



the Gaming Ordinance was adopted, Prescott duly applied to the Gaming Commission for a license under Title III of the Gaming Ordinance and, pending the complete processing of that application, he was granted a Temporary Employment Authorization. In May, 1994, however, the Gaming Commission suspended Prescott's Temporary Authorization on an "emergency" basis; and then, following hearings in May and June, 1994, it revoked the Temporary Authorization.

Prescott appealed that revocation to the Trial Court arguing, inter alia, that evidence had emerged which suggested that two of the Gaming Commission's members had openly expressed a bias against him. The Trial Court remanded the matter to the Gaming Commission, directing that a hearing be held on the bias issues and suggesting that the Commissioners whose fairness had been questioned by Prescott refrain from participating in the hearing. The Gaming Commission then did hold additional hearings on the bias issue -- with the two Commissioners participating, however -- and in January, 1996, it concluded that the original revocation had not been tainted by bias and that Prescott's rights to due process had not been violated.

Prescott again appealed, and on February 20, 1997 the Trial Court held that the two Commissioners should have recused themselves, and that Prescott's rights to substantive due process had been violated in the 1994 proceedings. The Trial Court granted Prescott's appeal of his Temporary Employment Authorization termination. The Gaming Commission then appealed to this Court.

On April 30, 1998, we reversed the portions of the Trial Court's decision relating to the Commission's bias. We noted that under section 219 of the Gaming Ordinance, the Community's Courts can reverse factual determinations of the Gaming Commission only if they

are arbitrary and capricious or clearly an abuse of the Gaming Commission's discretion; and we concluded that there was a reasonable basis, in the record of the Gaming Commission's decision on the bias issue, to support the Commission's conclusion that bias had not improperly tainted the 1994 proceedings.

That left us with the Gaming Commission's appeal from the Trial Court's decision that the 1994 termination of Prescott's Temporary Employment Authorization had been improper. At our request, the parties submitted additional briefs and oral argument on that matter. Today, we conclude that the Trial Court committed error when it decided that the Gaming Commission's termination of Prescott's Temporary Employment Authorization was improper, and we reverse.

### Discussion

Our analysis of this matter begins with and centers on section 219 of the Gaming Ordinance, which provides:

Persons against whom action has been taken pursuant to Section 214 through 218 by the Gaming Commission and who have been heard before the Commission may appeal the Commission's decision to the Shakopee Mdewakanton Sioux (Dakota) Community's Tribal Court. In all appeals before the Tribal Court, there will be deference given by the Tribal Court to the determination of the Commission as the agency charged with responsibility for interpreting its own regulations. Findings of fact made by the Commission may be certified for review by the Tribal Court.

Conclusions of law made by the Commission shall be reviewed *de novo* by the Tribal Court, that is, as though the Tribal Court were hearing the matter for the first time. The Tribal Court will overturn actions of the Commission only where it can be shown that those actions were arbitrary and capricious, or were clearly an abuse of the Commission's discretion. In all cases, the evidentiary standard on review shall be a preponderance of the evidence standard.

The arbitrary, capricious or abuse of discretion standard, established by section 219, is derived from the Federal Administrative Procedure Act ("the APA"). See, 5 U.S.C. §

706(2)(A). Generally, Federal Courts have held that an agency action is arbitrary, capricious or an abuse of discretion if the agency relies on factors the agency was not intended to consider, entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983). Additionally, failure of an agency to conform to prior procedure without adequate explanation for the deviation is arbitrary and capricious. Id.

The APA also utilizes a substantial evidence test, see, 5 U.S.C. § 706(2)(E), which, as we interpret the law, is no more than the application of the arbitrary and capricious standard to factual findings. Atlanta Gas Light Company v. Federal Energy Regulatory Commission, 140 F.3d 1392, 1397 (11th Cir. 1998). The substantial evidence test requires that an agency decision be based on relevant evidence sufficient to adequately support the decision. Pierce v. Underwood, 487 U.S. 552 (1988). It requires more than a mere scintilla of evidence but less than a preponderance of the evidence, Associated Electric Cooperative, Inc. v. Hudson, 73 F.3d 845 (8th Cir. 1996), and an agency decision will survive the substantial evidence test if the evidence is enough to justify, if the trial were to a jury, a refusal to direct a verdict. Universal Camera Corporation v. National Labor Review Board, 340 U.S. 474 (1951). Thus, when reasonable minds could arrive at the same conclusion as that reached by the agency, the substantial evidence test is satisfied. The basic requirement for application of the test is an adjudicatory hearing which produces a record that allows review. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414-15 (1971).

In the present case, the Gaming Ordinance imposes the arbitrary and capricious standard on this Court's review of Gaming Commission determinations which are not purely issues of law. But, as procedures followed by the Gaming Commission in this case permit review by resort to a factual record, we hold that both the arbitrary and capricious standard and the substantial evidence standard are applicable.<sup>1</sup> See, Gaming Ordinance, § 209-13. The arbitrary and capricious test is most suitable to review of the Gaming Commission's procedural actions, and the substantial evidence test provides a method of review for the Gaming Commission's factual determinations.

