were held on May 23, 2007, the Honorable Jenny Lee Kronk, presiding.

Findings of Fact

The Appellee substantially agrees with the Appellant's recital of the facts, that:

1. For quite some time, Victories Casino customers had been purchasing gift certificates with credit cards and immediately turning them in for cash, thereby avoiding the payment of the cash advance fee from the credit card company.
2. On October 11, 2006, Vince Cook, LTBB Regulatory Director, sent an email to Appellant advising him that the immediate cash redemption of gift certificates had been discussed at the GRC's October 7 meeting and that the practice needed to stop immediately. See, Appellee's Exhibit 2.

3. Appellant told his staff, including the marketing director, that immediate cash redemption of gift certificates had to stop.
4. After speaking with the credit card company, Certogy, Appellant decided to allow two high-roller customers to continue the practice until a policy could be developed.
5. On October 12, Valerie L. Tweedie, LTBB Chief Financial Officer, sent a memo to the Gaming Board of Directors (GBD) with a copy to the GRC and Mr. Cook that indicated that "Several weeks ago it was brought to my attention that certain customers were still being allowed to purchase gift certificates and immediately cash them at the cage in a direct effort to circumvent credit card cash advance fees and interest charges to the customer on cash advances from the credit card companies. As stated several months ago this is an unacceptable practice as it violates our contractual agreements with Certogy/Game Cash and the merchant services agreements with the credit card companies." See, Appellee Exhibit 1.
6. On October 17, a request was made by Rob Dearstine and Barry Milligan for a P&P revision regarding gift certificates. See, Appellee Exhibit 3.
7. On October 24, Catherine Portman, Executive Administrative Assistant to the GBD, sent an email to Mr. Cook asking if he had received the gift certificate policy revision request and inquiring when it could expect the GRC to review and sign it.
8. On October 27, 2006 at 3:00 p.m., Ms. Portman sent a high-importance email to Appellant indicating that the GBD was issuing a directive that until the GRC developed a gift certificate policy, gift certificates needed to be purchased with cash only. She also asked to be informed of any solution he had worked out with Certogy.
9. Two minutes later, Appellant sent an email to his subordinates telling them to follow Ms. Portman's directive and stop the practice immediately.
10. On October 27, Mr. Cook responded to Ms. Portman's email acknowledging receipt of the policy and indicating it was on the agenda for the next GRC meeting set for November 2, 2006. See, Appellee Exhibit 7.
11. On October 31, the GRC suspended Appellant's license for two weeks "for failure to comply with the attached notification dated October 11, 2006 by Vince Cook, Regulatory Director on behalf of the Gaming Regulatory Commission," which it believed was a violation of Section VI a. (2) that "the licensee may have violated any condition or requirement imposed on the licensee by the Gaming Regulatory Commission or applicable laws."

12. Following an appeal hearing on November 20, 2006, Appellant's license suspension was upheld because the "Licensee stated he was negligent for not following up and verifying that the process had ceased as requested by the Gaming Regulatory Commission."
13. Testimony at the hearing indicated that Appellant's license was not suspended for failure to respond to the October 11 email in a timely manner and that the Commission did not know that the practice had been discontinued at the time of the October 31 suspension. (Tr p 18, 19).

Positions of the Parties

The Appellant maintains that: (1) the GRC acted beyond its power in suspending his gaming license; (2) the GRC violated his due process rights guaranteed by Title I of the Waganakising Odawak constitution; (3) the record below does not support the suspension of the Appellant's license; and (4) the record is unclear on why the GRC suspended the Appellant's license.

Appellee says (1) it has broad oversight powers and was within its jurisdiction to suspend Appellant's gaming license; (2) that it followed the procedure for suspending his license, therefore, it did not violate Appellant's due process rights; and, (3) the record below supports the suspension of the Appellant's license.

Standard Review

As the LTBB Appellate Court noted in *Carey v Victorias Casino et al*, decided March 27, 2007, "[A]lthough the opinions of other jurisdictions are not binding on questions involving the interpretation of the Tribe's constitution, such opinions are often helpful guideposts that may provide examples of effective methods for resolving legal questions that arise under the Tribe's constitution" (*Id* at 12), the Court can look at established law in other jurisdictions when considering questions of first impression for this Court. Under the Michigan Constitution, all final decisions of an administrative agency like the GRC, existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or a license, shall be subject to direct review by the courts as provided by law. This review shall include, at a minimum, the determination of whether the final decision is authorized by law; and in cases in which a hearing is required, whether the agency action is supported by competent, material and substantial evidence on the record. Const 1963, art 6, § 28.

Courts when acting as appellate bodies reviewing agency decisions generally give great deference to the agency and affirm the decision if the action is authorized by law and there is substantial evidence on the record to support the decision. The Court must look to the Tribal statute to determine if the GRC's action was authorized by Tribal law and review the hearing transcript to determine if the action passes the substantial evidence test.

Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence. This Court's review of the GRC's decision is limited to determining whether it "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." In other words, this Court reviews the GRC's decision for clear error. A decision is clearly erroneous when, "on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Barak v Oakland Co Drain Comm'r*, 246 Mich App 591, 597; 633 NW2d 489 (2001).

