

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MISSISSIPPI GAMING COMMISSION

APPELLANT

v.

CAUSE NO. 2008-SA-02066

EDWARD SIMON

APPELLEE

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MISSISSIPPI GAMING COMMISSION'S APPEAL FROM  
FINAL DECISION OF THE TUNICA COUNTY CIRCUIT COURT FINDING  
COMMISSION'S DENIAL OF A WORK PERMIT TO EDWARD SIMON  
ARBITRARY AND CAPRICIOUS

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BRIEF OF APPELLANT

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ORAL ARGUMENT NOT REQUESTED

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MISSISSIPPI GAMING COMMISSION

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**CERTIFICATE OF INTERESTED PERSONS**

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 judge of this Court may evaluate possible disqualification or recusal.

1. Edward Simon, Appellee
2. Robert Stan Little, Counsel for Appellee
3. Mississippi Gaming Commission, Appellant
4. Mississippi Office of the Attorney General
5. Thomas Mueller, Special Assistant Attorney General, Counsel for Commission
6. Deanne Saltzman, Special Assistant Attorney General, Counsel for Commission
7. The Honorable Joan Myers, Hearing Examiner
8. The Honorable Albert B. Smith, III, Tunica County Circuit Court Judge

  
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### STATEMENT OF THE ISSUES

- I. WHETHER THE TUNICA COUNTY CIRCUIT COURT ERRED IN FINDING THAT THE MISSISSIPPI GAMING COMMISSION'S DENIAL OF EDWARD SIMON'S WORK PERMIT APPLICATION WAS ARBITRARY AND CAPRICIOUS.
- II. THE CIRCUIT COURT CORRECTLY HELD THAT MISS. CODE ANN. § 75-76-131(5) DOES NOT REQUIRE A FORMAL CONVICTION AND THAT COMMISSION OF A FELONY CAN BE SHOWN THROUGH ENTRY OF A GUILTY PLEA.

### STATEMENT REGARDING ORAL ARGUMENT

Appellant, Mississippi Gaming Commission, submits that the facts of this case are clear, and the issues on appeal are neither complex nor unique. Accordingly, Appellant does not believe oral argument is necessary.

## STATEMENT OF THE CASE

On March 25, 1998, Edward Simon [hereafter "Simon"] entered a plea of guilty in the Circuit Court of DeSoto County, Mississippi, to a felony charge of possession of marijuana more than one ounce but less than one kilogram. [Commission ROR Exhibits, pgs. 28-30]. At the time Simon entered his guilty plea, he was employed as box person for Sam's Town Casino in Robinsonville, Mississippi. Shortly thereafter, on March 28, 1998, Simon submitted an application for renewal of his gaming work permit. On that application, Simon disclosed that he was on non-adjudicated probation in DeSoto County, Mississippi, for the drug possession charge. As a result, Simon's application for a work permit was denied by the Executive Director for two reasons: (1) commission of a crime which is a felony in Mississippi; and (2) being in the constructive custody of law enforcement. [Commission ROR Exhibits pgs. 49-50]; *see* Miss. Code Ann. § 75-76-131(5).

Simon appealed the Executive Director's denial and a hearing was held before Hearing Examiner Larry Stroud. On June 15, 1998, the Hearing Examiner issued an opinion affirming the Executive Director's denial but citing only the constructive custody status as the basis for his decision.<sup>1</sup> [Commission ROR Exhibits pgs. 68-69]. On July 16, 1998, at its regular monthly meeting, the Commission declined review of the Hearing

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Although both commission of a felony and constructive custody grounds were alleged by the Executive Director for denial of Simon's work permit in 1998, the Hearing Examiner only addressed the constructive custody ground in his written decision.



Examiner's decision, thereby making the Hearing Examiner's decision the final decision of the Commission. Miss. Code Ann. § 75-76-131(6).

After Simon completed the terms of his non-adjudicated probation, an Order was entered by the Circuit Court of DeSoto County, Mississippi, terminating Simon's probationary period. [Commission ROR Exhibits pgs. 26-27 and 32-33]. In 1998, Simon submitted another application for a work permit and, for reasons unknown, the Commission unanimously approved the issuance of a work permit to Simon.<sup>2</sup> Miss. Code Ann. § 75-76-137(3). Simon's work permit was renewed in 2000 and again in 2003. Although Simon did not disclose information relating to his 1997 felony commission on his 2000 application and answered falsely to questions regarding having previously been denied a permit by the Commission [Commission ROR Exhibits, pgs. 45-47], Simon did disclose the felony charge on his 2003 application [Commission ROR Exhibits, pgs. 42-44].

On November 16, 2006, Simon again submitted an application to the Mississippi Gaming Commission seeking renewal of his gaming work permit. On that application, Simon disclosed his 1997 charge and non-adjudication for felony possession of marijuana. [Commission ROR Exhibits, pgs. 7-11]. On March 30, 2007, the Executive Director of the Commission denied Simon's work permit application on the ground that Simon had previously committed a felony offense. [Commission ROR Exhibits, pgs.4-5]. Simon

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Miss. Code Annotated § 75-76-137(3) provides that "[a] work permit shall not be issued to ... a person to whom the issuance or renewal of a work permit has been denied, except with the unanimous approval of the commission members."

appealed that denial and a hearing took place before Hearing Examiner Joan Myers. On July 31, 2007, the Hearing Examiner issued an opinion affirming the Executive Director's denial of Simon's work permit. [Commission ROR, pgs. 00008-000015]. In that decision, the Hearing Examiner ruled, in relevant part, as follows:

In the present case, Miss. Code Ann. § 75-76-131(5) prohibits the issuance of a gaming work permit to [Simon]. The issuances of a work permit to [Simon] in 1998, 2000, and 2003 were in contravention of Section 76-76-131(5) and hence were unauthorized acts. Without a doubt, the consequences of Section 75-76-131(5) are harsh in this case. Nevertheless, the hearing examiner is of the opinion that the Commission has no discretion in this matter. [Simon] committed a crime which is a felony in the State of Mississippi, and under the provisions of Miss. Code Ann. § 75-76-131(5), the Executive Director is precluded from issuing him a gaming work permit. Therefore, the decision of the Executive Director denying [Simon's] work permit was correct, and is hereby affirmed.

[Commission ROR, pgs. 00007-00008]. Thereafter, the full Commission, at its regularly monthly meeting on September 20, 2007, adopted the decision of the Hearing Examiner, making the Hearing Examiner's decision the final decision of the Commission. [Commission ROR, pgs. 000024-000025].

On October 8, 2007, Simon filed a Petition for Judicial Review of the Commission's decision in the Circuit Court of Tunica County, Mississippi. [Circuit Record, pgs. 004-008]. After briefs were submitted by both parties [Circuit Record, pgs. 25-39 and Brief of Appellee (bounded separately)], oral arguments were heard before Judge Albert Smith on October 20, 2008. [Circuit Transcript]. Shortly thereafter, the Tunica County Circuit Court issued an Order reversing the decision of the Commission, finding the decision of the

Commission to be arbitrary and capricious. [Circuit Record, pgs. 053-055]. It is from this Order, the Commission now appeals.

## SUMMARY OF THE ARGUMENT

The Commission respectfully requests this Court reverse the Order entered by the Tunica County Circuit Court finding the Commission's decision to deny the work permit of Edward Simon to be arbitrary and capricious. The specific statutory section at issue is Mississippi Code Annotated 75-76-131(5), which provides that, "the executive director *shall refuse to issue a work permit* if the applicant has committed, attempted or conspired to commit a crime which is a felony in this state or an offense in another state or jurisdiction which would be a felony if committed in this state." (emphasis added).

In September of 2007, the Commission denied the work permit application of Edward Simon based upon Simon's commission of a felony offense in 1997. Although the Circuit Court did not take issue with the applicable statutory or case law provided as the basis for the Commission's decision, it nonetheless found the Commission's denial decision to be arbitrary and capricious because the Commission had previously granted Simon a work permit after learning about the felony offense. While the Commission admits that it erred in issuing Simon work permits after he entered a plea of guilty to a felony offense, the Commission nonetheless cannot perpetuate that wrongdoing by acting in contravention to statutory authority.

The denial is not arbitrary or capricious. The final decision of the Commission violated no constitutional provisions, was supported by "any" evidence, and was lawfully

made pursuant to statutory authority. Thus, the decision of the Tunica County Circuit Court must be reversed.

