



PENNSYLVANIA GAMING CONTROL BOARD
HARRISBURG, PENNSYLVANIA
17106-9060

June 19, 2008

Honorable Jane Earll
Majority Chairman
Senate Community, Economic
& Recreational Development Committee
177 Main Capitol Building
Harrisburg, PA 17120

Honorable Harold James
Majority Chairman
House Gaming Oversight Committee
317 Irvis Office Building
Harrisburg, PA 17120

Honorable Gerald LaValle
Minority Chairman
Senate Community, Economic
& Recreational Development Committee
458 Main Capitol Building
Harrisburg, PA 17120

Honorable Paul I. Clymer
Minority Chairman
House Gaming Oversight Committee
216 Ryan Office Building
Harrisburg, PA 17120

Honorable Jay Costa
Gaming Task Force
15 East Wing
Harrisburg, PA 17120

Honorable Mike Vereb
Gaming Task Force
160A East Wing
Harrisburg, PA 17120

Dear Senators Earll, LaValle and Costa and Representatives James, Clymer and Vereb:

The Gaming Control Board has recently received inquiries concerning the process utilized by the Board and its staff to fulfill the Board's licensing role as set forth in the Gaming Act. Since the gaming industry is unique and new to the Commonwealth, those processes are not well-understood outside of this agency. Therefore, in an effort to provide background on the process and the reasons for it, I am forwarding to you a memo describing the licensing process and the basis upon which it was built.

Sincerely,

R. Douglas Sherman,
Acting Chief Counsel

Subject: Slot Machine
Licensing Hearing Process

Executive Summary

The licensing process of the PGCB has been developed in a deliberate and methodical fashion to comply with mandates of law, to be applied uniformly to all applicants, and to promote the purposes of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §§1101 et seq. The process, which includes the preparation of a Suitability Report is undertaken to assure the appropriate presentation of facts based upon substantiated information and evidence, the consistent treatment of all applicants, and the formulation of an evidentiary document in a manner which is consistent with Pennsylvania administrative law and constitutional due process principles.

The following is an explanation of the process as it has been developed to fulfill the mandates of the Gaming Act and in accordance with existing, well-established law.

The PGCB Licensing Process

Long before the Fall 2006 licensing decisions, the Gaming Control Board's staff began developing a process for conducting licensing hearings and awarding the licenses authorized under the Gaming Act. The Gaming Act does not establish a specific licensing process but rather simply establishes that the Gaming Control Board shall issue the licenses judged against a number of eligibility and suitability criteria. Therefore, the process of licensing began with researching and applying Pennsylvania administrative law, other relevant State statutes, concepts of due process as embodied in the Pennsylvania and United States Constitutions, and case law, all with the goal of developing a system which meets these requisites ingrained in our legal system while remaining true to the goal of licensing appropriate applicants.

The starting point in the process demands recognition of the ending point: in the competitive licensing situation facing the PGCB at the end of the hearing process, the Board was required to issue Adjudications and Orders which granted licenses to some applicants and denied licenses to others. Moreover, the Gaming Act specifically provides a right of appeal directly to the Pennsylvania Supreme Court to consider appeals of any final order, determination or decision of the Board involving the approval, issuance, denial or conditioning of a slot machine license, and provided a standard of review for that Court to exercise: the Court shall affirm the Board's final order unless it shall find the Board committed an error of law or that the order or determination was arbitrary and there was a capricious disregard of the evidence. 4 Pa.C.S. §1204. Thus, the Adjudications and Orders to be issued by the Board had to follow a process and be based

upon an evidentiary record which would survive any appeals by disappointed applicants in order to properly implement gaming in the Commonwealth.

1. Adjudications and Orders

Under established law, an adjudication is “any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.” 2 Pa.C.S. §101; 58 Pa.Code § 491a.2. An Order by the Board that leaves applicants or licensees under the Gaming Act with no other forum in which to assert their personal or property rights, privileges or immunities constitutes an adjudication and is a “final order” under state law. See e.g. *Shaulis v. Pennsylvania State Ethics Comm’n*, 739 A.2d 1091 (Pa.Cmwlt. 1999), *appeal granted in part, affirmed* 833 A.2d 123 (Pa. 2003), *Turner v. Pennsylvania Pub. Util. Comm’n*, 683 A.2d 942 (Pa.Cmwlt. 1996), *Cook v. Pennsylvania Dept. of Agric.*, 646 A.2d 598 (1994), and *Allegheny Ludlum Steel v. Pennsylvania Pub. Util. Comm’n*, 549 A.2d 1218, 1221 (Pa.1983).

