IN THE COURT OF APPEALS OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY

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CARRIE L. SVENDAHL
CLERK OF COURT

IN THE COURT OF APPEALS FOR THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

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| In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order | Ct. App. No. 015-97 |

MEMORANDUM OPINION AND ORDER

Before Judge John E. Jacobson, and Judge Robert Grey Eagle. Judge Henry M. Buffalo, Jr. took no part in the decision.

This appeal involves a dispute over a decision made by the SMS(D)C Gaming Commission ("the Commission") on Leonard Prescott's application for a gaming licence. In this present phase, Little Six, Inc. ("LSI") appeals both the trial court's order requiring two Commission members to recuse themselves due to bias, and its decision to remand this case back to the Commission for reconsideration of the underlying licencing dispute. We reverse the trial court's decision on bias, and invite further briefing from the parties on merits of the Commission's original decision on Prescott's licence.

## I. FACTUAL AND PROCEDURAL BACKGROUND

The SMS(D)C Gaming Ordinance (Gaming Ordinance) requires "key employees" to apply for and obtain gaming licences in order to conduct gaming activities on the reservation. Gaming Ordinance § 300. A licence is obtained by submitting an application to the SMS(D)C Gaming Commission ("the Commission"). While a licence application is pending, the Commission may issue a Temporary Employment Authorization ("TEA") to the applicant, allowing him or her to engage in gaming activities until a final decision on the application is reached. Gaming Ordinance § 306.

Leonard Prescott, in his former position as an officer and board member of Little Six, Inc. ("LSI"), applied to the Commission for a gaming license, and was granted a TEA pending the outcome of a background investigation.

On May 5, 1994, the Commission suspended Prescott's TEA pursuant to § 205 of the Gaming Ordinance. After notice, a hearing was held on the suspension. The hearing lasted eight days and generated nearly 2,000 pages of oral testimony, as well as over one hundred tangible exhibits. On July 1, 1994, the Commission issued 117 Findings of Fact and 11 Conclusions of Law, ultimately concluding that Prescott was not entitled to licensure under the Gaming Ordinance ("the July decision"). Prescott appealed the Commission's decision to the trial court, as provided by the Gaming Ordinance. See Gaming Ordinance § 219.

While on appeal, an affidavit by Rodney M. Haggard, an investigator hired by Prescott, was submitted to the trial court. In his affidavit, Haggard stated that Thomas Guthery, former executive director of the Commission, told him of remarks made by two members of the Commission demonstrating bias against Prescott. The trial court declined to receive Haggard's affidavit into the record, see In re Leonard Prescott Appeal, No. 041-94 (SMS(D)C Tr. Ct. (Nov. 11, 1994 order)), but nonetheless remanded to the Commission for consideration of the allegations of bias.

On February 21, 1995, the Commission held a second hearing, this time on the bias claims. Consistent with his affidavit that the trial court declined to take into the record, Haggard testified that Guthery had told him about remarks indicating bias against Prescott by at least two Commission members. The Commission subpoenaed Guthery, but he did not attend the hearing. Instead, he sent a letter (labeled as an affidavit) to the Commission, the trial court, and each of the parties, disassociating himself from the investigation undertaken by Haggard. Guthery's letter was admitted into the Commission's record. The Commission issued its Findings of Fact and Conclusions of Law on January 19, 1996 (the January decision), concluding that the allegations of bias were not supported by the record, and that its earlier July decision suspending Prescott's licence should stand.

Prescott again appealed to the trial court, which reversed and remanded. Specifically, the trial court concluded that the

allegations of bias, when coupled with the familial and political relationships of certain Commission members, deprived Prescott of his right to a neutral and detached arbitrator, and violated his substantive due process rights. On remand, the trial court ordered two Commission members to recuse themselves before the remaining Commission members reconsidered the matter of Prescott's licence. Because we believe the trial court erred in considering material outside the record, and because we believe that on the record the Commission's decision regarding bias was not arbitrary or capricious, the decision of the trial court is reversed.

## II. DISCUSSION

Our standard of review is a narrow one. The General Council has delegated to the Gaming Commission "the sole authority to regulate any and all gaming activity on the Shakopee Mdewakanton Sioux (Dakota) Reservation." Gaming Ordinance § 200(a). This Court will reverse a Commission decision only when its actions are arbitrary, capricious, or clearly an abuse of discretion. SMS(D)C Gaming Ordinance § 219. Under an arbitrary and capricious standard, our inquiry is limited to the record before the agency at the time it made its decision, not any record made on appeal. See, e.g., Camp v. Pitts, 411 U.S. 138, 142 (1973); Edwards v. United States D.O.J., 43 F.3d 312, 314 (3d. Cir. 1996). While our standard of review for the actions of the Commission is generally

a deferential one, this Court will review any legal conclusions of the Commission de novo. Gaming Ordinance § 219.

Looking at the administrative record that was before the Commission at the time it made its decision, we cannot say the Commission erred when it concluded there was insufficient evidence of bias. The only evidence of bias in the record came from the double and triple hearsay testimony of Haggard, an investigator employed by Prescott, who indicated that Guthery had heard, or knew of, biased remarks from at least two Commission members. Standing alone, the Commission could have reasonably doubted this testimony due to its hearsay nature and the fact that Haggard was employed by Prescott. However, there was also a letter in the record from Guthery distancing himself from Haggard's investigation. Given the absence of any other evidence of bias in the record, and given the tenuous nature of the evidence that was in the record, we are hard pressed to say the Commission's actions were arbitrary, capricious, or clearly an abuse of discretion.