## ARGUMENT

### STANDARD OF REVIEW

Pursuant to Mississippi Code Annotated § 75-76-127, the exclusive method for reviewing the actions of the Mississippi Gaming Commission is through Circuit and Supreme Court review as provided by the Mississippi Gaming Control Act. See *Pickle v. IGT*, 830 So.2d 1214, 1219 (¶ 1)(Miss. 2002). A strict standard governs judicial review of administrative agency decisions:

Our constitution does not permit the judiciary of this state to retry *de novo* matters on appeal from administrative agencies. Our courts are not permitted to make administrative decisions and perform the functions of an administrative agency. Administrative agencies must perform the functions required for them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal to hear the appeal. The appeal is a limited one ... since the courts cannot enter the field of administrative agency.

*American Legion Post #134 v. Mississippi Gaming Comm'n*, 798 So.2d 445, 449 (¶ 24)(Miss. 2001)(quoting *Cook v. Mardi Gras Casino Corp.*, 697 So.2d 378, 380 (Miss. 1997)). The standard of review for such appeals is determined by the Gaming Control Act. *Mississippi Gaming Comm'n v. Freeman*, 747 So.2d 231, 240 (¶ 40)(Miss. 1999). This standard of review is outlined as follows:

The reviewing court may affirm the decision and order of the commission, or it may remand the case for further proceedings or reverse the decision if the substantial rights of the petitioner have been prejudiced because the decision is:

- (a) In violation of constitutional provisions;
- (b) In excess of the statutory authority or jurisdiction of the commission;
- (c) Made upon unlawful procedure;
- (d) Unsupported by *any evidence*; or
- (e) Arbitrary or capricious or otherwise not in accordance with law.

**Miss. Code Ann. § 75-76-125(3)(a)-(e)**(emphasis added). “While administrative agency decisions are afforded great deference, that deference is enhanced when that administrative agency is the Mississippi Gaming Commission.” *Mississippi Gaming Comm’n v. Pennebaker*, 824 So.2d 552, 555-556 (¶ 10)(Miss. 2002). “The Gaming Commission decision will not be disturbed if it is supported by ‘any’ evidence.” *Pennebaker*, 824 So.2d at 556; see also *Freeman*, 747 So.2d at 239 (¶ 42)(emphasis added). “In Nevada, which employs the identical statutory standard of review, the Nevada Supreme Court held that a ‘reviewing court should affirm a decision of the Board which is supported by *any evidence whatsoever*, even if that evidence is less than that which a reasonable mind might accept as adequate to support a conclusion.’” *Pickle*, 830 So.2d at 1220 (¶ 12)(citing *Singel v. IGT*, 116 Nev. 565, 2 P.3d 258, 261 (2000)(emphasis in original)(citations omitted).

In Mississippi, our Supreme Court has repeatedly stated that it “affords great deference to an administrative agency in interpreting its own regulations.” *Mississippi Gaming Comm’n v Board of Educ.*, 691 So.2d 452, 455 (Miss. 1997)(citing *Casino Magic Corp. v. Ladner*, 666 So. 2d 452, 463 (Miss. 1985); *Mississippi Dep’t of Env’tl. Quality v. Weems*, 653 So. 2d 266, 273 (Miss. 1995). As such, “[w]hen a reviewing agency interprets a statute it is responsible for administering, [the reviewing court] must defer to the agency’s

interpretation so long as the interpretation is reasonable.” *Parkerson v. Smith*, 817 So.2d 529, 534 (Miss. 2002)(citing *Chevron USA Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843; 104 S.Ct. 2778, 2782; 81 L.Ed.2d 694 (1984)).

**I. WHETHER THE TUNICA COUNTY CIRCUIT COURT ERRED IN FINDING THAT THE MISSISSIPPI GAMING COMMISSION’S DENIAL OF EDWARD SIMON’S WORK PERMIT APPLICATION WAS ARBITRARY AND CAPRICIOUS.**

In its Order filed on November 6, 2008, the Tunica County Circuit Court found as follows:

**As for [Simon’s] argument that the Commission overstepped its statutory authority by denying his work permit in the absence of a felony conviction, the Court finds this argument to be without merit. Under the prevailing law, it is the opinion of this Court that the Commission has the authority to deny a person a gaming badge if they commit a felony crime. There is no requirement in the statute that a person have an actual conviction. For the same reason, there is also no merit to the argument that the Commission somehow violated the terms of the DeSoto County Circuit Court order which dismissed the charges against Appellant.**

[Circuit Record, pg. 054 (§ 3)](emphasis added). Despite ruling that the Commission had **not** violated statutory authority and applicable law, the Circuit Court nonetheless found the actions of the Commission to be arbitrary and capricious and in support thereof held, in relevant part, as follows:

[Simon’s] argument that does have merit is the contention that the Commission’s action was arbitrary and capricious. When the Commission became aware of the Appellant’s charge in 1997, it made the decision to suspend [Simon’s] work permit until such time as he was released from probation. Once [Simon] had successfully completed his probation and had



the charges against him dismissed, the Commission again made the decision to reinstate his work permit and again renew it in 2002.

This is not a case where the Commission is claiming that it only recently discovered [Simon's] run in with the law; the Commission had all of the pertinent facts before it in 1997 when it chose to take the its (sic) disciplinary action. It had the opportunity then to deny [Simon's] work permit unequivocally. It chose not to. Once [Simon] finished his probationary period and reapplied for his work permit, the Commission again had the discretion to deny his request. It chose not to. In 2002 when [Simon's] work permit came up for renewal, the Commission again had the discretion to deny his request. It chose not to.

While the Commission would have been justified in denying [Simon] a work permit in 1997 when he first entered a plea of guilty to a felony crime, to wait some ten years later to do so is arbitrary and capricious.

[Circuit Record, pgs. 054-055].<sup>3</sup> Although the Commission admits that it was aware of Simon's felony offense in 1997 and that it erred by issuing renewal permits after that date, the action of the Commission in correcting its mistake is neither arbitrary or capricious.<sup>4</sup>

"An administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone." *American Legion Post #134*, 798 So.2d at 450 (¶26)(citations omitted). Similarly, "an action is capricious if done without

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For clarification purposes, although 2002 is referenced as a renewal year in the Court's Order, Simon's work permit was actually renewed in 2000 and 2003.

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The Commission wishes to respectfully point out that several Mississippi cases have been handed down since 1998 that have clarified the law and provided the Commission with additional guidance in how to handle issues relating to a defendant's entry of a guilty plea to felonious conduct despite the charge being non-adjudicated and expunged. See *Board on Law Enforcement Officer Standards and Training v. Rushing*, 752 So. 2d 1085, 1091 (Miss. Ct. App. 1999), cert. denied (2000). See also *Mississippi Bar v. Shelton*, 890 So. 2d 827 (Miss. 2003); *Mississippi Bar v. Baldwin*, 752 So. 2d 996 (Miss. 1999).

reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles.” *Id.* The Mississippi Supreme Court has further held that, “‘fairly debatable’ is the antithesis of arbitrary and capricious. If a decision is one which could be considered ‘fairly debatable’, then it could not be considered arbitrary or capricious.” *Pennebaker*, 824 So.2d at 556 (¶ 12)(citing *City of Biloxi v. Hilbert*, 597 So. 2d 1276, 1280-1281 (Miss. 1992)). In other words, an action “is arbitrary or capricious if the agency 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.” *Sierra Club v. Miss. Environmental Quality Permit Board*, 943 So.2d 673, 678 (¶ 11)(Miss. 2006)(citations omitted).

Again, the relevant portion of the Gaming Control Act at issue in this case is Mississippi Code Annotated 75-76-131(5) which provides as follows:

The executive director **shall refuse to issue a work permit** if the applicant has committed, attempted or conspired to commit a crime which is a felony in this state or an offense in another state or jurisdiction which would be a felony if committed in this state.

(Emphasis added). In *Conway v. Mississippi State Board of Health*, 173 So. 2d 412, 415 (Miss. 1965), the Mississippi Supreme Court stated:

No principle is more firmly established, or rests on more secure foundations, than the rule which declares when a law is plain and unambiguous, whether it be expressed in general or limited terms, that the Legislature shall be deemed to have intended to mean what they have plainly expressed, and, consequently, no room is left for construction in the application of such a law.

