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TRIBAL COURT OF THE

SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY CLERK OF COURT

CARRIE L. SVENDAHL

COUNTY OF SCOTT

STATE OF MINNESOTA

In re Leonard Louis Prescott  
Appeal from 7/1/94 Gaming  
Commission Final Order

Court File No. 041-94

**MEMORANDUM AND ORDER  
NUNC PRO TUNC**

I.

**BACKGROUND & PROCEDURAL HISTORY**

This matter is before the Court on administrative appeal from a decision of the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Commission (the Commission or Respondent) revoking the gaming license of Leonard Louis Prescott (Prescott or the Appellant). In addition to challenging the substance of the Commission's decision, Prescott also alleges that the Commission's proceedings violated his procedural and substantive due process rights.

The Commission is the regulatory arm of the Community government charged with overseeing gambling on the Reservation. The Commission was established by the Community's Tribal Gaming Ordinance (the Ordinance) which was approved by the National Indian Gaming Commission (NIGC) on November 2, 1993. Section 307 of the Ordinance requires the Commission to perform a background investigation on all persons falling within the definition of a Key Employee or Primary Management Official. After a background investigation is completed, the Commission must determine whether the individual is eligible for a Tribal gaming license. During the pendency of such an investigation, the Commission may issue a Temporary Employment Authorization (TEA) which is valid for 90 days. Ordinance at § 306. If the Commission determines that an applicant or licensee is not eligible for such a license, the



Commission may deny, or suspend and/or revoke the license. The Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701 et seq. requires tribes which engage in gambling to adopt standards whereby "any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the damages of unsuitable, unfair, or illegal practices and methods and activities in the content of gaming shall not be eligible for employment", 25 U.S.C. 2710(2)(F)(ii)(II); 25 C.F.R. 558.2. Section 306 of the Gaming Ordinance contains such a provision.

Prescott is a member of Shakopee Mdewakanton Community. From January 1987 to January 1992, Prescott served as the Community Chairman, and from 1991 to 1994 he served as an officer of Little Six, Incorporated (LSI), a corporate arm of the Community government, first as COO and then as CEO and Chairman of the Board. Subsequently, Prescott was defeated in elections by the current Community Chairman Stanley Crooks.

In his role with LSI, Prescott fell within the definition of a Key Employee. On January 13, 1994 Prescott submitted an application for a Key Employee license, and on March 1, 1994, the Commission issued a TEA. On May 5, 1994, the Commission issued an Order Suspending Prescott's TEA. On July 1, 1994, after notice and a hearing, commencing on May 25 and concluding on June 15, 1994, the Commission issued its Findings of Fact and Conclusions (the July Decision) in which it revoked Prescott's TEA. Prescott did not seek a rehearing and did not attend a scheduled hearing on his application for a permanent Key Employee License. Instead, on July 8, 1994, Prescott filed an appeal to this Court.

During the review of Prescott's appeal, this Court received written correspondence from



Mr. Thomas Guthery<sup>1</sup> stating that the comments allegedly made by the Commission's Chairperson, Ms. Cherie Crooks-Bathel, daughter of the current Chairman, and a Commission member, Mr. Scott Campbell, indicated that they were biased against Prescott, and intended to revoke his license irrespective of the evidence presented at his hearing. On November 8, 1994, this Court remanded the matter to the Commission to develop its record on the issue of the alleged bias. The Commission provided a notice of hearing and subpoenaed witnesses, including Mr. Guthery and on February 21, 1995, the Commission conducted a hearing on the allegations of bias. Mr. Guthery did not attend the hearing and the hearing closed without his testimony being taken on the allegations. On January 19, 1996 the Commission issued its Finding of Fact (the January Decision) with respect to the allegations of bias.

The proceedings in this matter were stayed while the parties explored a settlement of their disputes. Those efforts, sadly, were not successful, and the parties then submitted Supplemental Briefs regarding the issues addressed on remand.

## II.

### THE COMMISSION'S DECISION

The Commission's July decision is comprised of 117 Findings of Fact and 11 Conclusions of Law. The Findings and Conclusions relate to six general issues:

1. **Findings 1-35, Conclusions 3 and 4; Findings 102-112, 115-117, Conclusion 9.**

Whether Prescott converted assets of LSI for his and other's personal use.