The Supreme Court has stated that since an adjudication cannot be in accordance with law if it is not decided on the basis of law and facts properly adduced, the review of an agency adjudication for capricious disregard of material, competent evidence is an appropriate component of appellate consideration. *Wintermyer v. WCAB*, 571 Pa. 189, 812 A.2d 478 (2002). Thus, to satisfy due process requirements, “administrative decisions of an adjudicatory nature must be based exclusively on evidence contained in the formal record which has been made known to the parties and which they have had an opportunity to refute.” *Mercy Regional Health Sys. v. Dep’t of Health*, 645 A.2d 924, 928 (Pa.Cmwlt. 1994), *cited in Turner*, 683 A.2d at 946 (Pa.Cmwlt. 1996). The Board is required to set forth its findings in an adjudication, and that adjudication must include all findings necessary to resolve the issues raised by the evidence and which are relevant to a decision. 2 Pa.C.S. 507. See *Green Township Bd. of Supervisors v. Pennsylvania Pub. Util. Comm’n*, 642 A.2d 541 (Pa.Cmwlt. 1994).

The Board’s Order must contain findings of fact and conclusions of law supported by credible, legally competent and substantial evidence. 2 Pa.C.S. §§507 and 704. “Substantial evidence should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision.” Substantial evidence is “more than a mere scintilla and must do more than create a suspicion of the existence of a fact to be established.” *A.P. Weaver v. Sanitary Water Bd.*, 284 A.2d 515, 517 (Pa.Cmwlt. 1971). Thus, within this context, Pennsylvania law requires the Board’s decisions be based upon findings of fact contained in the evidentiary record, not upon rumor or suspicion.

Administrative Agencies are not bound by the technical rules of evidence in conducting any hearing or investigation (*see* 2 Pa.C.S. §505); however “within the administrative forum there has not been a complete abandonment of all the rules of evidence.” *Gibson*

v. Workers' Compensation Appeal Board, 861 A.2d 938 (Pa. 2004). Certain evidentiary rules are more than technical and are fundamental rules of law that “ought to be followed by agencies when facts crucial to the issue are sought to be placed on the record and an objection is made thereto.” *Id.* Our Supreme Court has identified a number of rules of evidence that are fundamental including the hearsay rule, the personal knowledge rule, and rules regarding expert and lay-witness testimony.

a. Hearsay

Hearsay under the Pennsylvania Rules of Evidence is defined as a statement, which is an oral or written assertion or nonverbal conduct of a person if intended by the person as an assertion, other than one made by the person making the statement, while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Pa.R.E. 801. Hearsay evidence, properly objected to, is **not** competent evidence to support a finding in an administrative hearing. Furthermore, hearsay evidence that is admitted without objection may support a finding only if corroborated by competent evidence in the record. *See Burks v. Department of Public Welfare*, 408 A.2d 912 (Pa.Cmwlth. 1979). The rule was designed to ensure that when evidence is presented that cuts to the heart of a case, a party has a reasonable opportunity to examine or cross-examine the source of information. *See Smith*, 333 A.2d at 805; *See also* 2 Pa.C.S. 505; *State Board of Medical Education v. Contakos*, 346 A.2d 850 (Pa.Cmwlth. 1975).

b. Personal Knowledge

First hand personal knowledge is another non-technical, fundamental rule of law that administrative agencies are bound to follow. *See Gibson*, 861 A.2d 947 (Pa. 2004). According to the Pennsylvania Rules of Evidence, “a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not consist of the witness’ own testimony.” Pa.R.E. 602.

c. Lay and Expert Witness Testimony

Those who provide testimony are typically categorized as either lay or expert witnesses. Lay witness testimony “in the form of opinion or inference is limited to those opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge.” Pa.R.E. 701. Testimony by experts however, is necessary “if scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.” Pa.R.E. 702. The rules regarding lay and expert witness testimony have also been viewed by our Court as fundamental rules of law applicable to administrative agencies. *See Gibson*, 861 A.2d 947 (Pa. 2004).

In conclusion, the desired flexibility in administrative procedure does not justify an order without substantial evidence to support it. An order cannot be based upon hearsay, rumor, speculation or statements made by those without personal or specialized knowledge. An order based on invalid or inadequate findings would violate due process rights and would not withstand judicial review under the capricious disregard standard.

2. The Investigative Process

With the goal of formulating a legally sufficient Adjudication and Order in mind, PGCB staff undertook the task of investigating applicants and reporting the results of the investigations to the Board. The investigation is multi-faceted with the Bureau of Licensing playing an instrumental role in obtaining application documents, the Bureau of Investigations and Enforcement conducting investigations of the applicants, the financial investigatory unit reviewing financial viability and funding matters, and the Offices of Diversity and Compulsive Gambling conducting reviews of the applicants' proposed diversity and compulsive gaming plans..