See also *City of Natchez, Mississippi v. Sullivan*, 612 So. 2d 1087, 1089 (Miss. 1992). As stated by Mississippi Supreme Court in *Miss. Ethics Comm'n v. Graham*, 957 So.2d 997, 1001-1002 (¶ 12)(Miss. 2007):

When the language used by the legislature is *plain and unambiguous* ... and where the statute conveys a *clear and definite meaning* ... the Court will have no occasion to resort to the rules of statutory interpretation. Instead, courts have a duty to give statutes a practical application consistent with their wording, unless such application is inconsistent with the *obvious intent* of the legislature. While we have accepted an obligation of deference to agency interpretation and practice in areas of administration by law committed to their responsibility ... *it has no material force where agency action is contrary to statutory language.*

(citations omitted)(emphasis in original).

In reversing the Commission's decision, the Circuit Court found it to be arbitrary and capricious. Nonetheless, there was no finding by the Circuit Court that the Commission violated the Constitution, exceeded its statutory authority or jurisdiction, or performed an unlawful procedure. To the contrary, the Circuit Court ruled that the Commission acted within its statutory authority. "Given the deference we give to agencies in interpreting their own regulations, an agency can hardly be charged with acting arbitrarily or with caprice or whimsy when it has made a decision that is consistent with its own published policies and regulations." *Miss. Gaming Comm'n.*, 691 So. 2d at 459. There is simply no indication in the record that the decision of the Commission was done without reason or judgment or done in a whimsical manner.

It has been and remains the position of the Commission, pursuant to the language of Miss. Code Ann. § 75-76-131(5), that it has absolutely no discretion or authority to issue work permits to individuals who have attempted, conspired or committed felony offenses. Though the Circuit Court ruling finds that the Commission acted arbitrarily because it failed to utilize its discretion on previous occasions to deny the work permit of Simon, it remains the position of the Commission that it *never* had discretion to grant Simon a work permit. The Commission has long since interpreted Miss. Code Ann. §75-76-131(5) and Miss. Gaming Regulation II. J. Section 2.(d)(1) to be that it is statutorily prohibited from issuing work permits to those individuals that have previously committed felony offenses. While the Commission admits that it erred in granting Simon work permits on previous occasions and acknowledges that the resulting denial seems unfair, the Commission simply cannot perpetuate its error and continue issuing Simon a work permit in contravention to statutory authority. If anything, the opposite would be true ... issuing Simon a work permit in contravention to the plain language of Section 75-76-131(5) would be *per se* arbitrary and capricious because the Commission would be violating express legislative policy. See *County of Monmouth v. Dept. of Corrections*, 566 A.2d 543, 544 (N.J. 1989)(holding "action by State agency in contravention of State statutes and its own regulations is *per se* arbitrary and capricious because it violates express or implied legislative policy.")(citations omitted).

In effect, the Court finds that the Commission is acting arbitrarily because it is attempting to correct mistakes made in the past. While the Circuit Court does not mention

or reference the principle of estoppel, the Circuit Court's ruling operates upon an estoppel principle. The Circuit Court's ruling could be interpreted to find that because the Commission erred in granting work permits to Simon in the past that it is now estopped or prevented from denying Simon a work permit, despite the fact that the Commission is acting within the confines of the law by issuing the denial. The issuances of a work permit to Appellant in 2000 and 2003 were in contravention of Miss. Code Ann. § 75-76-131(5) and thus were unauthorized acts. "It is a 'well-established rule in Mississippi that the doctrine of equitable estoppel cannot be applied against the state or its counties where the acts of their officers were unauthorized.'" *Rawls Springs Utility District v. Novak*, 765 So. 2d 1288, 1292 (Miss. 2000), quoting *Oktibbeha County Board of Education v. Town of Sturgis, Mississippi*, 531 So. 2d 585, 589 (Miss. 1988); see *Morrow v. Vinson*, 666 So. 2d 802, 804 (Miss. 1995). The fact that Simon was issued work permits in the past, in contravention of law, does not entitle him to the issuance of future work permits.<sup>5</sup> "Officers of the state ... have no power to authorize the *continuance* of any act or business which is in violation of law ...." *Eastman Oil Mills v. State*, 130 Miss. 63, 93 So. 484, 486 (1922) (Emphasis added).

In *Conway*, the Mississippi State Board of Health sought to enjoin Conway from engaging in the practice of medicine until he received a new license from the State Board

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In *Eicher v. Louisiana State Police, Riverboat Gaming Enforcement Division*, the Louisiana Court of Appeals, First Circuit, held that the Louisiana State Police, Riverboat Gaming Enforcement Division, was not estopped to deny a work permit to Ms. Eicher based on her criminal history, even though the Division, having knowledge of her criminal history, had issued her a temporary permit shortly before.

of Health. *Conway* at 413. As part of his argument on appeal, Conway asserted that the State Board of Health was estopped from challenging the validity of his license since Conway relied on two letters sent to him by the Board and was not directed to the latter portion of the statute relating to recordation. *Id.* at 415. The Mississippi Supreme Court rejected this argument finding that “*a departmental ruling cannot make a statute mean one thing when on its face it plainly means another thing.*” *Id.* (citations omitted)(emphasis added). The Court additionally held “the letters by the Secretary of the State Board of Health could not have the effect of altering the statute and it is not estopped thereby from pursuing the other duties imposed upon it (citation omitted) in regard to the granting of licenses for the practice of medicine and the regulation thereof within this state.” *Id.* The same is true of the Mississippi Gaming Commission. A previous error by the Commission does not allow the Commission to now disregard statutory mandates set forth by our legislature. To allow Simon to prevail on this estoppel argument would afford Simon and all other individuals who have committed felony offenses rights in contravention of clear and unambiguous statutory mandates.

As so clearly held in *Conway*, prior decisions of state agencies made in error cannot serve to obliterate the clear meaning of the statute. Borrowing from the distinct language of the Supreme Court of Ohio:

The board cannot be estopped from its duty to protect the public welfare because it did not bring a disciplinary action as expeditiously as possible. (citations omitted). If a government agency is not permitted to enforce the

law because the conduct of its agents has given rise to estoppel, the interest of all citizens in obedience to the rule of law is undermined.

*Ohio Board of Pharmacy v. Frantz*, 555 N.E.2d 630, 633 (Ohio 1990). As such, the principle of estoppel should not and cannot apply to the Mississippi Gaming Commission under the facts of this particular case. The statutory provision of Section 75-76-131(5), which forbids issuance of a work permit to an applicant who "has committed, attempted or conspired to commit a crime which is a felony in this state ...," is clearly set forth and contains no ambiguity.

Moreover, although Simon had previously held work permits, those work permits had since expired. In fact, he was attempting to acquire work permit privileges anew. This was not a continuance of previous permits. Instead, this was a new application requiring the Commission to conduct another investigation of his credentials to hold a work permit. Simon had no "right" to the granting of a work permit. "No applicant for a license or other affirmative commission approval has any right to a license or the granting of the approval sought." Miss. Code Ann. § 75-76-3(5). To the contrary, each gaming work permit issued is a for a finite period. "No work permit shall be effective for more than three years from the date of issue." Mississippi Gaming Regulation II. Section 1.(b). The Mississippi Gaming Regulations clearly state that each work permit is issued for a certain period of time and is not subject to automatic renewal or extension. "[An] application for a work permit is to be made to the executive director and may be granted or denied for any cause deemed reasonable by the commission." Miss. Code Ann. § 75-76-131(4). "The executive director

has the authority to recommend to the commission the denial of any application, the limitation, conditioning or restriction of any license, registration, finding of suitability or approval or the imposition of a fine upon any person licensed, registered or found suitable or approved for any cause deemed reasonable by the executive director." Miss. Code Ann. § 75-76-29(2). "Any license issued or other commission approval granted pursuant to the provisions of this chapter is a revocable privilege, and no holder acquires any vested right therein or thereunder." Miss. Code Ann. § 75-76-3(5) and Miss. Code Ann. § 75-76-29(4).

The actions of the Commission were in compliance with applicable law and were based upon sound reason and judgment. As such, the action of the Commission in denying Appellant's request for a work permit was neither arbitrary or capricious.