2. **Findings 36-66, Conclusions 1 and 2.**

Whether Prescott falsified license applications and provided false statements under oath.

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<sup>1</sup> Thomas Guthery is a former executive director for the Community Gaming Commission.



3. **Findings 67-86, Conclusions 5 and 6.**

Whether Prescott released confidential information regarding LSI and Community per capita payments without proper authorization.

4. **Findings 87-91, Conclusion 8.**

Whether Prescott violated Community policy regarding the employment of felons by not disclosing his own criminal record.

5. **Findings 92-96, Conclusion 7.**

Whether Prescott made unsubstantiated allegations that the Community's Chairman was engaged in criminal activity.

6. **Findings 97-101, Conclusion 10.**

Whether Prescott fabricated information and disseminated it to the public.

Based on its Findings and Conclusions contained in its July decision, the Commission made the following ruling:

falsification of information under oath to state gaming officials, conversion of corporate assets, diversion of gaming proceeds, release of confidential information, violation of laws relating gaming, demonstrate that continued licensing of Leonard Louis Prescott will increase the dangers of unfair or illegal activity and practices in the conduct of gaming on the Shakopee Mdewakanton Sioux (Dakota) Community Reservation, and require the revocation of the Temporary Employment Authorization of Leonard Louis Prescott, pending the exercise of the right to a hearing before the Commission to Show Cause why Leonard Louis Prescott should be granted a permanent Key Employment license.

The Commission's January Decision consists of 10 Findings of Fact and 3 Conclusions of Law. Ultimately the Commission determined that the allegations of bias were unsupported by evidence and that the proceedings leading up to and including the July decision did not violate Prescott's due process rights.



### III.

#### STANDARD OF REVIEW

This Court reviews Commission decisions pursuant to § 219 of the Tribal Gaming Ordinance. This Section provides that Commission Conclusions of Law are reviewed *de novo*. Commission Findings of Fact are reviewed based on an arbitrary and capricious standard, and applications of law to fact are reviewed based on an abuse of discretion/clear error of judgment standard. This Court must defer to the Commission's decision, unless it is shown to be an abuse of discretion or a clear error of judgment. The Court reviews that action based on a preponderance of the evidence.

Prescott asserts that this Court must reverse because "the record reveals no substantial evidence supporting the Gaming Commission's decision." (Brief at pp. 4-5, 6). This Court does not review Commission decisions on a "substantial evidence" standard, however. Rather, the Commission's review is based on an "arbitrary and capricious" standard based on a preponderance of the evidence.

The Commission argues that "The Court can overturn the Gaming Commission's action only if Prescott first demonstrates that he presented clear and convincing evidence proving his qualifications and demonstrating that he complied with all applicable law "(emphasis in original) (Brief at p. 12). The Court does not agree. It is not the role of this Court to determine whether Prescott met his burden of proof before the Commission. Rather, we must determine whether the Commission applied the appropriate standard of proof, and whether its determination of the sufficiency of his proof was an abuse of discretion or clear error of judgment, based on a preponderance of the evidence.



#### IV.

#### DUE PROCESS PROTECTIONS

At pp. 28-36 of his Brief, Prescott alleges that the Commission proceedings violated his due process rights.<sup>2</sup> Prescott separately alleges procedural (pp. 28-33) and substantive (pp. 33-36) due process violations. In order to invoke the protections of substantive and/or procedural due process, one must establish that the challenged proceeding affected either a property or liberty interest. U.S. Const. 5th and 14th Amendments; See also, Mathews v. Eldridge, 424, U.S. 319, 332 (1975). Accordingly, before evaluating whether the Commission's proceedings violated Prescott's due process rights, this Court first must determine whether Prescott has either a property or liberty interest which was affected by the Commission proceeding. If no such interest exists, the Court may evaluate the appropriateness of the Commission's Findings and Conclusions. However, if such an interest exists, the Court must determine whether the Commission's proceedings violated such an interest. In the event the Court finds a violation to have occurred, it will not review the Commission's substantive decision, but will remand the matter for further proceedings which are consistent with due process requirements. Concrete Pipe & Prod. of California, Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2277 (1993).

