

**LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
APPELLATE COURT**

Court Mailing Address:
7500 Odawa Circle
Harbor Springs, MI 49740
Court Telephone No. (231) 242-1462
Court Fax No. (231) 242-1470

Aaron Wemigwase,
Plaintiff/Appellant

Case No: A-032-0516
(Tribal Court Case No. C-216-1215)

v.

Vince Cook and Andrea Cowles,
in their individual and official capacities,
Defendants/Appellees

Matthew Lesky (P69418)
Counsel for Appellant
Stroup Meengs, P.C.
P.O. Box 809
Petoskey, MI 49770

Tobin Dust (P61090)
Counsel for Appellees
Dust & Campbell, P.C.
5090 State Street, Bldg A, Suite 1
Saginaw, MI 48603

OPINION AND ORDER

Aaron Wemigwase (Plaintiff/Appellant) appeals the Tribal Court's order dismissing his claims against Regulatory Director Vince Cook and Licensing Manager Andrea Cowles (Defendants/Appellees). Conversely, the Appellees seek to overturn the portion of the Tribal Court's decision finding that neither administrative exhaustion nor the comprehensiveness of the Gaming Regulatory scheme barred Appellant's claims.

I. Background

The Little Traverse Bay Bands of Odawa Indians operates the Odawa Casino Resort in accordance with a regulatory scheme consisting of the Indian Gaming Regulatory Act (IGRA) and associated regulations promulgated by the National Indian Gaming Commission, a compact with the State of Michigan, and LTBB's Gaming Regulatory Statute, tribal regulations, and tribal policies and procedures. In conformance with the regulatory scheme, only individuals holding a gaming license may fill a position designated as Key Employee or Primary Management Official.¹ Vested with the authority and duty to regulate tribal gaming operations, the Gaming

¹ See Gaming Regulatory Statute, Waganakising Odawak Statute (WOS) #2011-005, section XIII(H)(2), Waganakising Odawak Tribal Code of Laws (WOTCL) § 7.401 *et. seq.*, section 7.413(H)(2); see also

Regulatory Commission (GRC or Commission) exercises discretion to determine whether an applicant is eligible and suitable to hold a license.

The Commission's regulations, in addition to the Compact and federal regulations, prohibit the Casino from hiring individuals in designated positions unless they are determined to meet regulatory standards and issued an employee license. As the Regulatory Director, Appellee Vincent Cook is "designated by the Regulatory Commission as having management responsibility for the day to day operations of the Regulatory Departments." REG-WOS 2011-005-040915-014, Section 2(V).

At this stage of the proceedings, the Tribal Court made no findings concerning questions of fact. To evaluate Appellees' affirmative defenses, the Court accepts the facts alleged as true, and includes the following facts for informational purposes.

The Resort employs Appellant as a Surveillance Manager, a position designated by the GRC as requiring a Primary Management Official license. On August 22, 2014, police officers in Iron County, Wisconsin arrested and charged Appellant with misdemeanor disorderly conduct.² After he entered a plea of not guilty on October 20, 2014, the court scheduled the matter for jury trial in June of 2015. Rather than proceed to trial, Appellant pled no contest to a civil charge of disorderly conduct.

On August 7, 2015 Mr. Cook issued a Formal Suspension Notice informing the Appellant that his "Primary gaming license has been suspended pending Revocation," citing two grounds. Appellant "may have violated any condition or requirement imposed" on him because (1) a licensee cannot be convicted of or plead guilty to a criminal offense; and (2) a license cannot be issued to an individual whose "prior activities, criminal records, reputation, habits, and/or associations [that] pose a threat to the public interest or to the effective regulation and control of gaming"

The Commission convened a license suspension/revocation hearing on September 3, 2015, and conditionally reinstated Appellant's license the following day. Appellant commenced this suit December 18, 2015. He alleges that Appellees violated the Fair Employment Statute "by unlawfully altering the terms and conditions of Plaintiff's employment," Compl. para 28, and that Mr. Cook violated the Whistleblower Protection Statute when he suspended Appellant's license in retaliation for previously reporting Mr. Cook's violation of internal control standards. Compl. para 38.