**II. THE CIRCUIT COURT CORRECTLY HELD THAT MISS. CODE ANN. § 75-76-131(5) DOES NOT REQUIRE A FORMAL CONVICTION AND THAT COMMISSION OF A FELONY CAN BE SHOWN THROUGH ENTRY OF A GUILTY PLEA**

Although the Circuit Court correctly found that a conviction is not required to show commission of a felony offense by an applicant for a work permit, the Commission nonetheless feels it important to adequately and completely set forth the legal authority and reasoning behind its interpretation and application of Miss. Code Ann. § 75-76-131(5) to better assist this Court in its review of the Circuit Court's Order.

In 1990, the Mississippi Legislature enacted the Mississippi Gaming Control Act. Miss. Code Ann. §§ 75-76-1 to -313. In so doing, the Mississippi Gaming Commission was



created in order to regulate the gaming industry effectively. Miss. Code Ann. § 75-76-7. Part of the Commission's duties, as outlined in the Gaming Control Act, are to regulate the issuance of work permits to potential gaming employees. "No person shall be employed as a gaming employee unless such person is the holder of a valid work permit issued by the Commission." Miss. Code Ann. § 75-76-131(2) & Mississippi Gaming Regulation II.J. Section 1(a). "Application for a work permit is to be made to the executive director and may be granted or denied for any cause deemed reasonable by the commission." Miss. Code Ann. § 75-76-131(4). The Gaming Control Act additionally sets forth and creates a multi-step administrative appeals process that was followed precisely in the instant case. Miss. Code Ann. §§ 75-76-131 to -141.

In his appeal to the Circuit Court, Simon however argued in his brief that "in the eyes of the law, there was no crime" and that the "Commission is attempting to circumvent the very purpose which the legislature intended in passing these statutes in the first place." [Circuit Record, pgs. 025-039]. Simon further asserted that the Gaming Commission's use of expunged records exceeded its authority and usurped the authority of the DeSoto County Circuit Court. [Circuit Record, pgs. 025-039]. In its Order, however, the Court disagreed with Simon's interpretation of the law, finding no fault with the constitutionality of the Act itself and holding the Commission acted within its statutory authority. Further, there is ample case law and statutory authority to support the Commission's position that expunged records may be used to deny a work permit application.

Again, Mississippi Code Annotated § 75-76-29(3) provides that, “[t]he commission has full and absolute power and authority to deny any application or limit, condition, restrict, revoke or suspend any license, registration, finding of suitability, or fine any persons licensed, registered, found suitable or approved, for any cause deemed reasonable by the commission.” See also Miss. Code Ann. §§ 75-76-29(1), (2) and (4). The Gaming Control Act contains multiple provisions setting forth the Commission’s duties, responsibilities and authorities over gaming employees and the issuance of work permits thereto. Miss. Code Ann. §§ 75-76-5 and 75-76-131 to -141. The Commission, as directed by statute, has created an entire regulatory scheme to further clarify the permitting process. In the present case, the Commission was merely carrying out its statutory duty to investigate a possible permittee seeking employment as a statutorily defined “gaming employee”.

On or about November 16, 2006, Simon submitted an application for a gaming permit seeking employment at Sam’s Town Casino as a dealer. On the Criminal History Background Section of that application, Simon answered “yes” to the question of whether he had previously participated in a non-adjudication program and listed a 1997 charge for possession of marijuana in Horn Lake, Mississippi, as the basis for that affirmative response. [Commission ROR Exhibits, pg. 8]. As a result of this affirmative response, an investigation into the charge was conducted by the Commission, and it was determined that on or about March 25, 1998, Simon entered a plea of guilty in open court to the charge

of possession of marijuana more than one ounce but less than one kilogram in the Circuit Court of DeSoto County, Mississippi. [Commission ROR Exhibits, pgs. 28-30]. As a result of his entry of a guilty plea, the Court withheld acceptance of the guilty plea and sentenced Simon to three (3) years of non-adjudicated probation. [Commission ROR Exhibits, pgs. 28-30].

Mississippi Code Annotated § 75-76-131(5) provides in part that “[t]he executive director of the Mississippi Gaming Commission] shall refuse to issue a work permit if the applicant **has committed, attempted or conspired to commit a crime which is a felony in this state** or an offense in another state or jurisdiction which would be a felony if committed in this state.” (Emphasis added). This prohibition is not limited to persons who have been *convicted* of a crime which is a felony; it extends to anyone who has committed such a crime, even though there has been no formal judgment of conviction. It is the illegal conduct itself, regardless of whether it results in a conviction, which renders the applicant ineligible to obtain a gaming work permit. See *Board on Law Enforcement Officer Standards and Training v. Rushing*, 752 So. 2d 1085, 1091 (Miss. Ct. App. 1999), cert. denied (2000); see also *Mississippi Bar v. Shelton*, 890 So. 2d 827 (Miss. 2003); *Mississippi Bar v. Baldwin*, 752 So. 2d 996 (Miss. 1999). Simon’s entry of a guilty plea to the felony charge of possession clearly establishes that he committed the crime. A defendant’s guilty plea, under a non-adjudication program, establishes for legal purposes that the defendant

committed the crime to which he or she pleaded guilty. See *Rushing*, 752 So. 2d 1085; *Shelton*, 890 So. 2d 827; *Baldwin*, 752 So. 2d 996.

The commission of the felony crime bars Simon from obtaining a gaming work permit, even though he was never *adjudicated* guilty. At the work permit hearing, an "Order to Expunge Record, Etc." from the Circuit Court of DeSoto County, Mississippi, was entered into evidence. [Commission ROR Exhibits, pgs. 19-21].<sup>6</sup> Although the Court's "Order to Expunge Records" removes from the public domain the records of Simon's arrest and of the criminal proceedings in the case, it does not erase the fact that Simon committed a felony offense. An expunction does not exonerate a defendant of a crime to which he plead guilty. *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 115 (1983)(superseded in part by statute).

It is the fact that Simon *committed* a felony crime (as evidenced by his own guilty plea) which renders him ineligible for a gaming work permit, and expunction does not alter the "historical fact" that the crime was committed. See *Dickerson*, 460 U.S. at 115. Furthermore, Mississippi's non-adjudication statute, Miss. Code Ann. § 99-15-26, additionally establishes that the historical fact of a non-adjudicated offense is not erased by an expunction, in that the statute allows a defendant to qualify for non-adjudication

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It should be noted that the Order of Expungement was entered on March 7, 2007, almost four (4) months after Appellant submitted his application for a work permit and after he had been informed that his work permit application was being denied.

only one time.<sup>7</sup> Even though the public records of a person's non-adjudicated offense have been expunged pursuant to Section 99-15-26, a non-public record showing that the person was non-adjudicated must be preserved in order to ensure that there cannot be a non-adjudication for a subsequent offense.

In *Mississippi Department of Public Safety v. Carver*, 809 So. 2d 713 (Ms. Ct. App. 2001)(*cert. denied* 2002), Carver was an employee of the Department of Public Safety and appealed the agency's decision to demote him based upon his involvement in certain criminal violations regarding the taking and possession of wildlife in the State of Idaho. *Carver*, 809 So. 2d at 714. As part of his argument on appeal, Carver questioned the severity of the agency's disciplinary actions by arguing that his entry into a pre-trial diversion program shouldn't be held against him "since [he] wasn't admitted to anything." The Mississippi Court of Appeals rejected this argument finding:

We find Carver's position regarding the effect of entering a diversion program for the purpose of avoiding a criminal conviction on the right of his employing agency to discipline him for his conduct to be untenable. It is not the fact of a conviction that necessarily forms the basis for a disciplinary action. It is the conduct itself that demonstrates "acts of conduct occurring ... off the job which are plainly related to job performance ... and are of such nature ... [that they] could constitute negligence in regard to the agency's duties to the public ..." as set out in the Department's General Orders regarding the conduct of its employees. More to the point, even an outright acquittal in a criminal proceeding would not answer unequivocally the right of a state agency to discipline an employee based on the alleged underlying conduct that led to the criminal charges since the standard of proof to

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Section 99-15-26(1) provides that "[n]o person having previously qualified under the provisions of this section ... shall be eligible to qualify for release in accordance with this section."

criminally convict and to support a personnel action are substantially different.

*Id.* at 717 (citation omitted). Though the underlying facts differ slightly, the fact remains that Mississippi law clearly holds that criminal conduct, rather than conviction, should be considered by a state agency.

