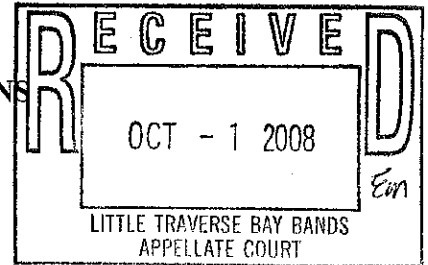


LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
APPELLATE COURT



Little Traverse Bay Bands of Odawa
Indians Gaming Regulatory Commission,
Defendant-Appellant,

v.

Barry Milligan,
Plaintiff-Appellee.

Appellate Case #A-006-0707
Tribal Court Case#GRL-002-1206

CJ Singel, J Anthony, J Genia

OPINION AFFIRMING THE ORDER OF THE TRIBAL COURT

I. FACTS

For some period of time, customers at Victories Casino have been purchasing gift certificates with credit cards and immediately redeeming them for cash thereby avoiding the payment of the cash advance fee charged by Certigy, the casino's credit card company. On October 11, 2006, Vince Cook, Regulatory Director for the Little Traverse Bay Bands of Odawa Indians Gaming Regulatory Commission (GRC), delivered a writing to Barry Milligan, the casino General Manager, informing him that the practice of allowing the immediate cash redemption of gift certificates purchased by credit card "was unacceptable and needs to stop immediately."

Milligan was out of the office that day, but received the writing in the next day or two. Milligan directed his staff, including the casino's marketing director, to stop allowing the immediate cash redemption of gift certificates purchased with credit cards. However, after speaking with Certigy, Milligan decided to allow two high-roller customers to continue the practice until a policy on the practice could be developed.

On October 12, 2006, Valerie Tweedie, Little Traverse Bay Bands of Odawa Chief Financial

Officer, sent a memo to the Gaming Board of Directors (GBD) stating that several months prior she had expressed her belief that the practice violated contracts entered into by the casino and she was concerned that the practice still had not stopped. Tweedie copied the GRC and Cook on her memo.

On October 17, 2006, Milligan and the marketing director made a request to the GRC for a revision of the policy on gift certificates to deal with the issue. On October 24, 2006, Catherine Portman, Executive Administrative Assistant to the GBD, sent an email to Cook asking if he had received the gift certificate policy revision and asking when the revision would be reviewed by the GRC.

On October 27, 2006, at 3:00 p.m., Portman sent a high-importance email to Milligan stating that the practice of allowing customers to purchase gift certificates with credit cards needed to stop until the GRC adopted a revised policy. Two minutes later, Milligan sent an email to his staff telling them to follow Portman's directive and immediately stop the practice. There is no evidence that any gift certificate purchases by credit card and immediate cash redemptions took place after this date. Also on October 27, Cook responded to Portman's October 24th email stating that he had received the gift certificate policy revision request and that it would be on the agenda at the GRC's next meeting on November 2, 2006.

On October 31, 2006, the GRC suspended Milligan's gaming license for two weeks for failure to comply with Cook's original October 11th directive to halt the cash redemption of gift certificates purchased by credit card. The GRC also suspended Milligan from work for two weeks without pay. Milligan appealed his suspension and a hearing was held before the GRC on November 20, 2006.

After the hearing, the GRC issued a decision upholding Milligan's suspension because the "Licensee stated he was negligent for not following up and verifying that the process had ceased"

Milligan appealed the decision upholding his suspension to the Tribal Court. The Honorable

Jenny Kronk issued a decision overturning Milligan's suspension on June 7, 2006. The Tribal Court's opinion overturned Milligan's suspension on the grounds that the GRC's power to suspend a licensee's gaming license was limited to instances where a licensee had violated any condition or requirement imposed on the licensee by the GRC or applicable laws. Because the Tribal Court found that the GRC failed to identify any violation of a condition or requirement of Milligan's gaming license and failed to articulate a violation of any federal, state or Tribal gaming regulations, the Court concluded that the GRC acted outside the scope of its authority when it suspended Milligan's gaming license. In addition, the Tribal Court held that the record produced from the GRC's initial decision to suspend Milligan and from the hearing held on November 20, 2006 failed to support Milligan's license suspension. The Court reached this conclusion because it found that neither the October 31, 2006 Suspension Order nor the November 20, 2006 Decision upholding Milligan's license suspension articulated findings of fact and conclusions of law to support the GRC's suspension decision. The GRC filed this appeal shortly thereafter.

II. ANALYSIS

Although the Appellate Court has not had a chance to adopt standards for reviewing agency action under the new Constitution, in general, most tribal, federal and state courts give some degree of deference to agency decisions on matters that are within the agency's delegated authority because the agencies tend to have more expertise in their designated subject areas than the courts. However, before the Appellate Court exercises such deference, it must first conclude that the relevant agency acted within its legally-authorized, delegated authority.

One issue that must be resolved at the outset is whether the GRC had the authority to suspend Milligan's gaming license for failure to comply with the GRC's directive issued on October 11, 2006. The GRC is established by the Little Traverse Bay Bands of Odawa Indians "to ensure compliance with

Tribal, Federal, and, if applicable, State laws and regulations.” WOTC § 7.406(B). The GRC is authorized by tribal statute to issue regulations for, among other things, the fining of gaming licensees and the “suspension or revocation of gaming licenses for violations of the gaming Statute, or any other Tribal, Federal, or State, if applicable, gaming regulations.” WOTC § 7.406(F)(14). Tribal statute also describes certain circumstances under which the suspension or revocation of a gaming license is mandated. It provides:

If, after the issuance of a gaming license, the Commission receives from the National Indian Gaming Commission, or other credible source, reliable information indicating that a key employee or a primary management official is not eligible for employment, the Commission shall suspend/revoke such license and shall notify in writing the licensee of the suspension and the proposed revocation.