Appellees filed to dismiss and/or for summary disposition, asserting, among other affirmative defenses, that: (1) Appellant failed to exhaust administrative remedies; (2) the regulations created a comprehensive system of relief to the exclusion of Appellant's statutory claims; and (3) sovereign immunity barred the action. The Court, the Honorable John Lemire presiding, held that the Appellant's failure to exhaust a remedy did not bar the claim, and that the GRC Regulations do not constitute an exclusive remedy. The Court granted Appellees' motion, however, holding

Compact, section IV(D). The terms "key employee" and "primary management official" derive from federal law, 25 C.F.R. §§ 502.14 and 502.19.

² Wisconsin Statute 947.01(1).

that sovereign immunity barred the claim because Appellees acted within the scope of their duties and authority when they suspended Appellant's license.

On appeal, Appellant argues that sovereign immunity does not bar the claim because both bases for the suspension exceeded Appellees' scope of duties and authority. The first reason given for the suspension fails, he contends, because it erroneously equated his civil infraction guilty plea to a criminal guilty plea. The second reason fails because the statute expressly authorizes the Commission, not the Appellees, to make suitability determinations. Given their faulty justifications, Appellant argues, the suspension exceeded the scope of the Appellees' duties and authority.

II. Analysis

This matter comes before the Appellate Court on a motion to dismiss and/or for summary disposition based on Appellees' affirmative defenses. Appellees moved to dismiss under LTBBRCR XVI(b)(1), lack of subject matter jurisdiction; (b)(2), lack of jurisdiction over the person; and (b)(6), failure to state a claim upon which relief may be granted. Appellees also moved for summary disposition pursuant to LTBBRCP XVII.

We review de novo the Tribal Court's legal conclusions. LTBB Rule of Appellate Procedure 7.501(E).

A.

The Appellees argue for dismissal on two prudential theories. First, under the doctrine of "exhaustion of administrative remedies," Appellant waived his right to file when he failed to appeal the reinstatement of his license with conditions. Second, the GRC regulations furnish the "exclusive remedy regarding a suspension of a gaming license," Brief of Appellees at 22, precluding by implication Appellant's statutory claims. We consider these arguments: If either warrants disposition of the matter, the Court will decide on these grounds to avoid deciding on constitutional grounds.

1.

Appellees contend the complaint cannot proceed because Appellant elected not to appeal the GRC's decision to reinstate his license. The Court could have removed the conditions the Commission imposed on Appellant's license, Appellees emphasize, thereby strengthening Appellant's case for compensation from the general manager.

The requirement that a litigant exhaust administrative remedies prior to filing in court is, generally, a sensible one: Courts avoid adjudicating cases that are before another forum involving the same set of facts to serve judicial economy and to avoid conflicting outcomes. Nevertheless, the existence of an avenue for relief from a licensing decision does not foreclose the availability of statutory causes of action. The forum established in the regulations enables a licensee to appeal a licensing decision of the Commission only to detect "procedural error that significantly prejudiced the licensee." Section VII(S)(3). Indeed, this Court confirmed that any

Tribal Court review beyond the procedural conformance, and any remedy other than a second hearing before the Commission is improper. *Gaming Regulatory Commission v. Roberts*, A-018-0811 (December 20, 2012)(noting that the Tribal Court is authorized only to remand a matter to the GRC for a corrective hearing, and that an “award of relief other than the remand permitted by the regulation would necessitate a broader waiver of the Tribe’s sovereign immunity.”).

An appeal from the GRC hearing as a purported administrative remedy lacks a foothold for Appellant’s claims because he asserts no procedural defect or other claim related to the hearing. The gravamen of his complaint is that the Appellees impermissibly suspended his license, forcing him to file an appeal in the first instance. The Gaming Statute neither equips nor empowers the Commission to hear grievances as to its employees. While this Court can, it cannot hear substantive issues in an appeal of a GRC decision. See *Roberts*. Given this setup, an appeal of the Commission’s decision would be futile because the Commission cannot address the grievances averred in this matter. Accordingly, the Appellant need not appeal the Commission decision for no reason other than to exhaust a remedy as a prerequisite to praying for relief under the FES, Torts Statute, and WPS.³

2.