It is not unusual for a State to apply stringent restrictions to the admission and retention of persons in certain areas of employment [e.g., medicine, law, and law enforcement], due to the State's interest in protecting the public in those areas. The same holds true in the gaming industry. The Mississippi legislature, in authorizing licensed gaming in certain waters of the State, declared it to be the public policy of this State that:

- (a) Regulation of licensed gaming is important in order that licensed gaming is conducted honestly and competitively, that the rights of the creditors of licensees are protected and that gaming is free from criminal and corruptive elements.
- (b) Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments and the manufacture or distribution of gambling devices and equipment.
- (c) All establishments where gaming is conducted and where gambling devices are operated, and manufacturers, sellers and distributors of certain gambling devices and equipment must therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the state.

Miss. Code Ann. § 75-76-3(3)(2000). In conformity with that policy, the legislature enacted the provision in Section 75-76-131(5) which effectively bars the gaming industry from

employing as a gaming employee any person who has committed, attempted, or conspired to commit a crime which is a felony under Mississippi law. Section 75-76-131(5) makes no exception for anyone who has committed, attempted, or conspired to commit such a crime, not even for a person whose criminal records have been expunged.<sup>8</sup> Although this is a stringent law, it furthers Mississippi's public policy regarding gaming and helps to maintain public trust and confidence in the integrity of the gaming industry in the State. To treat Simon's expunction as a complete obliteration of his criminal offense would contravene the State's public policy regarding gaming. Under Miss. Code Ann. § 75-76-131(5), the Executive Director is statutorily barred from issuing Simon a work permit.

Notably, the State of Louisiana has examined and taken a similarly stringent position regarding denial of a gaming permit to an applicant who pleaded guilty to a felony crime but was not adjudicated guilty, and whose criminal record was subsequently expunged. See *Waddell v. State of Louisiana*, 757 So. 2d 680 (La. App. 1st Cir. 1999). In *Waddell*, the petitioner Steven Waddell had pleaded guilty to a felony drug offense but had been non-adjudicated for the offense and placed on probation. After successful completion of his probation, an order of acquittal was issued, the criminal charge against Waddell was dismissed, and Waddell's criminal records were expunged. Waddell then applied to the Louisiana State Police, Riverboat Gaming Division, for a gaming employee

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<sup>8</sup>

Had the legislature intended a **conviction** be required, it would have clearly set forth a conviction requirement in Section 75-76-131(5) as it has done in other portions of the Gaming Control Act. See Miss. Code Ann. § 75-76-137(2)(j).

permit. On his application, Waddell disclosed the information regarding his felony drug offense. Waddell was issued a gaming employee permit, and his permit was renewed two successive times. However, when Waddell applied for a third renewal permit, he was denied. The denial was based on La. R.S. 27:76(3), which provided that the Riverboat Gaming Division shall not award a license or permit to any person who has been convicted of, or pleaded guilty or *nolo contendere* to, an offense punishable by imprisonment of more than one year, i.e., a felony offense.

On appeal, the Louisiana Court of Appeals for the First Circuit held that, under La. R.S. 27:76(3), Waddell was ineligible for a gaming employee permit because of his guilty plea to the felony drug charge. In so holding, the Court stated:

The order of acquittal, the dismissal of Mr. Waddell, and the expungement in no way affects the legality or historical fact of the guilty plea. A conviction is not necessary for La. R.S. 27:76(3) to apply; the plea of guilty standing alone is sufficient.

*Waddell*, 757 So. 2d at 684; see also *Catanese v. Louisiana Gaming Control Board*, 712 So. 2d 666 (La. App. 1st Cir. 1998); *Eicher v. Louisiana State Police, Riverboat Gaming Enforcement Division*, 710 So. 2d 799 (La. App. 1st Cir. 1998), *writ denied* May 8, 1998.

Simply put, the expungement of Simon's record does not aid him in obtaining a work permit because it does not erase the historical fact that he committed the criminal offense. *Dickerson*, 460 U.S. at 115. Instead, expunction simply removes the record of one's criminal activity from the public domain. "Without the expungement order ...



matters of arrests and convictions are public records open to public inspection; they thereby are made available to members of the public generally, as well as to credit bureaus, prospective employers, and others." *State of Louisiana v. Sims*, 357 So.2d 1095 (La. 1978). Accordingly, the Commission, a law enforcement agency, clearly had legal authority to utilize Simon's entry of a guilty plea to a felony offense to deny his work permit application.

The Mississippi Gaming Commission has repeatedly held that where an individual has entered a plea of guilty to a felony crime in Mississippi pursuant to a non-adjudication statute, the individual is ineligible to hold a Mississippi gaming work permit, even though there was a subsequent dismissal of the criminal case and an expunction of the records of the case. See, e.g., *In the Matter of the Denial of a Work Permit to O.G.H., Jr., Appellant*, No. 05-00299(SD)(hearing examiner's decision dated June 28, 2006; adopted by Commission Aug. 17, 2006), *aff'd sub nom. O.G.H., Jr. v. Mississippi Gaming Commission*, No. A2402-2006-00174 (Cir. Ct. Harrison Cty. Miss., 2d Jud. Dist. (Sept. 7, 2007)).

### CONCLUSION

The elementary and cardinal rule of statutory construction is that the court must ascertain and effectuate the intent of the legislature. Therefore, in interpreting a statute, the words must be given their plain and ordinary meaning without resorting to subtle or forced construction that limit or expand the statute's operation. In this case, the statutory language clearly provides that if a person has committed an offense which was a felony in

the State of Mississippi that the Executive Director must deny his request for a gaming work permit. Although the Commission erred in issuing permits to Simon in the past, it nonetheless cannot ignore the plain and unambiguous language of Miss. Code Ann. § 75-76-131(5) which statutorily bars the Executive Director from issuing work permits to individuals who have *committed* felony offenses.

When reviewing the actions of the Commission, it is important to again note the language of Mississippi Code Annotated § 75-76-125(3) which provides that the Commission's decision must be supported by "any" evidence. In the present case, the court documents reflecting Simon's entry of a guilty plea to a felony drug offense have been gathered and entered into evidence. [Commission ROR Exhibits, pgs. 28-30]. After a formal hearing, the Hearing Examiner issued a written decision thoroughly outlining the legal and statutory reasons for denial of Simon's permit. [Commission ROR, pg. 000008-000015]. Those findings were later reviewed and adopted by the full Commission. [Commission ROR, pgs. 000022, 000024-25]. There is ample evidence contained within the record, exhibits and transcripts to support the Commission's decision and thus fulfill the "any evidence" standard found in Mississippi Code Annotated § 75-76-125(3).

Because the final decision of the Commission was neither arbitrary or capricious, did not violate constitutional provisions, was supported by "any" evidence, and was lawfully made pursuant to statutory authority, the Circuit Court was without authority to reverse the Commission's decision.

WHEREFORE, PREMISES CONSIDERED, the Mississippi Gaming Commission hereby requests this Honorable Court reverse the Order of the Circuit Court of Tunica County, Mississippi, finding the denial of a work permit to Edward Simon to be arbitrary and capricious.

RESPECTFULLY SUBMITTED, this the 6<sup>th</sup> day of May, 2009.

**STATE OF MISSISSIPPI and  
MISSISSIPPI GAMING COMMISSION**

**BY: JIM HOOD, ATTORNEY GENERAL**

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SPECIAL ASSISTANT ATTORNEY GENERAL**

  
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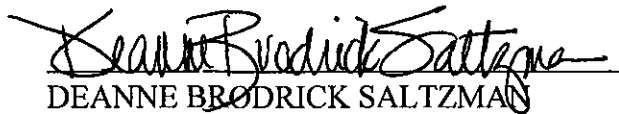
**CERTIFICATE OF SERVICE**

I, Deanne Brodrick Saltzman, Special Assistant Attorney General, of counsel for the Mississippi Gaming Commission, do hereby certify that I have this day caused to be mailed via U. S. mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

R. Stan Little, Jr., Esq.  
Post Office Box 5  
Tunica, Mississippi 38676

Judge Albert B. Smith, III  
Post Office Drawer 478  
Cleveland, Mississippi 38732

So certified, this the 6<sup>th</sup> day of May, 2009.