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<sup>2</sup> Prescott asserts that because the Commission proceedings "parallel those found in Anglo-Saxon Society" federal Constitutional standards should be used by this Court. The Court need not reach this question, however, since the Shakopee Mdewakanton Sioux Constitution assures all members of the Community "freedom of worship, conscience, speech, press assembly, association and due process of law, as guaranteed by the Constitution of the United States. Const. Art. VI - Bill of Rights. To the extent this Court evaluates such rights, it only follows that, at a minimum, it must evaluate actions alleged to violate rights secured by the United States Constitution, in light of United States Supreme Court precedent on those issues.



### A. Property Interest

Prescott argues that the Commission proceedings deprived him of a property interest in a Commission license. To so hold, this Court must find that a Commission - issued Temporary Employment Authorization creates a property interest in its holder. We are unwilling to make such a finding.

A property interest in a particular thing must be based on more than a "unilateral expectation." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). As the Court noted in Roth --

property interests, of course, are not created by the Constitution. Rather, they are created, and their dimensions are defined, by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

*Id.* at 577. See also, Bishop v. Wood, 426 U.S. 341, 345 n.7. The Commission argues that because the Gaming Ordinance defines a Commission license as a "revocable privilege" (§ 324), Prescott *A fortiori* cannot demonstrate a property interest. The Court disagrees. In determining whether a property interest exists in a benefit, the Court will not be guided solely by how a benefit is denominated in the relevant law, but will look to the nature of the interest, as defined by relevant laws, rules and understandings. Bell v. Burson, 402 U.S. 535, 539 (1971)

The Court, after considering the relevant laws, rules and understandings, finds that the TEA does not create a property interest in its holder. A TEA is in essence a pre-licensing work permit, which has no effect once a full background investigation -- required by federal law -- is completed and the Commission determines whether licensure is justified. Federal and Tribal law does not permit licensing of persons until a full background investigation is conducted and a persons suitability has been determined by the appropriate tribal regulatory body. Neither



federal nor tribal law in any way indicates that the grant of the TEA has any effect on the Commission's ultimate licensing determination. Here Prescott was issued a TEA which was revoked 60 days later, and he never was issued a permanent license. TEA's are permitted by federal law, for up to 90 days, in part to allow Tribes to staff and operate casinos while conducting the federally-mandated investigations. Whether or not a Commission license creates a property interest (Appellants Brief at 30; Appellees Brief at 36-37) is irrelevant, inasmuch as a TEA is not a Commission license, and nothing indicates that a TEA shares the status of a permanent license.

Based on the foregoing, it is the Court's opinion that Prescott cannot demonstrate a property interest in the TEA.<sup>3</sup>

#### **B. Liberty Interest**

Prescott also argues that the Commission proceedings deprived him of a liberty interest in his good name, reputation honor and/or integrity. Relying on Board of Regents v. Roth, 408 U.S. 564 (1972) and Wisconsin v. Constantineau, 400 U.S. 433 (1971), Prescott contends that the Commission's July decision stigmatized him in both the Indian and non-Indian communities and besmirched his integrity. (Appellants Brief at 29). As a result, Prescott alleges that he was denied a liberty interest without due process of law. The Commission suggests that Prescott has no such liberty interest, and if he does, the proceedings did not offend that interest because the basis for the decision to revoke was kept confidential (Appellee's Brief at 35 n. 14).

While the United States Supreme Court in Constantineau seemed to suggest that there is an independent liberty interest in good name, reputation, honor and/or integrity, subsequent

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<sup>3</sup> The Court expresses no opinion as to whether a "permanent" Commission license, or a TEA that continues in effect for more than 90 days from issue, creates a property interest in its holder.



Supreme Court precedent has clarified what must be shown to give rise to a liberty interest. Paul v. Davis, 424 U.S. 693 (1976), developed what has become known as the "stigma plus" analysis. In Paul, the Plaintiff sued for being "posted" as an "active shoplifter". The Plaintiff argued that his liberty interest in reputation, honor or integrity had been denied without due process of law and that the posting threatened his future access to stores and his future ability to get work. The Sixth Circuit, relying on Constantineau, found the Plaintiff to have a liberty interest and the proceeding to have violated that interest.

