

MISSISSIPPI SUPREME COURT

DOCKET NO. 2007-SA-02063

FLORIDA EASH

Respondent/Appellant

v.

IMPERIAL PALACE OF MISSISSIPPI

Petitioner/Appellee

ON APPEAL FROM A FINAL JUDGMENT OF
THE CIRCUIT COURT OF THE SECOND JUDICIAL DISTRICT
OF HARRISON COUNTY, MISSISSIPPI
IN CAUSE NO. A2402-07-62

BRIEF OF RESPONDENT/APPELLANT,
FLORIDA EASH

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ORAL ARGUMENT REQUESTED

1. CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Florida Eash
Respondent/Appellant
2. Paul M. Newton, Jr
Newton and Hoff, L.L.P.
Attorneys for Respondent/Appellant, Florida Eash
3. Jonathan B. Fairbank
Attorney for Respondent/Appellant, Florida Eash
4. Imperial Palace of Mississippi, LLC
Petitioner/Appellee
5. International Game Technology
Liable to indemnify appellee Imperial Palace for any Judgment in excess of \$8.000
6. Scott E. Andress
Tara P. Ellis
H. Rodger Wilder
Balch & Bingham, LLP
Purported attorneys for Petitioner/Appellee Imperial Palace of Mississippi;
Actual attorneys for undisclosed party-in-interest International Game Technology
7. Britt R. Singletary
Attorney for Petitioner/Appellee Imperial Palace of Mississippi
8. Mississippi Gaming Commission
Interested Administrative Agency
9. Larry K. Gregory
Executive Director, Mississippi Gaming Commission

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3. STATEMENT OF ISSUES

The issue before this Court is whether the Final Order of the Mississippi Gaming Commission [hereafter the "MGC" or the "Commission"], granting appellant Florida Eash a \$1,000,000 jackpot, should be upheld by this Court. This Court reviews the Circuit Court's Order reversing the MGC's Final Order *de novo*, and should defer to the MGC's Final Order if there is "any evidence" to support such order. Thus, the MGC's Final Order must be upheld unless the substantial rights of petitioner/appellee Imperial Palace were prejudiced under Miss. Code Ann. § 75-76-171 (3), after review under the "unsupported by any evidence" standard.

4. STATEMENT OF THE CASE

The parties agree that appellant Florida Eash, while playing a "Double Top Dollar" slot machine manufactured and programmed by International Game Technology [hereinafter "IGT"] at the casino of petitioner/appellee Imperial Palace of Mississippi, L.L.C [hereinafter "Imperial Palace"], won a jackpot. The parties further agree that the display on the top portion of the Double Top Dollar machine indicated that Ms. Eash's jackpot totaled \$1,000,000. However, appellee Imperial Palace refused to satisfy the indicated \$1,000,000 jackpot, contending that the provisions on the machine's "belly glass" indicated that Ms. Eash's combination yielded only an \$8,000 jackpot. Ms. Eash rejected Imperial Palace's offer of \$8,000, and initiated a patron dispute for the indicated \$1,000,000 jackpot.

The MGC investigating agent determined, and the parties agree, that the Double Top Dollar machine functioned as programmed by IGT, *i.e., the machine did not malfunction*. However, IGT (an undisclosed party-in-interest who by contract must indemnify appellee Imperial Palace for any jackpot in excess of \$8,000) contends that it programmed its machine incorrectly, that its self-described "human error" caused the machine to indicate a jackpot of \$1,000,000, and that Ms. Eash is entitled only to the purportedly "correct" jackpot of \$8,000.

After due consideration, MGC Executive Director Larry K. Gregory issued a written decision that Ms. Eash was entitled to the \$1,000,000 jackpot indicated on the properly functioning machine. The Executive Director's decision, under Miss. Code Ann § 75-76-163 (1), is presumed correct.

Petitioner/appellee Imperial Palace then filed a Petition for Reconsideration with the MGC. Hearing Examiner Myers, citing prior hearing examiner opinions, reversed the MGC Executive Director's presumptively correct decision.

On Ms. Eash's ensuing appeal, the MGC stressed its responsibility to guard the integrity of the Mississippi gaming industry. The MGC further emphasized that our gaming industry's continued success mandates that the public's perception of fairness in the industry be safeguarded by the MGC. Accordingly, the MGC entered a "Final Order" setting aside the hearing examiner's decision, and reinstating Executive Director Gregory's determination in favor of patron Eash.