  
DEANNE BRODRICK SALTZMAN

# ADDENDUM

Miss. Code Ann. § 75-76-125

**C**

West's Annotated Mississippi Code Currentness

Title 75. Regulation of Trade, Commerce and Investments (Refs &amp; Annos)

Chapter 76. Mississippi Gaming Control Act

Disciplinary Actions

**→ § 75-76-125. Additional evidence**

(1) The reviewing court may, upon motion therefor, order that additional evidence in the case be taken by the commission upon such terms and conditions as the court may deem just and proper. The motion must not be granted except upon a showing that the additional evidence is material and necessary and that sufficient reason existed for failure to present the evidence before the hearing examiner or the commission. The motion must be supported by an affidavit of the moving party or his counsel showing with particularity the materiality and necessity of the additional evidence and the reason why it was not introduced in the administrative hearing. Rebuttal evidence to the additional evidence must be permitted. In cases in which additional evidence is presented, the commission may modify its decisions and orders as the additional evidence may warrant and shall file with the reviewing court a transcript of the additional evidence together with any modifications of the decision and order, all of which become a part of the record on review.

(2) The review must be conducted by the court sitting without a jury, and must not be a trial de novo but is confined to the record on review.

(3) The reviewing court may affirm the decision and order of the commission, or it may remand the case for further proceedings or reverse the decision if the substantial rights of the petitioner have been prejudiced because the decision is:

- (a) In violation of constitutional provisions;
- (b) In excess of the statutory authority or jurisdiction of the commission;
- (c) Made upon unlawful procedure;
- (d) Unsupported by any evidence; or
- (e) Arbitrary or capricious or otherwise not in accordance with law.

**CREDIT(S)**

Laws 1990, 1st Ex. Sess., Ch. 45, § 63, eff. from and after passage (approved June 29, 1990).

Miss. Code Ann. § 75-76-125, MS ST § 75-76-125

Current through all 2008 Sessions and HB Nos. 197, 699, 636 and 1027 of the 2009 Regular Session

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Miss. Code Ann. § 75-76-131

West's Annotated Mississippi Code Currentness

Title 75. Regulation of Trade, Commerce and Investments (Refs &amp; Annos)

Chapter 76. Mississippi Gaming Control Act

Work Permits

**→ § 75-76-131. Records of gaming employees**

(1) The executive director shall:

(a) Ascertain and keep himself informed of the identity, prior activities and present location of all gaming employees in the State of Mississippi; and

(b) Maintain confidential records of such information.

(2) No person may be employed as a gaming employee unless he is the holder of a work permit issued by the commission.

(3) A work permit issued to a gaming employee must have clearly imprinted thereon a statement that it is valid for gaming purposes only.

(4) Application for a work permit is to be made to the executive director and may be granted or denied for any cause deemed reasonable by the commission. Whenever the executive director denies such an application, he shall include in the notice of the denial a statement of the facts upon which he relied in denying the application.

(5) Any person whose application for a work permit has been denied by the executive director may, not later than sixty (60) days after receiving notice of the denial or objection, apply to the commission for a hearing before a hearing examiner. A failure of a person whose application has been denied to apply for a hearing within sixty (60) days or his failure to appear at a hearing conducted pursuant to this section shall be deemed to be an admission that the denial or objection is well founded and precludes administrative or judicial review. At the hearing, the hearing examiner appointed by the commission shall take any testimony deemed necessary. After the hearing the hearing examiner shall within thirty (30) days after the date of the hearing announce his decision sustaining or reversing the denial of the work permit or the objection to the issuance of a work permit. The executive director may refuse to issue a work permit if the applicant has:

(a) Failed to disclose, misstated or otherwise attempted to mislead the commission with respect to any material fact contained in the application for the issuance or renewal of a work permit;

(b) Knowingly failed to comply with the provisions of this chapter or the regulations of the commission at a place of previous employment;

(c) Committed, attempted or conspired to commit any crime of moral turpitude, embezzlement or larceny or any violation of any law pertaining to gaming, or any crime which is inimical to the declared policy of this state concerning gaming;

(d) Been identified in the published reports of any federal or state legislative or executive body as being a member or associate of organized crime, or as being of notorious and unsavory reputation;

- (e) Been placed and remains in the constructive custody of any federal, state or municipal law enforcement authority;
- (f) Had a work permit revoked or committed any act which is a ground for the revocation of a work permit or would have been a ground for revoking his work permit if he had then held a work permit; or
- (g) For any other reasonable cause.

The executive director shall refuse to issue a work permit if the applicant has committed, attempted or conspired to commit a crime which is a felony in this state or an offense in another state or jurisdiction which would be a felony if committed in this state.

(6) Any applicant aggrieved by the decision of the hearing examiner may, within fifteen (15) days after the announcement of the decision, apply in writing to the commission for review of the decision. Review is limited to the record of the proceedings before the hearing examiner. The commission may sustain or reverse the hearing examiner's decision. The commission may decline to review the hearing examiner's decision, in which case the hearing examiner's decision becomes the final decision of the commission. The decision of the commission is subject to judicial review.

(7) All records acquired or compiled by the commission relating to any application made pursuant to this section and all lists of persons to whom work permits have been issued or denied and all records of the names or identity of persons engaged in the gaming industry in this state are confidential and must not be disclosed except in the proper administration of this chapter or to an authorized law enforcement agency. Any record of the commission which shows that the applicant has been convicted of a crime in another state must show whether the crime was a misdemeanor, gross misdemeanor, felony or other class of crime as classified by the state in which the crime was committed. In a disclosure of the conviction, reference to the classification of the crime must be based on the classification in the state where it was committed.

(8) A work permit expires unless renewed within ten (10) days after a change of place of employment or if the holder thereof is not employed as a gaming employee within the jurisdiction of the issuing authority for more than ninety (90) days.

(9) Notice of any objection to or denial of a work permit by the executive director as provided pursuant to this section is sufficient if it is mailed to the applicant's last known address as indicated on the application for a work permit. The date of mailing may be proven by a certificate signed by the executive director or his designee that specifies the time the notice was mailed. The notice is presumed to have been received by the applicant five (5) days after it is deposited with the United States Postal Service with the postage thereon prepaid.

#### CREDIT(S)

Laws 1990, 1st Ex. Sess., Ch. 45, § 66, eff. from and after passage (approved June 29, 1990).

Miss. Code Ann. § 75-76-131, MS ST § 75-76-131

Current through all 2008 Sessions and HB Nos. 197, 699, 636 and 1027 of the 2009 Regular Session

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**Section 15. Insolvency Of A Licensee.**

- (a) In the event that a licensee files any petition with the bankruptcy court for relief as a debtor or has such a petition filed against it, or a receiver is appointed for such licensed business or an assignment of such business is made for the benefit of creditors, the licensee, trustee, receiver or assignee, as the case may be, shall immediately notify the Executive Director of such fact in writing. Such written notice shall have attached a copy of the petition filed with the court, and any relevant court orders such as orders appointing trustees, receivers, or assignees.
- (b) No licensed establishment shall be operated by any trustee, receiver or assignee for the benefit of creditors until such operation has been authorized by the Commission.
- (c) Any such trustee, receiver, or assignee desiring to continue operation of the licensed establishment shall immediately make application for permission to do so. Application shall be made in the same manner as an application for an initial license; but the operation, if approved, shall be deemed to continue under the existing license of the establishment.
- (d) Permission for such trustee, receiver, or assignee to continue the operation of the licensed establishment may be summarily withdrawn at any time in the discretion of the Commission without the necessity of any hearing or proceedings for revocation or suspension.

(Adopted: 09/25/1991.)

**J. GAMING EMPLOYEES**

**Section 1. Work Permits Required.**

- (a) No person shall be employed as a gaming employee unless such person is the holder of a valid work permit issued by the Commission.
- (b) Every licensee, shall, before employing any person in connection with the licensed gaming operation, ascertain that such person holds a valid work permit issued in accordance with this regulation, and shall cause his employment records to reflect such fact. No work permit shall be effective for more than three (3) years from the date of issue. A permit may be issued for a period of less than three (3) years within the discretion of the Executive Director. A work permit expires unless renewed within ten (10) days after a change of place of employment, or if the holder is unemployed as a gaming employee within the jurisdiction of the Mississippi Gaming Commission for more than ninety (90) days. Complete renewal applications must be received by the Mississippi Gaming Commission at least thirty (30) days prior to the date of expiration of an employee's existing work permit.