The Supreme Court reversed, noting that simple defamation by the state without some additional alteration or extinguishment of a "right" or "status" previously recognized by law was insufficient to implicate a liberty interest, but probably gave rise to a state law defamation suit:

The stigma resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of "liberty" protected by the procedural guarantees of the Fourteenth Amendment. This conclusion is reinforced by our discussion of the subject a little over a year later in Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d at 548 (1972)...

While Roth recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official, but unconnected with any refusal to rehire, would be actionable under the Fourteenth Amendment: "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community..." Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Id., at 573, 92 S.Ct., at 2707, 33 L.Ed.2d, at 558 (emphasis supplied).

Id. at 708-09.

Though Paul v. Davis, and its "stigma plus" standard, have been criticized extensively as too stringent and "at odds with our ethical, political, and constitutional assumption about the



worth of each individual"<sup>4</sup>, even under this standard the Court finds that Prescott demonstrates that a protectable liberty interest was at stake in the Commission proceeding. There can be little doubt that the Commission's July Decision impugns Prescott's integrity; in fact, it specifically states that he is a person whose connection with the Community Gaming Operations threatens the integrity of gaming by increasing "the danger of unfair or illegal activity or practices". This is not a small or insignificant statement and, beyond doubt, stigmatizes Prescott. Yet, under the "stigma plus" test this is insufficient unless Prescott demonstrates the alteration of a right or status.

We find that three distinct results of the revocation of Prescott's TEA create a sufficient alteration of a right or status to meet the "stigma plus" standard. A TEA -- or "permanent" license as the case may be -- is a necessary prerequisite to employment at an Indian gaming establishment. So, by revoking Prescott's TEA -- whether it is a privilege or right -- the Commission not only has altered Prescott's status as an "authorized" employee, it has ended his eligibility for employment with LSI or any other gaming-related employer on the Shakopee Reservation. Moreover, as is more fully discussed below, the revocation of Prescott's TEA, and the reasons for that action, must be reported by the Commission to the National Indian Gaming Commission (NIGC) which will share that information with any gaming tribe to whom Prescott applies for employment in the future. Such a report may well keep him from obtaining employment anywhere in the field of Indian Gaming. The Court finds that revoking Prescott's TEA, effectively terminating his employment with LSI, and rendering a decision which will affect his future employability in Indian gaming, collectively represent a significant alteration

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<sup>4</sup> David Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 Harv.L.Rev. 293, 324-328 (1976); Henry Monaghan, of "Liberty" and "Property", 62 Corn.L.Rev. 405 (1977).



of Prescott's status which is sufficient to meet the requirement under Paul v. Davis.

The Commission suggests that any liberty interest Prescott might possess in his reputation, honor, or integrity was not offended by the Commission's proceedings, because the Commission's reasons for its decisions were kept confidential (Appellee's Brief at 35 n 14, citing Bishop v. Wood, 426 U.S. 341, 348 (1976)). We disagree for two reasons. First, in Bishop and Roth upon which the Court in Bishop relies -- the Supreme Court noted that it would stretch the concept of liberty too far to find a deprivation of liberty where a person is not rehired by a school, but remains free and eligible to seek other positions (Roth), or where an "at will" employee is terminated and the reasons for the termination are not disclosed to the public. Bishop, 426 U.S. at 348. The logical basis for such a ruling as is plainly stated by the Court in Roth, is that no stigma attaches to a person who simply has not been rehired, or to one who is terminated from an at will job without any indication of cause.

The situation in the present case is considerably different from those existing in Roth or Bishop. Unlike Roth, this action involves the revocation of a gaming license for cause. The effect of this action will be devastating on Prescott's future employability in Indian gaming, whereas the Court in Roth rightly found that not rehiring an untenured professor, at worst, would make that Plaintiff "somewhat less attractive to other employers..." Id. Unlike Bishop, there will be disclosure of this information. Federal law requires the Commission to disclose Key Employee and Primary Management official license revocations to the NIGC. Although the reasons for the revocation may not be available to the general public as the result of a Freedom of Information Act <sup>5</sup> request to the NIGC -- although this is not certain -- the

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<sup>5</sup> 5 U.S.C. 552, Exemption 6 (personal privacy reasons), Exemption 7 (information compiled for law enforcement purposes); 25 CFR 517.4(a)(6) and 517.4(a)(7).



information certainly will be disclosed to any Indian tribe which requests it as part of a pre-employment screen, or pre-licensing background investigation. The continued confidentiality of this information, then, will depend on the rules, practices and procedures of all Indian tribes involved in gaming, which are impossible to predict. This situation is far different from Bishop where the reason for termination was communicated orally to the employee, and was not disclosed publicly until the employer was compelled, in the context of civil litigation, to respond to discovery propounded by the employee.