The trial court, on the other hand, concluded that two of the Commission members exhibited at least an appearance of bias, if not actual bias, and that Prescott's substantive due process rights were therefore violated. To state a due process violation, a party must articulate a cognizable property or liberty interest. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 332 (1975). Even assuming, without deciding, that Prescott has articulated a cognizable liberty interest as an applicant for a gaming licence,

we cannot say that his substantive due process rights were violated.

While it is true that substantive due process, and common notions of fairness and decency, require that decisions affecting the rights of tribal members be made by a neutral arbitrator, a party claiming bias must still overcome the presumption of good faith, honesty, and integrity of the decision maker, and convince this Court that an actual risk of bias of prejudgment exists. See, e.g., Withrow v. Larkin, 421 U.S. 35, 47 (1975); Kenneally v. Lungren, 967 F.2d 329, 333 (9th Cir. 1992). This standard is consistent with our earlier cases requiring evidence of bias before requiring recusal. See In re Leonard Prescott Appeal and Prescott v. SMS(D)C Business Council (consolidated), Nos. 003-94, 004-94 (SMS(D)C Ct. App. Nov. 7, 1995)(11/7/95 order).

The trial court's finding of bias was in error because it relied at least in part on material not in the record. The trial court considered the fact that two of the Commission members were related to a political opponent of Prescott, and it concluded that these familial relationships, when coupled with the allegations of Prescott, created at least an appearance of bias, if not actual bias. However, there was no actual evidence in the administrative record concerning the political affiliations or loyalties of any Commission members, or that any members were politically biased against Prescott. Even if the trial court could have properly taken judicial notice of the blood relationships of Commission

members, inferring political bias on the basis of familial relationships is a tricky and inexact science at best. Particularly when reviewing a decision by an administrative agency, the trial court must confine its review to the evidence in the record that was before the agency at the time it made its decision.

In addition, even if it was shown in the record that certain Commission members were associated with different political factions than Prescott, this, standing alone, is not necessarily a reason to impute impermissible bias to a Commission member. Under the trial court's approach, second and third hand allegations of bias, accompanied by an undocumented assumption of political bias, would be sufficient to create a due process violation and require recusal of the relevant tribal decision maker. If that were all that was required, almost any member before an administrative tribunal would be able to allege bias and require the removal of an adjudicator he or she suspected of being politically opposed to the matter under consideration. This would be problematic for the governance of this Community because its governing bodies, such as the Gaming Commission, are composed of different members who will, in all likelihood, have different political affiliations and backgrounds.

The trial court's reliance on Midnight Sessions v. City of Philadelphia, 945 F.2d 667, 683 (3d. Cir. 1991) is also misplaced. In that case, the United States Court of Appeals for the Third Circuit noted that allegations of bias, bad faith, or improper

motives by a government adjudicator "may support" a claim for a violation of substantive due process. Id. However, the Midnight Sessions court did not state that allegations alone are sufficient to prove a violation of substantive due process. Id. Mere allegations of bias or bad faith cannot compel a substantive due process violation without actual evidence of animus to support it. Any evidence of bias or bad faith is properly evaluated by the fact finder, which in this case was the Commission. Midnight Sessions, at 683. Consistent with Midnight Sessions, our decision today requires a party to produce sufficient evidence to support a finding that there exists an actual risk of bias or prejudgment.

We affirm the Commission's January 19, 1996 decision that there was insufficient evidence of bias, in the administrative record, to warrant disturbing the Commission's original conclusion on Prescott's TEA. We hold only that the Commission actions were not arbitrary, capricious, or clearly an abuse of discretion. Whether we agree with the ultimate conclusion of the Commission is not relevant. Under the deferential standard of review mandated by Community law, as long as there is a reasonable basis in the record for the Commission's actions, we will affirm its decision.

The resolution of the bias issue leaves before us the merits of the Gaming Commission's July 1, 1994 decision to suspend Prescott's TEA and deny him a tribal gaming licence. Prescott appealed the Commission's suspension of his TEA on July 12, 1994; the issue was briefed in the trial court; and the administrative

record was properly submitted. The trial court's order dated February 20, 1997, which is the subject of this appeal, granted Prescott's appeal of the TEA revocation, and denied LSI's request to affirm the Commission's decision on the TEA. LSI's properly filed Notice of Appeal to this Court includes a request that we review the merits of the Commission's decision on the suspension of the TEA. Therefore, the merits of the Commission's decision on the TEA now are properly before us.

However, the parties have not briefed the TEA suspension on appeal. Therefore, in our view the most prudent course for us is to allow the parties to submit additional briefing on the merits of the Commission's decision to suspend Prescott's TEA. The question presented for briefing is: given the administrative record before it, was the Commission's decision to suspend Prescott's licence arbitrary, capricious, or clearly an abuse of discretion.

## ORDER

For the foregoing reasons, the order of the Trial Court is reversed, and the Gaming Commission's findings and conclusions dated January 19, 1996 are affirmed. This Court will entertain further briefing on the merits of the Commission's July 1, 1994 decision, in accordance with this opinion. The schedule for further briefing will be established during a scheduling conference, the date and time of which will be set by the Clerk of

Court following consultation with counsel for the parties.

Dated: April 30, 1998

John E. Jacobson
Judge

Robert A. Grey Eagle
Judge