Toward the end of the investigative process, prehearing conferences are held with each applicant and are attended by the applicant and their counsel as well as by PGCB staff from all of the relevant bureaus. The purpose of the conference in each case is to review any and all outstanding items. The conferences typically involve representatives from each bureau discussing the status of the bureau's requests for information so that the applicant is on notice of what remaining information is needed, addressing any discrepancies in information obtained, reviewing any remaining steps that need to be taken prior to the bureau issuing its final report. During this conference, applicants are placed on notice of any issues which may affect licensure. *See* 4 Pa. Code §491a.9.

Following the prehearing conference and completion of the investigations, reports are prepared by each bureau and office and forwarded for inclusion in the overall Suitability Report. The Bureau of Investigations and Enforcements' report is referred to as the "Report of Investigation." The nature of the BIE Report of Investigation and the Suitability Report process is foreign to most and therefore an understanding of what these reports are, as well as what they are not, is necessary to put the reports into factual and legal context.

The Suitability Report is nothing more, nor nothing less, than a cumulative overview of the multifaceted investigation of an application for licensure. The Report contains sections prepared by various Bureaus and entities of the Board including the Bureau of Licensing (BOL), and the Bureau of Investigations and Enforcement (BIE). Other individuals within the Board's staff also have significant input into the preparation of the Report including the Directors of Diversity and Compulsive Gambling.

The purpose of the Suitability Report is to address the various eligibility and suitability factors applicable to a license applicant including, *inter alia*, location; distance from other facilities; licensure by other jurisdictions; numbers of proposed machines; projected revenues and financial fitness; character information; civil judgments; owners and key

employees; political contributions; payment of fees and bonds; as well as many other items. The Suitability Report provides an overview of the information obtained through the various investigations and analysis bearing on these eligibility and suitability criteria.

a. BOL receipt of application

The preparation of the Suitability Report follows an extensive review of the application when first received by the Bureau of Licensing (BOL). BOL receives and reviews all applications for completeness. If there are issues of incompleteness, BOL works with the applicants to resolve any deficiencies. Should any legal issues arise during an application review (for example, whether the Act or regulations require additional individuals to be licensed in support of a slot machine license application), BOL can request legal advice from the Office of Chief Counsel ("OCC"). Once all deficiencies and legal issues relating to the application are resolved to the satisfaction of BOL, the entire application package is forwarded to BIE which, along with the Office of Enforcement Counsel (OEC) acting as BIE's counsel, conducts an investigation. *See* 4 Pa. Code Ch. 423a.

b. BIE investigation and Report of Investigation

The BIE investigative process culminates in the presentation of a Report of Investigation ("ROI") which is provided to a counsel within the Office of Enforcement Counsel for review and revision to assure that grammar and spelling are appropriate, that all relevant questions are answered, that internal inconsistencies are not present, that all pertinent issues have been addressed, and that an overall consistency of treatment of issues is reflected among the various applicant reports which is especially important in a competitive licensing situation. Further, OEC counsel reviews the Report of Investigation to assure that the information contained within each report is appropriate for presentation to the Board, i.e. that the information is verifiable and has elements of reliability which the Board can use to render an adjudication.

Upon completion by BIE of its investigation and the preparation of the Report of Investigation, the BIE Report of Investigation is forwarded to the BOL for review and inclusion in the Suitability Report as appropriate.

c. Drafting and Preparation of Suitability Report

Once the submissions and information gathered from all investigations by reviewing sources are compiled, the drafting of the Suitability Report is assigned to an OCC attorney who is identified as a licensing attorney who works with BOL. At that point, the attorneys assigned to BOL review all submissions which include the ROI and reports and application materials and then draft the Suitability Report for submission to the Board based upon those materials. As stated, the Suitability Report is a compilation of information about each applicant including biographical information, financial information, regulatory history, criminal history, litigation history and the like.

In drafting the Suitability Report, the attorneys are responsible for establishing the veracity of any facts included in the Suitability Report and only include facts which are or can be verified. This is a cooperative and corroborative effort between counsel for BOL and OEC. Because the document is used and relied upon by the Board in making licensing decisions, no statements which are based upon hearsay, rumor and innuendo and which have no supporting factual basis are included in the Suitability Report. Once a Suitability Report is sufficiently completed by the attorney preparing it, a second attorney is assigned to "fact-check" the Suitability Report. A fact-check consists of simultaneously reviewing the Suitability Report, Application, ROI and supporting documentation, and any other relevant information so that all facts in the Suitability Report can be verified. Following the fact-check, the Suitability Report is again proofread to ensure correctness.