The Court also finds the Bishop decision inapplicable to present situation because Federal law requires that Indian tribes adopt standards in their gaming ordinances whereby persons who threaten the integrity of gaming either are denied licenses or have their licenses revoked. 25 U.S.C. 2710(b)(2)(f)(ii)(II). The Community adopted this standard at § 306 of the Ordinance. Accordingly, even though the Commission has not officially disclosed to the public the reasons for revoking Prescott's license, the act of revocation necessarily implies that the person is of a type described in federal and tribal law. In short, the universe of possible reasons for revocation is finite, and the reasons all are derogatory. Unlike the "at will" employee in Bishop, who could be terminated for any reason -- which breadth of reasons makes stigma virtually impossible -- revocation of a Commission license means that the former licensee's "past activities, criminal record, reputation, habits and associations...pose a threat to the public interest or to the effective regulation of gaming, or creates or enhances the damages of unsuitable, unfair, or illegal practices and methods". Plainly put, revocation means the person is, to one degree or another, "shady". The Court finds that this passive disclosure of the reason for revocation renders Bishop distinguishable from the present case.

This case -- and the interests implicated therein -- must ultimately be viewed in the



context of the political and social setting of the Shakopee Community. The Community is a federally recognized Indian tribe with a small enrollment. Its size has led, in large part, to both the Community's success in gaming and also to its relatively polarized politics.

The Appellant and the current Tribal Chairman are, and have been, bitter political rivals and the effect of this rivalry is a polarization of the Community down extended family lines. Given this context the Court must be ever vigilant that the power of Tribal government is not used to reward those who are in political favor and to punish those who are not. As a corollary of this charge, the Court must also look at Prescott's claimed liberty interest with a more lenient eye, so as to ensure that this process has not been the working of a spoils system.

## VI.

### COMMISSION PROCEEDINGS & PRESCOTT'S DUE PROCESS RIGHTS

Having determined that Prescott has a liberty interest at issue in this matter, the Court next must determine whether the Commission's proceedings afforded him the proper procedural and substantive due process. The distinction between procedural and substantive rights is an indefinite concept, the two having been described as "intimately related" (F. Esterbrook, *Substance and Due Process*, 1982 *The Supreme Court Review* 85, 112) and "intertwined". Arnett v. Kennedy, 416 U.S. 134 (1974). Due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances". Cafeteria Workers v. McElroy, 367, U.S. 886, 895 (1961). Morrissey v. Brewer, 408 U.S. 471, 481 (1972)("Due process is flexible and calls for such procedural protections as the particular situation demands"). With the facts of this particular case in mind, once the Court has determined that due process is required, it must ask "what process is due[?]" Morrissey v. Brewer, 408 U.S. 471, 481 (1972).



Although proper procedure, in light of the private interest at stake, is important, procedure is not determinative. Rather, a "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner". Mathews v. Eldridge, 424 U.S. 319, 313 (1975), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965) and Grannis v. Ordean, 234 U.S. 385, 394 (1914). See also, Anti-Fascist Committee v. McGrath, 341 U.S. 123, 164 (1950) (Frankfurter), quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937) ("The hearing, moreover, must be a real one, not a sham or a pretense"). A meaningful hearing is required in all cases, regardless of the political or social winds, since "the heart of the matter is that democracy implies respect for the elementary rights of people, however suspect or unworthy", (Anti-Facist Committee, 341 U.S. at 170) for "it is procedure that spells much of the difference between rule by law and rule by whim or caprice" Id. at 179.

With these concepts in mind, the Court must evaluate the Commission's proceedings to determine whether they afford Prescott procedural and substantive due process.