Conclusions of Law

Authorized by Law

In WOTC § 7.406 A the LTBB Tribal Council established the GRC and delegated authority to it for oversight of the Tribe's gaming operations. WOTC § 7.406(B) establishes the scope of authority of the GRC: "to ensure compliance with Tribal, Federal, and, if applicable, state laws and regulations; to serve as the licensing authority for individuals employed in the gaming operation and will administer background investigations as part of the licensing process; and to have a role monitoring compliance with the internal control standards for the gaming operation and tracking revenues." The statute further states that the "Commission shall have the authority to take enforcement actions, including suspension or revocation of an individual gaming license when appropriate." §§ F5 & 6 allows the Commission "to make suitability determinations" and "issue gaming licenses to management officials and employees of the operation, consistent with the suitability determination." Finally, § 7.406 F 14 allows the GRC to "promulgate and issue regulations on the levying of fines and/or suspension or revocation of gaming licenses for violations of the gaming Statute, or any other Tribal, Federal, State, if applicable, gaming regulations."

The GRC did a background check and found the Appellant suitable for licensing, and, in fact, Appellant still has his gaming license. However, the Appellee has not identified any violations of Tribal, Federal or State laws or regulations that would merit the two-week suspension of Appellant's license consistent with the GRC's statutory powers. The Appellant was suspended for failing to comply with the October 11 directive of the Gaming Regulatory Director who ordered the Appellant to immediately stop the cash redemption of gift certificates. Although the Appellant and the GRC were working on a regulation to deal with this issue, the Tribe had not yet promulgated a gaming rule on this subject.

WOTC § 7.501 "establishes a Gaming Board of Directors to develop policies and procedures for the orderly and efficient operation of the Tribe's Gaming Enterprises and to oversee their operation." §§ A & B establish the powers and duties of the GBD, including §A4 that empowers it "[t]o employ a general manager of the

Enterprises;" and §704 B1 that gives the GBD the authority to oversee "[h]uman resources and personnel management."

This section of the Tribal statute grants to the GBD the power and duty to oversee the general manager of the Casino. Therefore, it is within the powers and duties of the GBD, not the GRC, to discipline the Appellant. The GRC's October 31 suspension order indicates that the Appellant was suspended for "failure to comply with the attached notification dated October 11, 2006 by Vince Cook, Regulatory Director on behalf of the Gaming Regulatory Commission which it believes was a violation of IVa." Section VI A 2a (2) of the Gaming Regulations provides that the GRC may suspend a licensee if the licensee has violated any condition or requirement imposed on the licensee by the GRC or applicable laws. The November 20 Decision, however, upheld the suspension finding that the Appellant "was negligent for not following up and verifying that the process had ceased as requested by the Gaming Regulatory Commission."

Because the Appellee has failed to identify any violation of a condition or requirement of Appellant's gaming license and because the Appellee has failed to articulate a violation of any federal, state or Tribal gaming regulations, the GRC acted outside the scope of its authority when it suspended Appellant's gaming license for failure to stop the redemption of gift certificates for cash following the Regulatory Director's October 11 directive.

Substantial Evidence Test

Appellant further contends that the record below does not support a suspension of his license. The Court concurs.

Neither the October 31, 2006 Suspension Order nor the November 20, 2006 Decision articulated findings of fact and conclusions of law to support the GRC actions. The evidence at the November 20 hearing, however, showed that the Appellant had stopped the practice complained of; that he was not suspended for failure to act quickly enough in responding to the October 11 directive; and that the Commission did not know at the time it suspended his license that the practice had stopped. See, Tr p 18-19. Therefore, the finding of negligence appears to be a pretense for upholding the October 31 suspension.

The Court fails to find substantial evidence on the record to support the suspension of the Appellant's gaming license. To the contrary, the evidence at the hearing showed that a mistake had been made with the October 31 suspension because the GRC did not know at the time of the suspension that the cash redemption of gift certificates had ceased.

The purpose of a hearing is to correct any mistakes that have been made in the previous agency action. The evidence at the hearing showed that the GRC did not have accurate, up-to-date information when it suspended Appellant's gaming license

on October 31. Rather than vacate its decision and correct the mistake, the GRC found an alternative rationale to uphold the suspension. As previous courts have found, "It is an affront to the system to put people through a hearing . . . spend your time and mine and his . . . and then write a one liner . . . I do think it is wrong to hold a hearing that has no purpose." *See, Caprathe v Michigan Judges Retirement Bd*, unpublished opinion *per curiam* of the Court of Appeals, issued April 29, 2004 (Docket No. 246390).

It is the GBD, however, that hires the general manager of the Casino and has oversight regarding his job performance. Therefore, it is the GBD, the Appellant's employer, not the GRC who has the power to discipline the Appellant for any alleged malfeasance or misfeasance in the performance of his job duties. However, the evidence in the record clearly indicates that the Appellant sent an email directing his staff to immediately suspend the practice within two minutes of the directive from the GBD.

For all of the above, the Court sets aside the two-week suspension of Appellant's gaming license.

THEREFORE, IT IS ORDERED THAT THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS GAMING REGULATORY COMMISSION SHALL EXPUNGE ITS TWO-WEEK SUSPENSION OF BARRY MILLIGAN'S GAMING LICENSE FROM HIS FILE. MR. MILLIGAN SHALL BE PAID HIS SALARY FOR THE TWO WEEKS WHEN HIS LICENSE WAS SUSPENDED.

June 7, 2007
Date

Honorable Jenny Lee Kronk, Associate Judge