After the fact-check and proofreading process, the Suitability Report is disclosed to the applicant which has an opportunity to comment on the report and identify information which it contends to be inaccurate, omitted or not a fair portrayal of a matter. If applicant's counsel and PGCB staff counsel cannot resolve any issues relating to the Suitability Report, the Suitability Report – without the requested change - goes before the Board and the applicant is provided an opportunity to address the Board on the issue in question.

The Suitability Report is provided to the applicant one to three days prior to its submission to the Board. The Suitability Report has never been provided to an applicant weeks before being given to the Board. While an applicant may learn of issues through the pre-hearing conference discussed above, or during BIE interviews or statements and the attendant ongoing dialogue aimed at resolving issues, to state that some applicants have been treated differently either during the prehearing conference process or in terms of receipt of the Suitability Report simply is not true.

The presentation of the Suitability Report to the applicant prior to submission to the Board serves several purposes. First, it provides notice of the issues upon which the applicant will have to prove to the Board at the hearing. Notice is a fundamental component of due process which does not favor a presentation by ambush. Second, it permits the applicant to bring to staff attention any perceived factual errors in the report prior to submission to the Board. Third, it provides focus to the issues which need to be addressed at the hearing. Finally, it permits stipulations as to evidence to be presented where facts are not in dispute.

Discussions with staff from other gaming jurisdictions illustrates that this process is very common. Other jurisdictions either provide the report to the applicant prior to the licensing hearing or have an oral discussion with the applicant in which all outstanding matters and issues are discussed in order to obtain clarification, define issues for hearing and attempt resolution of items which are in controversy.

In sum, the preparation of the Suitability Report is undertaken in the same general fashion for all such slot machine license reports with the goals of: 1) the appropriate

presentation of facts based upon substantiated information and evidence; 2) the consistency of treatment of all applicants; and 3) maintaining a high quality work product for presentation in a manner that is consistent with Pennsylvania administrative law and Constitutional due process principles.

Formulated pursuant to these goals and rules of law, the Suitability Report permits the Board to base its decisions upon information in the evidentiary record which must contain information that is reliable and capable of being relied upon by the Board in exercising its quasi-judicial responsibilities. The Board cannot as a matter of law base its decisions on information that is comprised of rumor, hearsay, innuendo or speculation - because those forms of information cannot be substantiated. This is simply a matter of fundamental fairness and due process of law.

Based upon this precept, it has been the practice of the PGCB staff to assure that the record provided to the Board for its consideration is appropriate under law, and to assure that the parties involved in the process of creating the Suitability Report abide by this practice. There is no, and has been no practice of removing relevant and verified or substantiated information from the Board's review. To the contrary, all such information has been provided for the Board's review and consideration.

3. Licensing Hearings

The presentation of facts to the Board upon which it can legally rely is critical to its ability to draft an adjudication which will withstand appeal and, as we discuss above, is the ending point and goal of the licensing process. It is only by the implementation of these practices assuring the highest degree of quality of information being provided to the Board for its consideration in awarding licenses that the Board's decisions have each been upheld on appeal without exception. It is worthy to note that not one appeal of the Board's award of licenses raised as an issue for reversal the Board's process of investigating and preparation of the suitability reports. Moreover, a number of counsel for the non-winning applicants have stated that while disagreeing with the Board's decisions, they could not find any fault with the process employed.

The right to a fair and impartial hearing, which "is a cornerstone of our notion of due process" guaranteed by Administrative Agency Law and the Constitution of the United States, plainly was provided to all applicants in the licensing process developed and implemented by the PGCB. *See generally* 4 Pa. Code §441a.7 (licensing hearing process).

4. The Board's Licensing Decisions

Finally, the culmination of the investigatory and hearing process resulted in the Board's Adjudications and Orders which awarded some licenses and denied others. Thorough both in terms of factual support and legal analysis under the Gaming Act, the adjudications of the Board relied upon an extensive evidentiary record built upon a foundation of "substantial evidence" which was made possible only as a result of the

adherence to the strict principles of due process and administrative law discussed above. As noted, each Category 2 licensing decision was subject to at least one appeal by unsuccessful license suitors. Among the issues raised on appeal was the sufficiency of the evidence relied upon by the Board in rendering its decisions – demonstrating that the Board was correct in devising a process which would specifically safeguard against decisions erroneously made upon information not properly in the record, and was developed soundly – as all appeals were rejected and each Board decision upheld. See *Pocono Manor Investors v. PGCB*, 592 Pa. 625, 927 A.2d 209 (7/12/2007); *Riverwalk Casino v. PGCB*, 592 Pa. 505, 926 A.2d 926 (7/17/2007); *Station Square Gaming v. PGCB*, 592 Pa. 664, 927 A.2d 232 (7/18/2007).