**A. Procedural Due Process.**

The amount of procedure due an individual is indefinite and driven by the particular facts of the case. Since what may be fair in one situation may be unfair in another, the concept of fair procedure "cannot be tested by mere generalities or sentiments abstractly appealing". Anti-Facist Committee, 341 U.S. at 163. In Goldberg v. Kelly, 397 U.S. 254 (1970) and Mathews v. Eldridge, 424 U.S. 319 (1975), the Supreme Court refined some of the relevant procedural due process considerations enunciated by Justice Frankfurter in Anti-Facist Committee to a three point comparative analysis of -- :

- 1) The private interest to the affected; 2) the risk of erroneous deprivation based on the procedures used, and the probable value of additional procedural safeguards; and, 3) the Government's interest, including the function involved and



the burdens of additional procedures.

Goldberg, 397 U.S. at 263-71; Mathews, 424 U.S. 334-35.

The first element can be treated in fairly short order. As has been noted above, the interest of any individual is great in a proceeding which carries with it the possibility of such a derogatory finding. The denial or revocation of a license in the context of Indian gaming is devastating, and may well render such an individual unemployable. Moreover, in this particular context, a finding that Prescott had provided false statements on state gaming documents and had converted LSI proceeds exposes him to the possibility of state and federal civil and criminal proceedings. Certainly, these are important private interests.

The second and third elements relate to the sufficiency of the Commission's procedures. The Tribal Gaming Ordinance provides that written notice and an opportunity for a hearing shall be given to any Key Employee or Primary Management Official whose license has been suspended. (§ 309) The notice advises the licensee of the suspension and the proposed revocation of the license, as well as the time and place set for a hearing on the proposed revocation. The hearing is a full on the record adjudicatory hearing wherein the Licensee can call witnesses, offer evidence and make arguments. (§ 209(b)) The Commission issues a written decision after hearing (§§ 212 and 213) which -- based on this proceeding -- apparently includes findings of fact, conclusions of law and a decision. Prescott's hearing spanned eight days, during which 19 witnesses testified and 143 exhibits were received. Prescott was represented by counsel who was allowed to examine and cross-examine all witnesses and to make legal and factual arguments and objections.

The Court finds that the Commission's procedures more than amply provide safeguards against erroneous deprivation of rights. Only in emergency circumstances is the Commission



authorized to suspend a license without a hearing. Even after such a suspension, a licensee is entitled to an on the record, pre-revocation/hearing. The Court cannot imagine any further procedural safeguard which would further reduce the likelihood of erroneous deprivation. The Commission's procedures represent the greatest degree of administrative procedure available to an individual under the Federal Administrative Procedures Act 5 U.S.C. §§ 554-557, and only in Goldberg v. Kelly 397 U.S. 254 (1970) has the Supreme Court held that a proceeding resembling the Commission's proceedings was necessary to ensure procedural due process. Accordingly, the Court finds that the Commission's procedures afford proper procedural due process.<sup>6</sup>

Prescott alleges that he did not receive sufficient notice of the reasons for the suspension of his TEA and the matters to be addressed at the hearing. The Court cannot agree. As the Commission points out, and the Commission's record reveals, Prescott received a Notice of Hearing, pursuant to § 309 of the Ordinance, which had attached to it an eleven point Finding of the Commission -- stating the areas of concern supporting suspension, and forming the outline of the noticed hearing -- and the Commission's Resolution in which it documented its decision to suspend Prescott's TEA. While it may be that the issues at the hearing ebbed and flowed with the evidence presented, the Court is unpersuaded that Prescott was not sufficiently notified of the basis for suspension or the matters to be addressed at the hearing. Rather, the record reflects that the Commission's proceedings, and ultimately its July decision, did not deviate, to any great degree, from the matters identified in the Commission's Notice of Suspension.

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<sup>6</sup> The determination that the Commission's proceedings provide sufficient procedural due process is supported by the fact that the procedures provided to licensees were provided to Prescott, a holder of a Temporary Employment Authorization. The Ordinance does not expressly require such procedures for temporary licensees.



The Court, likewise, is unpersuaded that the use of two documents not offered into evidence at the Commission hearing denied Prescott procedural due process. The use of a letter authored by Prescott does not raise serious questions of due process deprivation, especially when Prescott's counsel could have objected to its use until it had been reviewed for authenticity and content. Likewise, the Court does not find the use of LSI corporate documents denied Prescott procedural due process. At bottom, Prescott alleges that the use of such documents violated his right to procedural due process, but doesn't explain how. The procedural rights afforded to Prescott gave him ample opportunity to object to and ultimately to appeal these issues. The Court feels that these two instances, taken individually or collectively, do not rise to the level of constituting a procedural due process violation.