In employing the arbitrary and capricious standard and the substantial evidence test, we must engage in a meaningful inquiry into the record. Id. at 415. Although an agency decision is entitled to a presumption of regularity under both the arbitrary and capricious and the substantial evidence standard, that presumption does not shield the agency action from a thorough review. Id. The Gaming Ordinance requires that the Community Court accord deference to the Gaming Commission when a review concerns the Commission's interpretation of its own regulations, but this deference should not prevent the Court from engaging an in-depth review of such interpretations.

In applying these tests to the Gaming Commission's proceedings and the administrative record in this matter, we have taken the opportunity to examine the approach of courts of other gaming jurisdictions when reviewing the actions of their gaming commissions. Nevada, New Jersey and Mississippi courts have all have reviewed appeals from gaming commission decisions,

---

<sup>1</sup> This Court explicitly limits its decision to review of licensing revocation procedures and withholds opinion over what standard of review would apply to other Gaming Commission determinations, where an adequate record might not be developed.

and in each state the law incorporates an arbitrary and capricious test and a substantial evidence test. Obviously, these cases do not govern this one -- the laws of the Community are unique to it. But we do feel that it is helpful to ascertain whether the results we reach here might be regarded as anomalous in another gaming jurisdiction; and we have concluded that they clearly would not be.

1. Nevada.

Nevada courts review the determinations of its gaming agencies using both an arbitrary and capricious standard and a substantial evidence standard. Nevada Tax Commission v. Hicks, 310 P.2d 852 (Nev. 1957); State v. Rosenthal (Rosenthal II), 819 P.2d 1296 (Nev. 1991); Redmer v. Barbary Coast Hotel & Casino, 872 P.2d 341 (Nev. 1994). In doing so, Nevada courts show "great deference" to gaming agency decisions, Redmer, 872 P.2d at 344, reasoning "[i]t is entirely appropriate to lodge such wide discretion in the controlling administrative agency when a privileged enterprise is the subject of the legislative scheme." State v. Rosenthal (Rosenthal I), 559 P.2d 830, 835 (Nev. 1977), appeal dismissed, Rosenthal v. Nevada, 434 U.S. 803 (1977). Purely legal questions are reviewed *de novo* however. Id.

2. New Jersey.

New Jersey courts also employ both an arbitrary or capricious standard and a substantial evidence test in reviewing gaming commission licensing determinations. In re Application of Tufi, 442 A.2d 1080 (N.J. Super. Ct. App. Div. 1982) (review determines "whether the findings of fact could reasonably have been reached on sufficient credible evidence present in the record"); Department of Law & Public Safety v. Gonzalez, 667 A.2d 684 (N.J. 1995) (review

by both arbitrary and capricious standard and substantial evidence test)<sup>2</sup>. Review is limited to the record on which the commission action was based. Id.; Adamar of New Jersey, Inc. v. Department of Law & Public Safety, Division of Gaming Enforcement, 593 A.2d 1237, 1249 (N.J. Super. Ct. App. Div. 1991). Questions of law are reviewed *de novo*. In re Application of Tufi, 442 A.2d at 1083.

### 3. Mississippi.

We were unable to find reported instances of Mississippi court review of Mississippi gaming commission license denials; however, Mississippi courts have articulated a standard for review of gaming commission determinations generally. The standard includes both an arbitrary or capricious standard and a substantial evidence test. Mississippi Gaming Commission v. Tupelo Industries, Inc., No. 98-CA-00729-COA, 1999 WL 367191 (Miss. Ct. App. Apr. 3, 1998)<sup>3</sup>; His Way Homes, Inc. v. Mississippi Gaming Commission, No. 98-CC-00690-SCT, 1999 WL 74782 (Miss. Feb. 18, 1999). Mississippi courts confer a rebuttable presumption in favor of the commission's decisions. Tupelo Industries, Inc., at \*2. Review is limited to the record. Id. Appellate courts independently review the commission determinations. Id. Deference is accorded to commission interpretations of its own regulations. Id. at \*3.

---

<sup>2</sup> The Gonzalez Court held review was limited to three inquiries: (1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors. Gonzalez, 667 A.2d at 688-89 (citations omitted).

<sup>3</sup> "The court will entertain the appeal to determine whether or not the order of the administrative agency (1) was supported by substantial evidence, (2) was arbitrary and capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party." Tupelo Industries, Inc., at \*4.



Hence, we find that both the arbitrary or capricious standard and the substantial evidence test are common standards of review for Gaming Commission denials of gaming licenses. The standards are complementary. The arbitrary or capricious standard is best suited for review of procedural issues. The substantial evidence test is best suited for review of Commission factual determinations.

The Community has a strong interest in protecting and maintaining the integrity of its gaming enterprises and the agencies charged with protecting that integrity. To this end, it is imperative that Community courts engage in meaningful, careful and thorough review of Gaming Commission licensing determinations. On the other hand, court review should never make Gaming Commission determinations a merely perfunctory stopping point on the way to court review. The Community has created an agency invested with expertise in the regulation of gaming in the Community.<sup>4</sup>

This Court finds the substantial evidence test is best suited for review of the issue before the Court in the present case.<sup>5</sup> The issue before the Court can thus be stated: Does the record relied on by the Gaming Commission provide sufficient relevant evidence for a reasonable person to reach the result reached by the Gaming Commission?