On appeal by Imperial Palace, the Circuit Court of Harrison County reversed the MGC, finding that "the final order of the Commission was not in accordance with law, was arbitrary and maybe capricious, and was made upon unlawful procedure, thereby prejudicing the substantial rights" of Imperial Palace. [Record Excerpts, Volume 1, at 59]. Appellant Eash requests that this Court, after *de novo* review of the Circuit Court's Order of reversal, reinstate the MGC's Final Order.

5. SUMMARY OF THE ARGUMENT

Unless petitioner/appellee Imperial Palace establishes both (i) that its substantial rights were prejudiced under one of the statutory prongs of Miss. Code Ann. § 75-76-171 (3), and (ii) that the Final Order is unsupported by any evidence in the record upon which the MGC could rule in favor of Eash, the MGC's Final Order *must* be affirmed and reinstated. Since this Court

reviews the Circuit Court's ruling *de novo*, the issue before this Court is not the propriety of the Circuit Court's Order, but whether the MGC's Final Order should be upheld under the two-step analysis.

6. ARGUMENT

I. LEGAL STANDARD

Miss. Code Ann. § 75-76-171 (3) mandates that this Court uphold and reinstate the MGC's Final Order unless

the substantial rights of the petitioner [*i.e.*, Imperial Palace] have been prejudiced because the Final Order is . . .

- (c) Made upon unlawful procedure;
- (d) Unsupported by any evidence; or
- (e) Arbitrary or capricious or otherwise not in accordance with law.

This Court reviews a lower Court's decision on an agency's action *de novo*. *OXY USA, Inc. v. Mississippi State Tax Commission*, 757 So.2d 271, 274 (Miss. 2000). Further, this Court reviews the agency's action under the same deferential standard as the lower court, *Town of Enterprise v. Mississippi Public Service Commission*, 782 So.2d 733, 735 (Miss. 2001), and must afford great deference to this MGC decision that "is consistent with its own published policies." *Mississippi Gaming Commission v. Board of Education*, 691 So.2d 452, 459 (Miss. 1997), *reh'g denied*, 695 So.2d 601 (Miss. 1997). Finally the MGC's Final Order should be upheld if it is supported under each prong of Miss. Code Ann. § 75-76-171 (3) by "any evidence." *Mississippi Gaming Commission v. Freeman*, 747 So.2d 231, 241 (Miss. 1999) (Commission's decision upheld if any evidence in support); *IGT v. Kelly*, 778 So.2d 773, 775-76 (Miss. 2001) (applying "any evidence" standard in determining whether decision appealed was, under Miss. Code Ann. § 75-76-171 (3) (e), arbitrary or capricious).

The MGC's "own published policies," as set forth in its Mission Statement, emphasize its

discretion in maintaining public confidence and trust; stating:

The mission of the Mississippi Gaming Commission (MGC) is to enforce the Gaming Control Act and Charitable Gaming Laws of the State of Mississippi. The MGC will establish and enforce regulations under the authority of those laws *in such a manner* that will ensure the integrity of the State of Mississippi and maintain the public confidence in both the charitable gaming and casino gaming industries

This MGC policy comports with the State of Mississippi's public policy to strictly regulate licensed gaming to ensure "public confidence and trust" in the industry, Miss. Code Ann. § 75-76-3 (2) (b), and with the MGC Executive Director's duty to administer the Gaming Control Act "for the protection of the public and in the public interest in accordance with the policy of this state." Miss. Code Ann. § 75-76-27 (1).

The MGC in the present case determined that successful patron Eash should be awarded the jackpot amount reflected on a machine which undisputedly functioned as programmed. The MGC's conclusion that the integrity of the State of Mississippi and the public's confidence in the casino gaming industry are best ensured by awarding the indicated jackpot was within its discretion, furthered its mission, and should be upheld by this Court.

II. STATUTORY ANALYSIS

A. No Substantial Prejudice to Petitioner/Appellee Imperial Palace

As the first part of the two-step analysis under Miss. Code Ann. § 75-76-171 (3), this Court must determine the effect of the MGC's Final Order on the *petitioner*. Significantly, *petitioner/appellee Imperial Palace* was not prejudiced in any manner by the MGC's Final Order because petitioner/appellee Imperial Palace is indemnified by IGT for any jackpot in excess of the conceded \$8,000 amount. Since petitioner Imperial Palace's is liable for \$8,000 (and only \$8,000) under all circumstances, the substantial rights of petitioner Imperial Palace cannot have been prejudiced by the MGC's Final Order, and such Final Order therefore should be reinstated