**B. Substantive Due Process.**

The Court also must also consider whether Prescott was afforded substantive due process in the Commission proceedings, since no amount of procedure is meaningful if the procedure is conducted by a biased arbiter. As the United States Supreme Court has stated --

...due process requires a 'neutral and detached judge in the first instance'...Before one may be deprived of a protected interest, whether in a criminal or civil setting...one is entitled as a matter of due process of law to an adjudicator who is not in a situation...which might lead him [or her] not to hold the balance nice, clear and true...even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator.

Concrete Pipe and Products of California, Inc. v. Constr. Laborers Pension Trust for Southern California, 508 U.S. 602, 617-18 (1993) (citations omitted). In fact, an unbiased tribunal has been ranked as the most important element of a fair hearing. Friendly, Some Kind of Hearing, 123 U.Pa.L.R. 1267, 1279 (1975). As the Supreme Court has noted, this substantive due process demands impartiality in fact and appearance. Concrete Pipe, 508 U.S. at 618. ("Justice,



indeed, must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties.")

In Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667 3rd Cir. (1991) the United States Court of Appeals for the Third Circuit noted that a claim of substantive due process violation may be supported by an allegation that the governmental action was 'motivated by bias, bad faith, or improper motive, such as partisan political reasons or personal reasons...' Id. at 683. While Midnight Sessions involved a different setting than the current case (e.g. a city council decision to deny a permit to operate a business), we find the sound reasoning of the Third Circuit no less compelling. In fact, that Court's analysis is even more compelling when applied to a formal adjudicatory process like the Commission's license revocation proceedings. It would seem that avoidance of the appearance of bias is more appropriate the more the challenged proceeding resembles a court trial.

In this case, the Court has determined that Prescott's substantive due process rights were violated by the Commission proceeding in the face of allegations of bias against its Chairperson and one of the Commissioners. There is serious doubt as to whether Chairperson Crooks-Bathel, the daughter of the Tribal Chairman, a political foe of Prescott, should have participated in any aspect of this proceeding, including the investigation, deliberation and decision regarding the suspension of Prescott's Temporary Employment Authorization. But, certainly, the Chairperson should have examined her impartiality before conducting the revocation hearing and participating in the July decision. Central issues supporting suspension and revocation relate to disputes which have simmered for years between Prescott and Chairman Crooks. The Court finds that Chairperson Crooks-Bathel would be hard pressed to demonstrate actual impartiality;



however, she would be incapable of overcoming an appearance bias.

The Commission's January decision regarding the allegations of bias do not cure, at a minimum, the appearance of bias. In fact, each of the three conclusions may well constitute clear errors of judgment. However, the Court does not reach this issue<sup>7</sup>, since even if they are accepted, they do not justify the Chairperson and Commissioner Campbell's failure to recuse themselves. Whether or not the allegations are "credible" or "supported by evidence", they raise serious and unresolved issues of the appearance of bias, so significant that the Chairperson and Commissioner Campbell should have recused themselves from further proceedings and vacated the July decision.

Recusal in this matter was plainly appropriate given the appearance of political and personal bias on the part of the Chairperson and Commissioner Campbell. However, it is magnified by the fact that this is the Commission's first revocation proceeding. It is the first time the Community and, indeed, those outside the Community will judge the integrity and professionalism of the Commission. Good sense, and the good of the Community and of the Commission dictates that Commission proceedings be actually, and in appearance, beyond reproach, and certainly to be free of the taint of political motivation. Nothing could be more damaging to the credibility of the Commission than to have its first regulatory proceeding appear to be the work of political forces, whether or not that is the case.

The effective regulation of Gaming on the Shakopee Reservation depends on the confidence that the regulated have in the fairness and impartiality of the regulator. Affirming the Commission's decision in the face of swirling allegations of bias would not promote such

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<sup>7</sup> With the exception of conclusion 3, which does constitute a clear error of judgment. inasmuch as this Court has determined that Prescott's due process rights were violated.



confidence. Based on the foregoing, the Court has determined that the Commission proceedings violated Prescott's substantive due process rights, and has ordered this matter remanded for further proceedings which are consistent with those rights.