WOTC § 7.412(K)(1). Since no effort to terminate Milligan resulted from the events leading to his license suspension, the Appellate Court concludes that Section 7.412(K)(1) is not applicable to this case. Instead, the Appellate Court considers whether the GRC’s suspension of Milligan’s license was authorized by Section 7.406(F)(14) of the Gaming Ordinance. Section 7.406(F)(14) permits the GRC to promulgate regulations for license suspensions for violations of a gaming statute or regulation. Therefore, our next inquiry is whether the GRC’s suspension of Milligan’s license constituted an action taken in conformity with the GRC’s regulations detailing the qualifying grounds for a license suspension. The GRC rules for license suspensions are detailed in Section VI of the GRC’s regulations. It states that the GRC may suspend a license if it has reasonable cause to believe that:

- (1) the suspension is necessary for the immediate preservation of the public peace, health, safety, morals, good order, or general welfare of the Tribe; or
- (2) the licensee may have violated any condition or requirement imposed on the licensee by the [GRC] or applicable laws.

GRC Regulations, Section VI(A)(2)(a). The GRC’s suspension of Milligan is within the scope of the GRC’s authority if the suspension falls under either of the two categories above. The October 31, 2006

Suspension Order, which was upheld by the GRC's Decision on November 20, 2006, states that the suspension was made in accordance with the second category.

We therefore consider whether the facts in the record support the conclusion that Milligan violated a "condition or requirement" imposed on him by the GRC or applicable laws. First, there is no evidence in the record that the GRC found that Milligan violated any law. Instead, the GRC's suspension must have been predicated on a finding that Milligan violated a "condition or requirement" imposed by the GRC itself. As a result, the October 11, 2006 directive from the GRC ordering Milligan to stop all immediate cash redemptions of gift certificates must have constituted a valid "condition or requirement" imposed by the GRC, the violation of which could establish the grounds for a license suspension under Section VI(A)(2)(a) of the GRC regulations.

The Appellate Court finds that the GRC is not a body that is empowered to issue spontaneous management directives for key employees of the Casino. On the contrary, the gaming ordinance clearly limits the GRC's authority to the promulgation of regulations and to the processing of license applications in accordance with those regulations. For example, the Gaming Ordinance states that the Tribe established the GRC "to regulate tribal gaming operations." WOTC § 7.406(A). Furthermore, the ordinance states that the purpose of the GRC is "to ensure compliance with Tribal, Federal and, if applicable, state laws and regulations." WOTC § 7.406(B). Perhaps most importantly, the Gaming Ordinance also provides a list of the various powers of the GRC. This list includes no references to the power to issue spontaneous management directives for key gaming employees. The only kinds of rules or directives that the GRC may issue under the GRC's enumerated powers include a) the power to "[p]romulgate and issue regulations necessary to comply with the Tribe and the NIGC's Minimum Internal Control Standards (MICS);" b) the power to "promulgate and issue regulations on the levying of fees associated with gaming license applications;" and c) the power to "promulgate and issue regulations

on the levying of fines and/or suspension or revocation of gaming licenses for violations of the gaming Statute, or any other Tribal, Federal, or State, if applicable, gaming regulations.” WOTC § 7.406(F)(12), (13) and (14). In each of these cases, the GRC may issue rules and directives, but they must take the form of regulations, not spontaneous management directives. Aside from these three provisions, no other enumerated GRC power involves the authority to issue rules or directives. The other enumerated powers of the GRC relate to monitoring gaming activities to ensure compliance with the law, processing background checks and licensing applications, and complying with federal reporting requirements. WOTC § 7.406(F). Furthermore, the Appellate Court notes that the GRC also has a fairly broad enumerated power in § 7.406(F)(15), which states that the GRC shall “perform such other duties the Commission deems appropriate for the proper regulation of the Tribal gaming operation.” Even here, however, this fairly broad power is limited to duties that are necessary for the “proper regulation” of Tribal gaming. Again, the emphasis is on the GRC’s authority to promulgate regulations rather than the authority to issue spontaneous management directives.

The Appellate Court’s finding that the GRC’s authority to issue rules and directives is limited to the promulgation of regulations is also supported by the statutorily-defined function of the LTBB Gaming Board of Directors (GBD). The GBD, unlike the GRC, has the “authority and responsibility for developing, reviewing and approving policies and procedures for the orderly and efficient operation, management and maintenance of the [gaming operations] . . . “ WOTC § 7.504(B). Even the GBD lacks the authority to be involved in the day-to-day management and supervision of the gaming enterprises, but its statutorily-defined role gives it far more direct control over gaming management as a result of the GBD’s authority to issue operational policies and procedures. Given the GBD’s function, it is even more apparent that the GRC’s role is limited to that of a regulator – one that operates through the promulgation of regulations, rather than spontaneous management directives.

III. CONCLUSION

Because the Appellate Court concludes that the GRC lacked the authority to issue the spontaneous management directive in the form of the October 11, 2006 communication to Milligan, the Appellate Court concludes that Milligan's suspension for violation of that directive was unlawful and not within the scope of the GRC's delegated authority. As a result, the decision of Tribal Court setting aside the two-week suspension of Milligan's gaming license is AFFIRMED. Furthermore, the Appellate Court AFFIRMS the Tribal Court's order that Milligan be paid his salary for the two weeks that he was suspended.

DECIDED AND APPROVED BY A UNANIMOUS APPELLATE COURT.

10-01-08
Date

Chief Justice Wenona T. Singel