by this Court.¹

B. Review of Statutory Prongs Under "Any Evidence" Standard

If this Court determines (for whatever reason) that the MGC's Final Order somehow prejudiced *petitioner Imperial Palace*, this Court must then consider whether such Order prejudiced petitioner Imperial Palace's substantial rights under one of the five prongs of Miss. Code Ann. § 75-76-171 (3).² In making this determination, the Court should uphold such Order if, as to each prong of Miss. Code Ann. § 75-76-171 (3), "any evidence" exists upon which the MGC could have made such ruling. *Mississippi Gaming Commission v. Freeman*, 747 So.2d at 241 (Commission's decision upheld if **any** evidence in support); *IGT v. Kelly*, 778 So.2d at 775-76 (applying "any evidence" standard in determining whether decision appealed was, under Miss. Code Ann. § 75-76-171 (3) (e), arbitrary or capricious).

(1) No Unlawful Procedure

Notwithstanding the Circuit Court's ambiguous determination that the MGC's Final Order was "made upon unlawful procedure," *see* Miss. Code Ann. § 75-76-171 (3) (c), the MGC is statutorily empowered to review its appointed hearing examiner's decision "on such terms and conditions as it may deem just and proper to review the decision and recommendation." Miss. Code Ann. § 75-76-119 (2). All parties, including petitioner/appellee Imperial Palace, had legal representation before the MGC, the issues were fully briefed, and the MGC's procedures complied with Miss. Code Ann. § 75-76-119 (2) and other applicable statutes. At the very least,

¹ Petitioner Imperial Palace's counsel of record actually represent the interests of IGT. Opposing counsel **deliberately** omitted IGT--the entity facing all contested liability--from its Certificate to the Circuit Court of Interested Parties. Opposing counsels' omission of the only entity facing out-of-pocket costs due to the Final Order underscores their recognition that the MGC's Final Order could not prejudice petitioner Imperial Palace.

² For brevity, appellant Eash shall discuss only Miss. Code Ann. § 75-76-171 (3) (c), (d) & (e), which provisions are pertinent to the Circuit Court's Order. If appellee Imperial Palace asserts that Miss. Code Ann. § 75-76-171 (3) (a) or (b) are here relevant, appellant Eash shall discuss such provisions on response.

the record contains evidence upon which the MGC's its procedures could be found lawful, and the MGC's Final Order, under the "any evidence" standard, should be upheld.

(2) Not Arbitrary, Capricious or Not in Accordance with Law

Petitioner's assertion the MGC's Final Order must be reversed under Miss. Code Ann. § 75-76-171 (3) (e) as "arbitrary, capricious, and not in accordance with law" is without merit.

(a) The Final Order is Not Arbitrary or Capricious

This Court, in determining whether an administrative agency's action is "arbitrary" or "capricious," has adopted the following definitions:

"Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending on the will alone,-absolute in power, tyrannical, despotic, non-rational,-implying either a lack of understanding of or a disregard for the fundamental nature of things.

"Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles

Mississippi Gaming Commission v. Board of Education, 691 So.2d at 458-59 (Miss. 1997); accord, *Mississippi State Department of Health v. Southwest Mississippi Medical Center*, 580 So.2d 1238, 1240 (Miss. 1991). This Court has recognized that "arbitrary" and "capricious" are "open-ended and not susceptible of precise definition or mechanical application," 580 So.2d at 1240. Nonetheless, the underlying issue is not whether the agency's analysis is perfect, but whether *some* basis exists for the agency's determination. *Id.* at 1242; cf. *IGT v. Kelly*, 778 So.2d at 775-76 (applying "any evidence" standard in determining whether decision appealed was arbitrary or capricious).

The Mississippi Gaming Commission, in determining that Ms. Eash was entitled to the reflected jackpot amount, emphasized its careful review of the record, and its responsibility to

"ensure the integrity of the State of Mississippi and maintain the public confidence in . . . casino gaming industries." MGC Mission Statement, *supra* at 9.

Chairman Pe stressed the MGC's mission to the public, stating "The Commission has a broader responsibility in some cases, without ignoring the law or regulations, to ensure that reasonable fairness or a perception of fairness prevails." Mississippi Gaming Commission Minutes, March 15, 2007. [Record Excerpts, Document 65 at 572]. Commissioner Hairston similarly commented that "the Commission must continue to exercise a degree of diligence and guard the reputation of fairness in our gaming industry." [Record Excerpts, Document 65 at 571]. Finally, Commissioner Canon noted that "It is the responsibility of this Commission to maintain the public trust and integrity." [Record Excerpts, Document 65 at 571].