The Appellees next contend that the remedial scheme established in section VI(A)(2)(e) of the Gaming Regulations excludes the application of remedies from other sources of law. In support of this contention, Appellees cite *Hall v. Clinton*, 235 F.3d 202 (4th Cir. 2000). There, a federal employee filed a First Amendment claim against three non-supervisory actors. The court dismissed her action as precluded by the Civil Service Reform Act (CSRA) of 1978, Pub. L. 95-454, 92 Stat. 1111. The CSRA “comprehensively overhauled the civil service system.” *Id.* (quoting *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 773-74 (1985), by “prescrib[ing] in great detail the protections and remedies applicable to,” *United States v. Fausto*, 484 U.S. 439, 443 (1988), personnel actions by federal employees. The CSRA replaced a patchwork and haphazard arrangement for reporting and adjudicating personnel actions with an organized process. Drawing on this precedent, the Appellees propose that the Regulations’ remedial scheme displaces the statutory causes of action relied upon by the Appellant.

We disagree. The regulations govern disparate aspects of gaming, including extensive governance in the area of licensing — primary management, key and non-key employees, facility, and vendor. The remedy, however, is anything but comprehensive. The regulations, almost in passing, authorize the general manager to compensate suspended licensees. In contrast to the robust framework created by the CSRA for adverse personnel actions against federal employees, the regulations’ remedial scheme is more aptly characterized as “token.” The subsection merely grants to the general manager the discretion to award a licensee back wages. There is no applicable standard and no avenue to seek review. The remedial scheme is insufficiently robust to preempt statutory claims against Regulatory Department employees.

More important, the Council enacted the FES, Torts Statute, and WPS. Although the regulations received Council approval as required by the Gaming Statute, they were promulgated by the

³ Additionally, only the FES imposes on claimants an obligation to pursue an “administrative claim, if available, with diligence and in good faith.” WOTCL 14.117(A).

Commission. Absent explicit textual indication that the regulations preempt application of the statutes in gaming licensing matters, we reject Appellees' assertion that the Gaming Regulations displace the statutory causes of action.

B.

The LTBB Constitution elevates immunity from common law to a constitutional doctrine. Article XVIII(A) immunizes the Tribe unless the Council clearly and expressly waives immunity, and immunizes officials and employees who are "acting within the scope of their duties or authority."⁴ Article XVIII(B), "Suit Against Officials and Employees," provides:

Officials and employees of the Little Traverse Bay Bands of Odawa Indians who act beyond the scope of their duties and authority shall be subject to suit in Tribal Court for purposes of enforcing rights and duties established by this Constitution or other applicable laws.

Under the Constitution, then, an action against the Tribe may proceed where the Council waives immunity, and against tribal employees and officials who act "beyond the scope of their duties and authority," making suit necessary to enforce "rights and duties established by this Constitution or other applicable laws."

1.

In our earlier cases involving the immunity of employees or officials, we have held that casino employees acted within the scope of their duties and authority in *Carey v. Espinoza*, A-011-1008 (May 2, 2011) (*Carey III*), and that elected officials exceeded the scope of their authority in *Bardwell v. Harrington*, A-022-1212 (July 9, 2014).

In *Carey III*, a former employee filed a wrongful termination claim, alleging his supervisors discharged him from the now-defunct Victories Casino in retaliation for reporting the Casino tracked player participation and awarded promotional incentives. In Tribal Court and on appeal, sovereign immunity barred the claim. The supervisors acted within the scope of their duties and authority in firing the employee because their positions vested them "with the authority to hire and fire," *id.* at 4. For purposes of sovereign immunity analysis, the Court "looks to whether or not the type of action is within the employee's scope of duties and authority, not the alleged circumstances of a particular action." *Id.* at 5. Notably, the employee alleged no constitutional violation; the Court determined the alleged violation of the Whistleblower Protection Statute could not be reasonably considered illegal. *Carey III* stands for the general proposition that Article XVIII immunity shields employees from liability where they perform discretionary functions pursuant to the terms of their employment.