- (c) Every gaming employee shall keep his work permit on his person and available for inspection at all times when actively engaged in the conduct of gaming operations.
  - (d) Each work permit holder shall report any arrest or conviction to the Mississippi Gaming Commission within ten (10) days after such conviction or arrest.
  - (e) Each employee of a holding company, intermediary company or affiliated company of a licensee who is directly or indirectly engaged in the administration or supervision of the gaming operations or physical security activities of such licensee and performs such duties at any time on the premises of the licensee shall obtain a work permit.
  - (f) Each employee of a holding company, intermediary company or affiliated company, contract employee, agent, attorney, accountant or other representative performing services, other than maintenance, for the licensee must hold a valid work permit, finding of suitability, or key employee license in order to enter surveillance, soft count, hard count or any cage area.
- (Adopted: 09/25/1991; Amended: 10/22/1998; Amended: 02/19/2003.)

**Section 2. Application For Work Permit; Procedure.**

- (a) The Mississippi Gaming Commission will process all work permit applications, to include taking photographs and fingerprints from all applicants. The Commission shall conduct background investigations on all work permit applicants. The applicant shall provide any information requested by the Executive Director in order to allow for a complete investigation of the applicant's background.
- (b) An applicant for a work permit shall pay the application fee established by the Executive Director, which shall be sufficient to cover the costs of processing the application.
- (c) The Executive Director shall investigate the applicant and may either grant or deny the work permit. The burden is on the applicant at all times to prove suitability for a work permit.
- (d) The Executive Director shall refuse to issue a work permit if the applicant has:
  - (1) committed, attempted or conspired to commit a crime which is a felony in Mississippi or an offense in any other jurisdiction which would be a felony if committed in Mississippi;
- (e) The Executive Director may refuse to issue a work permit if the applicant has:
  - (1) failed to disclose, misstated or otherwise attempted to mislead the Commission with respect to any material fact contained in the work permit application;

- (2) knowingly failed to comply with the provisions of the Gaming Control Act, MGC regulations, and /or internal controls of a gaming licensee as filed with and approved by the Commission;
- (3) committed, attempted or conspired to commit any crime of moral turpitude, embezzlement or larceny or any violation of any law pertaining to gaming or any crime which is inimical to the declared policy of Mississippi concerning gaming including, but not limited to, the following: any misdemeanor theft convictions, excluding first time conviction for false pretense/bad checks (false pretense) during the three (3) years prior to the date of application;
  - (A) any misdemeanor drug convictions during the three (3) years prior to the date of application;
  - (B) any misdemeanor convictions pertaining to gaming or gambling during the three (3) years prior to the date of application;
  - (C) any misdemeanor convictions pertaining to crimes of violence during the three (3) years prior to the date of application; and
  - (D) any pattern of criminal offenses making an applicant unsuitable;
- (4) been identified in published reports of any federal or state legislative or executive body as being a member or associate of organized crime, or as being of notorious and unsavory reputation;
- (5) been placed and remains in the constructive custody of any federal, state or municipal law enforcement authority when the crime involved would be a crime constituting grounds for denial of an application;
- (6) had a work permit revoked or committed any act which is a ground for the revocation of a work permit or would have been a ground for revoking a work permit if the applicant had been holding a work permit at that time.
- (7) failed to complete the application process for a gaming work permit by:
  - (A) failing to submit to additional fingerprinting where initial fingerprints are insufficient for proper analysis;
  - (B) failing to provide the Commission with court records and/or other requested documents detailing the disposition of previous arrests and/or convictions as well as facts and circumstances of the underlying offense(s); or

- (C) failing to provide any other requested information necessary to determine the suitability of the applicant.

The above enumerated reasons for denial shall not limit the Executive Director's discretion to deny an applicant if that applicant has committed, attempted or conspired to do any act which is inimical to the best interest of gaming in Mississippi.

(Adopted: 09/25/1991; Amended: 03/29/1993; Amended: 10/22/1998.)

**Section 3. Procedure For Hearing After Denial By Executive Director.**

- (a) If the Executive Director denies an application for a work permit and the applicant requests a hearing pursuant to Miss. Code Ann. 75-76-131(5), the hearing examiner shall schedule a hearing as soon as practicable after receipt of the request.
- (b) At the hearing, the Executive Director shall present any evidence supporting his reasons for denial and the applicant shall then present any evidence controverting the Executive Director's reasons.
- (c) Each party may cross-examine all witnesses and may subpoena witnesses to testify or produce evidence at the hearing. The hearing examiner shall issue subpoenas upon the request of a party, but for good cause shown may limit or quash any subpoena issued.
- (d) No discovery shall be permitted except upon a finding of good cause justifying the discovery sought.
- (e) The standard of review to be used by a hearing examiner is identical to the scope of review a court would have of a final commission action. The Hearing Examiner is to focus on the Commission regulations, policies and procedures, as well as the Commission's adherence to its own regulations and fairness of enforcing the Gaming Control Act and Mississippi Gaming Commission Regulations; then determine only whether the Commission is in compliance with those regulations.
- (f) Notwithstanding any other regulations concerning denial of work permits, the Hearing Examiner shall have discretion to recommend grant or denial of a permit and the Mississippi Gaming Commission shall have discretion to grant or deny a permit, except as proscribed by statute. Factors to be considered in the exercise of discretion include, but are not limited to:
  - (1) the nature and character of the offense or other matters alleged against the applicant, including all surrounding facts and circumstances, whether or not resulting in conviction;

- (2) the length of time since commission of the offense or other matters alleged;
  - (3) all criminal history of the applicant, including arrests, considering the type, frequency and number of arrests and convictions, before and after the offense or matter alleged; and
  - (4) whether it is in the best interests of gaming for the applicant to hold a work permit.
- (g) Hearing Examiners shall be chosen as follows; either from the Attorney General's office, a contracted private party or an individual whose expertise is relevant to properly interpret and enforce the Gaming Control Act and Mississippi Gaming Commission Regulations. Hearings may be conducted by telephone if the parties agree.

(Adopted: 09/25/1991; Amended: 03/29/1993; Amended: 10/22/1998)

**Section 4. Revocation of Work Permit; Procedure.**

- (a) The Executive Director shall recommend that the Commission revoke the work permit of a gaming employee if the gaming employee:
  - (1) is convicted of any violation of the Gaming Control Act or if in investigating an alleged violation of the Gaming Control Act by any licensee the Executive Director or the Commission finds that a gaming employee employed by the licensee has been guilty of cheating.
- (b) The Executive Director may recommend that the Commission revoke the work permit of a gaming employee if, subsequent to being issued a work permit, the gaming employee:
  - (1) fails to disclose, misstates or otherwise misleads the Commission with respect to any fact contained within any application for a work permit.
  - (2) commits, attempts or conspires to do any of the acts prohibited by the Gaming Control Act;
  - (3) knowingly possesses or permits to remain in or upon any licensed premises any cards, dice, mechanical device or any other cheating device whatever the use of which is prohibited by statute or ordinance;
  - (4) conceals or refuses to disclose any material fact in any investigation by the Executive Director or the Commission;
  - (5) commits, attempts or conspires to commit larceny or embezzlement against a gaming licensee or upon the premises of a licensed gaming establishment;

- (6) is convicted in any jurisdiction other than Mississippi of any offense involving or relating to gambling;
  - (7) accepts employment without prior commission approval in a position for which he is required to be licensed under this chapter after having been denied a license for a reason involving personal unsuitability or after failing to apply for licensing when requested to do so by the Commission or the Executive Director;
  - (8) is refused the issuance of any license, permit or approval to engage in or be involved with gaming in any jurisdiction other than Mississippi, or had any such license, permit or approval revoked or suspended;
  - (9) is prohibited under color of governmental authority from being present upon the premises of any gaming establishment for any reason relating to improper gambling activities or any illegal act;
  - (10) contumaciously defies any legislative investigative committee or other officially constituted bodies acting on behalf of the United States or any state, county or municipality which seeks to investigate crimes relating to gaming, corruption of public officials, or any organized criminal activities; or
  - (11) is convicted of any felony or misdemeanor, other than one constituting a violation of the Gaming Control Act.
- (c) A work permit shall not be issued to a person whose work permit has previously been revoked pursuant to this section or to whom the issuance or renewal of a work permit has been denied, except with the unanimous approval of the Commission members.