The Commissioners' seriousness in considering this patron dispute is memorialized by the record of the MGC's March 15, 2007 meeting in which its decision was orally rendered. For example, Commissioner Hairston stated:

We sincerely hope that both sides realize the amount of time and energy that the agency and commissioners all spent in reaching a resolution. This was not at all a flippant decision.

[Record Excerpts, Document 65 at 571].

Similarly, Commissioner Canon emphasized the Commission's careful review of the record and its responsibilities in patron disputes, noting that the Commission had

conducted an extensive review of the record and did not take this responsibility lightly. It is the responsibility of this Commission to maintain the public trust and integrity.

[Record Excerpts, Document 65 at 571].

In view of the Commissioners' statements, Imperial Palace cannot credibly contend that the MGC's thoughtful ruling was arbitrary or capricious under Miss. Code Ann. § 75-76-171 (3)

(e). Rather, the MGC's decision was supported under Miss. Code Ann. § 75-76-171 (3) (e) by evidence in the record, and should be given deference and reinstated by this Court. *See IGT v. Kelly*, 778 So.2d at 775-76 (applying "any evidence" standard in determining whether decision appealed was arbitrary or capricious).

(b) The Final Order is In Accordance with Law

Petitioner Imperial Palace's argument that the MGC was required to employ a contract analysis to reach its decision is unmeritorious for at least three reasons. First, the MGC's Final Order accords with the hearing examiner decisions cited by petitioner, due to the burden of proof imposed on Imperial Palace. Secondly, the MGC is not limited in its administrative process to determination of points of contract law, but may permissibly consider other matters. Finally, the MGC is not bound in perpetuity by its prior decisions or by prior hearing examiner decisions, particularly hearing examiner opinions which became MGC decisions due to lack of any appeal.

(i) Burden of Proof Before Hearing Examiner

Notwithstanding petitioner Imperial Palace's assertions before the Circuit Court, the MGC's Final Order comports with the hearing examiner decisions in *Minnefield v. Harrah's Casino, Vicksburg*, Mississippi Gaming Commission Hearing Examiner Decision, case number 95-PD (April 3, 1995), *Morrissey v. Beau Rivage, Biloxi*, Mississippi Gaming Commission Hearing Examiner Decision, case number 99-00319 (July 23, 1999), *Reeves v. Riverboat Corporation of Mississippi d/b/a Isle of Capri, Vicksburg*, Mississippi Gaming Commission Hearing Examiner Decision, case number 95-___ - D (November 2, 1995), and *Williams v. ITT Sheraton Casino Tunica*, Mississippi Gaming Commission Hearing Examiner Decision (June 16, 1996), due to the burden of proof imposed on the party seeking reconsideration.³

³ Although Imperial Palace in the hearings below also cited decisions from other jurisdictions, such decisions are not binding on either the MGC or this Court. *IGT v. Kelly*, 778 So.2d at 777 & 779.

Miss. Code Ann § 75-76-163 (1) sets forth the standard of review in an appeal of the Executive Director's decision to the hearing examiner, providing:

The party seeking reconsideration bears the burden of showing that the executive director's decision should be reversed or modified.

Unlike the present case, the Executive Director in *Minnefield*, *Morrissey*, *Reeves* and *Williams* rendered presumptively correct decisions in *favor* of the casino. The Hearing Examiner on appeal affirmed the Executive Director's decisions, agreeing either that the evidence supported the Executive Director's decision, *see Morrissey* at 5, *Minnefield* at 4, or that that the party seeking reconsideration did not demonstrate that the Executive Director's decision was incorrect, *see Reeves* at 11 & 12.

In the present case, the Executive Director's presumptively correct decision in favor of patron Eash was *reversed* by the Hearing Examiner. The record contains evidence upon which the MGC could conclude that petitioner Imperial Palace *did not satisfy* its burden of proving that the Executive Director's decision in favor of Ms. Eash should be reversed. This Court must treat the MGC's Final Order with deference.

(ii) Administrative Process Not Limited to
Contract Law Determination

This Court recognizes that the administrative process of the MGC is "not limited to the common law theories of meeting of the minds or other points of contract law." *IGT v. Kelly*, 778 So.2d at 777. Instead, the MGC is statutorily empowered to review hearing examiner's decision "on such terms and conditions as it may deem just and proper to review the decision and recommendation." Miss. Code Ann. § 75-76-119 (2). As discussed *supra* at 8 & 9, the MGC's decision is entitled to great deference, *Mississippi Gaming Commission v. Board of Education*, 691 So.2d at 459, and is reviewed under the "any evidence" standard. *Mississippi Gaming Commission v. Freeman*, 747 So.2d at 241; *IGT v. Kelly*, 778 So.2d at 775-76.