---

<sup>4</sup> The Community's 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).

<sup>5</sup> The issues remaining before the Court are factual determinations and not issues of procedure. The procedural issues implicated in the present case have already been considered when this Court reversed the trial court's order requiring two Commission members to recuse themselves on the basis of bias, and its decision to remand the case for further consideration. See, In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order, Apr. 29, 1998. In that opinion, this Court found no due process violations when the Gaming Commission actions were reviewed under an arbitrary, capricious or abuse of discretion standard. Id.



We believe that it does. The record before the Gaming Commission establishes that in 1971 Prescott was convicted of a felony. That conviction was legally expunged in September, 1992. But prior to expungement, Prescott signed and submitted to the State of Minnesota two "Distributor Personnel Information", which called for disclosure of his criminal record; and in neither did he disclose his felony conviction. During this period he also submitted to the State of Minnesota two "Distributor Personal Affidavits," stating under oath that he had never been convicted of a felony. Before the Gaming Commission and the Court, Prescott argued that these documents were prepared by others and simply signed by him, and that he had no intent to deceive. But clearly it is the responsibility of a person who signs a document prepared by others, particularly a document like an affidavit, sworn to under oath, to ensure that the statements made therein are accurate.

From our review of the case law of other gaming jurisdictions in the United States, it is clear, first, that a felony conviction is a common ground for revocation of a gaming license.<sup>6</sup> And misrepresenting or not revealing the existence of such a conviction brings into question the character of the licensee sufficiently to permit a denial or revocation of the license on the grounds of the misrepresentation, as considered separately from the underlying conviction. See, cf., In re Application of Tufi, 442 A.2d 1080 (misrepresentations made to customs officials concerning money brought into country sufficient credible evidence of unsuitability for gaming

---

<sup>6</sup> Other gaming jurisdictions have held a gaming commission may use a prior conviction as grounds for denial of a license even when the civil rights of the applicant had been restored, Rosenthal II, 819 P.2d at 1300, or that an applicant is entirely precluded from challenging the basis of any conviction "because of the strong public policy of maintaining integrity in the casino industry, a casino employee may not present evidence contradicting his or her convictions." Gonzalez, 667 A.2d at 686-87. For the purpose of this review, it is enough that the later expunged conviction could reasonably be seen as a conviction in fact at the time of the applications, and this Court does not advance any judgment relative to the conviction beyond that stated.

license).

Under the Gaming Ordinance and the rules by which the Gaming Commission has implemented that Ordinance, the Commission is required to consider whether a license applicant has “supplied in the license application false or materially misleading information” or “has omitted information.” Rules Governing the Conduct of Hearings Before the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Commission (Commission Rules) § 1.09(k). The Commission is also authorized to consider “all other information the Commission considers relevant or material to determine the suitability of the applicant.” Commission Rules § 1.09(m)<sup>7</sup>.

Thus, we believe that the Commission reasonably could base a revocation decision on the fact the licensee misrepresented to other licensing bodies the existence of a felony conviction. There is sufficient evidence in the record produced by the Gaming Commission hearing to allow a reasonable person to conclude that Prescott stood in conviction of a felony at the time of his application for three gaming distributor licenses in Minnesota. There is likewise sufficient evidence in the record to allow a reasonable person to conclude Prescott misrepresented the existence of such a conviction in applying for Minnesota gaming licenses. It is not enough that reasonable minds also could have come to a different conclusion. Rather, the Gaming Commission’s decision must be upheld because a reasonable mind could have concluded as the Gaming Commission did.

---

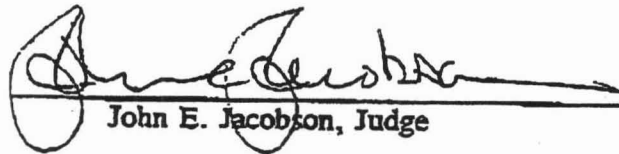
<sup>7</sup> Gaming Ordinance § 214(d) provides for immediate revocation for any licensee convicted of a felony. It is true that the Gaming Commission has within its power to waive the requirement that licensees have no felony convictions. See, Gaming Ordinance § 326. However, the issue is not whether the Commission could have allowed Prescott to retain his temporary license, but rather whether there is a reasonable basis for the Commission’s revocation of his license.

Thus, the Gaming Commission's revocation of Prescott's TEA was not arbitrary and capricious, is supported by substantial evidence in the record, and is upheld.

ORDER

For the foregoing reasons, the Trial Court's decision granting Leonard Prescott's appeal from the revocation of his Temporary Employment Authorization is reversed.

July 29, 1999

  
\_\_\_\_\_  
John E. Jacobson, Judge

  
\_\_\_\_\_  
Robert A. Grey Eagle, Judge