(Adopted: 10/22/1998.)

**Section 5. Procedure for Hearing After Recommendation of Revocation By Executive Director.**

- (a) If the Executive Director recommends the revocation of a gaming work permit, the matter will be set for hearing before a hearing examiner. The Hearing Examiner shall schedule a hearing as soon as practicable after receipt of the recommendation from the Executive Director.
- (b) At the hearing, the Executive Director shall present any evidence supporting his reasons for revocation and the applicant shall then present any evidence controverting the grounds for revocation.

- (c) Each party may cross-examine all witnesses to testify or produce evidence at the hearing. The hearing examiner shall issue subpoenas upon the request of a party, but for good cause shown may limit or quash any subpoena issued.
- (d) No discovery shall be permitted except upon a finding of good cause justifying the discovery sought.
- (e) The Hearing Examiner is to focus on the Commission regulations, policies and procedures, as well as the Commission's adherence to its own regulations and fairness of enforcing the Gaming Control Act and Mississippi Gaming Commission Regulations; then determine only whether the Commission is in compliance with those regulations.
- (f) Notwithstanding any other regulations concerning revocation of work permits, the Hearing Examiner shall have discretion to recommend revocation or continuation of a work permit and the Mississippi Gaming Commission shall have discretion to revoke or continue a work permit, except as proscribed by statute. Factors to be considered in the exercise of discretion include, but are not limited to:
  - (1) the nature and character of the offense or other matters alleged against the applicant, including all surrounding facts and circumstances, whether or not resulting in conviction;
  - (2) the length of time since commission of the offense or other matters alleged;
  - (3) all criminal history of the applicant, including arrests, considering the type, frequency and number of arrests and convictions, before and after the offense or matter alleged; and
  - (4) whether it is in the best interests of gaming for the applicant to hold a work permit.
- (g) Hearing Examiners shall be chosen as follows; either from the Attorney General's office, a contracted private party or an individual whose expertise is relevant to properly interpret and enforce the Gaming Control Act and Mississippi Gaming Commission Regulations. Hearings may be conducted by telephone if the parties agree.
- (h) The Commission or its Hearing Examiner may recall and declare void work permits or other approvals that were granted contrary to the provisions of the Gaming Control Act or Mississippi Gaming Commission Regulations.

(Adopted: 10/22/1998.)

**Section 6. Work Permit Applications After Objection Or Revocation.**

- (a) An application filed pursuant to Miss. Code Ann. §75-76-131 for the reconsideration of an objection to the issuance of a work permit or for the reinstatement of a work permit previously revoked must not be entertained by the Commission for a period of one (1) year following either a decision by the Commission upon the same matter or the failure of the person seeking the work permit to pursue all administrative remedies provided by Section 66.
- (b) Applications for reconsideration of work permit actions by the Commission will be referred to the Executive Director for investigation and review. The Executive Director shall thereafter make a recommendation to the Commission regarding the application.

(Adopted: 09/25/1991.)

**Section 7. Employee Report.**

- (a) Annually, on or before the 1st of July, each licensee shall submit an "Annual Employee Report" to the Executive Director on a form to be furnished by the Executive Director. The report shall identify every individual who is directly or indirectly engaged in the administration or supervision of the gaming operations or physical security activities of such licensee. The following classes of gaming employees are presumed to be actively and directly engaged in the administration or supervision of gaming:
  - (1) All individuals who are compensated in any manner in excess of \$75,000 per annum;
  - (2) All individuals who may approve or extend gaming credit in any amount, or whose recommendations in this regard are ordinarily sought or followed;
  - (3) All individuals who have authority to hire or terminate gaming employees;
  - (4) All individuals who have the authority to supervise or direct a shift of any gaming or security activity, including but not limited to supervision or direction of the pit area, keno games, slot machines, or any persons having authority to supervise or direct such persons;
  - (5) All individuals who supervise the count teams and all individuals responsible for directing each shift involving a count team;
  - (6) All individuals who may approve or extend to casino patrons complimentary house services other than beverages only;
  - (7) All individuals who supervise or direct other employees engaged in the control of gaming assets and revenues and record keeping, including the recording of cash and evidences of indebtedness, and the maintenance,



review or control of the records, accounts, and reports of transactions which are required to be kept pursuant to these regulations;

- (8) Any individual who has been specifically represented to the Executive Director or Commission by a licensee or any officer or director thereof as being important or necessary to the operation of the gaming establishment;
  - (9) All persons who individually or as part of a group formulate management policy.
- (b) The "Annual Employee Report" shall also include a description of the gaming duties, casino responsibilities, and casino authority delegated to each individual identified in the report, if requested by the Investigations Division of the Commission.
  - (c) Any changes, additions, or deletions to any information contained within the annual employee report which occurs subsequent to the filing of the report and prior to the filing of the report for the next calendar year shall be reported to the Executive Director in writing no less than ten (10) days after the end of the calendar quarter during which the change, addition, or deletion occurred.
  - (d) The Annual Employee Report and subsequent reports of changes, additions, or deletions shall be confidential and may not be disclosed except upon order of the Commission or pursuant to the terms of Mississippi Code Annotated §75-76-153.
- (Adopted: 09/25/1991; Amended: 07/16/1998; Amended: 10/22/1998; Amended: 10/27/2005.)

#### **Section 8. Key Employees.**

- (a) Any executive, employee, or agent of a gaming licensee having the power to exercise a significant influence over decisions concerning any part of the operation of a gaming licensee or who is listed or should be listed in the annual employee report is a key employee.
- (b) Whenever it is the judgment of the Commission that the public interest and the policies set forth in the Act will be served by requiring any key employee to be licensed, the Commission shall serve notice of such determination upon the licensee. The Commission shall not be restricted by the title of the job performed but shall consider the functions and responsibilities of the person involved in making its decision as to key employee status. Grounds for requiring licensing of a key employee which are deemed to serve the public interest and the policies of the Act include but are not limited to the following:
  - (1) The key employee is new to the industry, to the particular gaming establishment, the position, or the level of influence or responsibility which he has and the Commission has little or outdated information concerning his character, background, reputation or associations; or

- (2) Information has been received by the Commission which, if true, would constitute grounds for a finding of unsuitability to be associated with a gaming enterprise.
- (c) The licensee shall, within thirty (30) days of placing an employee into a key position, present the application for licensing of the key employee to the Executive Director or provide documentary evidence that such key employee is no longer employed by the licensee. Failure of the licensee to respond as required by this section shall constitute grounds for disciplinary action.
- (d) Any individual whose application for licensing as a key employee is required pursuant to this regulation may request the Commission in writing to review its determination of that individual's status within the gaming organization any time within ten (10) days following the filing of a completed application as required by this regulation. In the event the Commission determines that the applicant is not a key employee or that the public interest and policies of the Act do not require the licensing of the key employee at the time, then the key employee applicant shall be allowed to withdraw his application and he may continue in his employment.
- (e) An applicant for a Key Employee License has the burden of proving his qualification to receive and maintain a license pursuant to Mississippi Code Annotated §75-76-67 of the Gaming Control Act.
- (f) No key employee license shall be effective for more than nine (9) years from the date of issue. A license may be issued for a period of less than nine (9) years within the discretion of the Executive Director. A key employee license expires unless renewed within ten (10) days after a change of place of employment, or if the holder is unemployed as a key employee within the jurisdiction of the Mississippi Gaming Commission for more than ninety (90) days. Complete renewal applications must be received by the Commission at least ninety (90) days prior to the date of expiration of a key employee's existing license. A key employee may be required to submit to a finding of suitability any time after issuance of a key employee license. A holder of a Key Employee's License must file with the Investigations Division of the Commission the "Investigations Division Annual Report", providing all information requested on forms provided by the Commission, and any other information requested by the Executive Director. Such "Investigation Division Annual Report" shall be due by June 30<sup>th</sup> of each year, with the exception of the calendar year the license is granted.

(Adopted: 09/25/1991; Amended: 10/22/1998; Amended: 01/20/2000; Amended: 10/27/2005.)

## **K. GAMING SCHOOLS**

### **Section 1. Gaming School License Required.**

- (a) No gaming school shall enroll any student or offer any course to the public of this state or do any other business whatsoever in this state whether for compensation or not, relating to the teaching of gaming or playing or dealing techniques unless