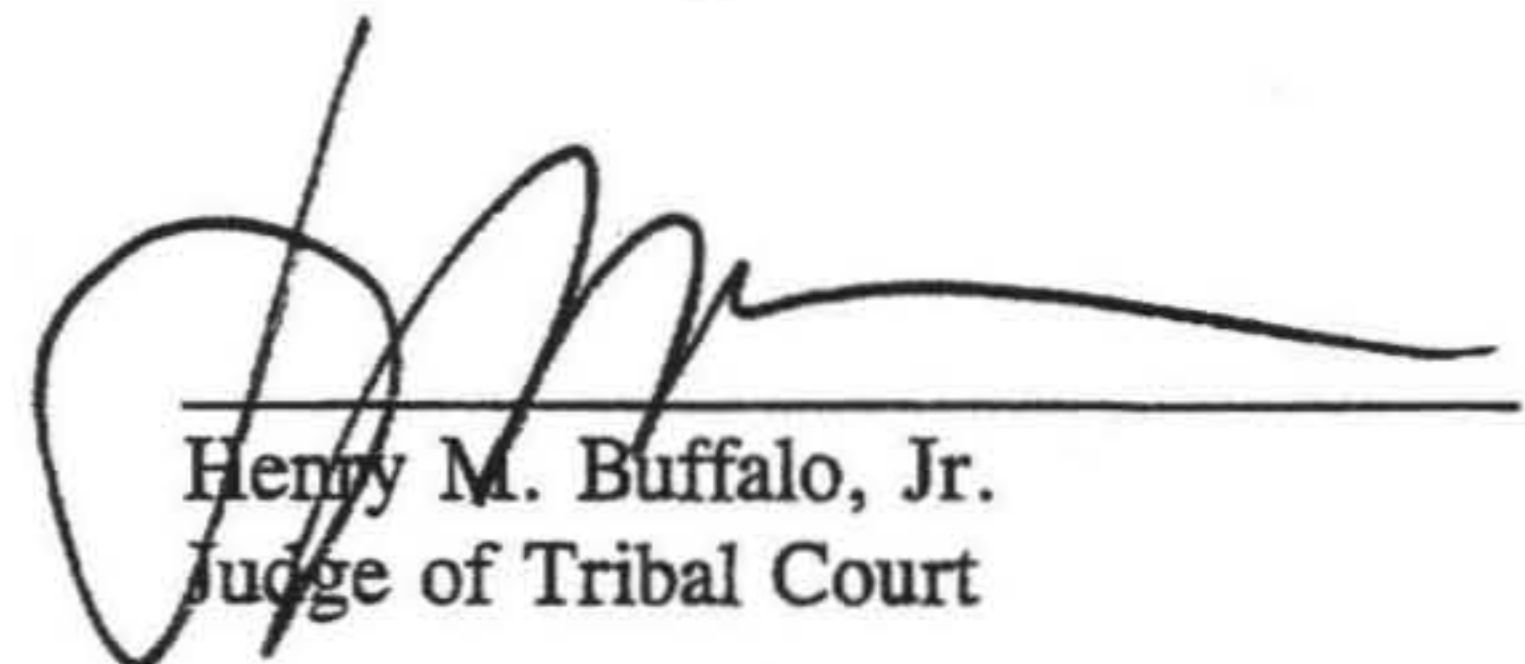
**IT IS HEREBY ORDERED,**

1. That the Appellant, Leonard Louis Prescotts' appeal of the revocation of his Temporary Employment Authorization is **GRANTED**;

2. That the Respondent, Shakopee Mdewakanton Sioux (Dakota) Gaming Commissions' request to affirm the revocation of Leonard Louis Prescotts' Temporary Employment Authority is **DENIED**;

3. That the matter is remanded to the Shakopee Mdewakanton Sioux (Dakota) Gaming Commission and that Chairperson Crooks - Bathel and Commissioner Campbell are hereby recused from hearing any further matter relating to the Prescott license proceeding.

BY THE COURT



Henry M. Buffalo, Jr.  
Judge of Tribal Court