Our legislature through its statutes, and this Court through its decisions, clearly perceives that the appointed public servants serving on the MGC and other administrative agencies are frequently laypersons. As a practical matter, the MGC Commissioners would be unable to fulfill their mission to "ensure the integrity of the State of Mississippi and maintain the public confidence in . . . casino gaming industries," MGC Mission Statement, *supra* at 9, if their administrative process were limited to determination of legal issues. Thus, our legislature vested these Commissioners with discretion as to how best to accomplish its public mission. *See IGT v. Kelly*, 778 So.2d at 775-76 (MGC's administrative process not limited to points of contract law). The MGC's conclusion that the integrity of the State of Mississippi and the public's confidence in the casino gaming industry are best ensured by awarding the indicated jackpot was within its discretion, furthered its mission, and should be upheld by this Court.

(iii) Effect of Prior Decisions

Finally, petitioner Imperial Palace's argument that the MGC is bound (apparently in perpetuity) by its prior decisions and by prior decisions of the hearing examiner--including hearing examiner decisions which became MGC Final Orders due to lack of an appeal--is manifestly incorrect. The issue before this Court on review is not the propriety of the hearing examiner's decision in this or prior cases, but whether the MGC's Final Order herein is supported by "any evidence." The MGC, and based on the record, determined that the indicated jackpot of \$1,000,000 should be awarded to respondent Eash. The MGC's Final Order violates no statute or regulation and is within the authority and responsibility of the MGC.

Ironically, *IGT v. Kelly*, 778 So.2d 773 (Miss. 2001) involved both IGT (the undisclosed party herein), and counsel of record herein, Mr. Scott Andress. In *Kelly*, IGT's counsel including Mr. Andress argued that the MGC committed reversible error by following its own precedent.

Id. at 777-78. The *Kelly* Court upheld the MGC's reliance on prior decisions; nonetheless, opposing counsel's arguments in *Kelly* are *directly contrary* to the present assertions, and underscore the frivolous nature of such argument. The MGC, like this Court, obviously may reconsider the basis for its prior decisions, and as an administrative agency may conclude not to follow prior opinions of a hearing examiner, especially when such decisions became those of the MGC due to lack of any appeal.⁴

The MGC specifically rendered its Final Order based upon review of the record before the Hearing Examiner, and this Court must give judicial deference to the MGC's Final Order. The MGC's Final Order was "in accordance with law," Miss. Code Ann. § 75-76-171 (3) (e), and this Court under the "any evidence" standard must treat such Final Order with deference.

7. CONCLUSION


This Court has consistently emphasized the deference accorded an action of an administrative agency such as the MGC. The Circuit Court on appeal failed to defer to the MGC's determination as to how best to fulfill its Mission Statement "to enforce regulations under the authority of the gaming laws *in such a manner* that will *ensure the integrity of . . . and maintain the public confidence in* the casino gaming industries." The MGC's careful and conscientious determination that its mission was best served by awarding the reflected jackpot to Ms. Eash was within its discretion and should not be disturbed by this Court.

For the reasons herein set forth, respondent/appellant Florida Eash requests that this Court reverse the Circuit Court's Order in favor of petitioner/appellee Imperial Palace, and reinstate the MGC's Final Order awarding appellant Eash the \$1,000,000 jackpot to which the

⁴ The hearing examiner opinions cited by petitioner Imperial Palace are distinguishable from the present facts. See *supra* at 13 & 14.

MGC has recognized she is entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Paul M. Newton, Jr., Newton and Hoff, L.L.P., Attorneys at Law, one of the attorneys for Respondent/Appellant, Florida Eash, certify that I have this day filed this Brief of Respondent/Appellant with the Clerk of this Court, and have served a copy of this Brief of Respondent/Appellant by United States mail with postage prepaid on the following persons at the following address:

Judge Roger T. Clark
Circuit Court of Harrison County
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and

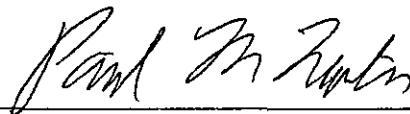
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This the ¹⁴14 day of April, 2008.



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