⁴ The Little Traverse Bay Bands of Odawa Indians, including all subordinate entities, shall be immune from suit except to the extent that the Tribal Council clearly and expressly waives its sovereign immunity, and officials and employees of the Tribe acting within the scope of their duties or authority shall be immune from suit.

Bardwell v. Harrington presented a dispute between two governmental branches. The Tribal Council had amended the Administrative Procedures Statute to enable the appropriation of funds by motion, depriving the Executive of the power to approve or veto legislative appropriations. The Tribal Chairperson filed suit against the council members, alleging they violated the LTBB Constitution by “appropriating tribal funds by motion rather than by formal resolution.” *Id.* at 8.

To evaluate the council members’ immunity defense, the Court adopted “a threshold examination of constitutional matters to determine the preliminary jurisdictional issue of whether sovereign immunity bars judicial review.” *Id.* at 13. In reviewing the appropriation practice, the Court concluded that the Council exercised its authority to pass motions in a manner that unconstitutionally shifted the government’s separation of powers. The Council conduct in question occurred “under color of authority of an unconstitutional law or without constitutional authority.” *Id.* at 14. The practice was “outside the scope of their duties and authority,” *id.*, and diminished the Executive’s clearly established right to approve or veto legislative appropriations. As a result, sovereign immunity did not bar the suit.

Appellant “urges this court to adopt the *Bardwell* framework . . . of a threshold determination as to whether or not the allegations in a complaint ‘demonstrate that it is sufficiently likely that the complained of actions’ violated a law or failed to enforce an applicable law.” Reply Brief at 4. Under the *Bardwell* test, “actions taken under the authority of an unconstitutional law or without constitutional authority . . . are not the ‘type of action’ that falls within an employee’s scope of duties or authority that *Carey III* described as falling within sovereign immunity’s protection.” *Id.*, at 13. Unlike *Bardwell*, however, there is no contention that the regulations are unconstitutional, nor that the suspension violated constitutional rights. Instead, Appellant advocates, Article XVIII(B) is not limited to constitutional violations — it enables suit against employees who act beyond the scope of their duties and authority, in the process violating rights conferred by “other applicable laws.” Under this broader standard, an injunction⁵ would issue prohibiting Appellees from suspending licenses for civil convictions if doing so (1) exceeds the scope of their duties and authority, and (2) violates a licensee’s constitutional *or* statutory rights.

Consistent with *Carey III* and *Bardwell*, we analyze the scope of duties and authority issue beginning with a threshold inquiry into whether the allegations, if true, establish a constitutional or statutory violation. The crux of Appellant’s grievances involving the FES, defamation, and gaming regulations is that the Appellees suspended the license on two grounds, one that was incorrect, and one that misused authority granted exclusively to the GRC. The final count, violation of the Whistleblower Protection Statute, is also predicated on the proposition that the grounds for suspension were manufactured as a pretext to retaliate against the Appellant. As a

⁵ The standard prescribed in *Bardwell* is “limited to cases such as the present one where the claimant seeks prospective injunctive relief, and not monetary damages.” *Id.*, at 14. However, the scope of duties and authority of employees are elements in immunity provisions in the three statutes under which Appellant requests damages: the Fair Employment Statute, WOS 2008-011, WOTCL 14.101 *et. seq.*, the Naawchigedaa Torts Statute, WOS 2014-012, WOTCL 6.5301 *et. seq.*, and the Whistleblower Protection Statute, WOS 2010-001, WOTCL 14.401 *et. seq.* See Compl. Para 14-16. The immunity provisions share another common strand: the employee or official must have acted “with malice or with reckless indifference” to a party’s rights. This case occasions no opportunity to consider the other elements.

threshold matter, we consider whether the grounds for the suspension as alleged violate the constitution or laws.

The Appellees issued the Notice of Suspension pursuant to section VI(A)(2)(a) of the regulations, which authorizes the Appellees to “issue a Notice suspending a license if there is reasonable cause to believe that: . . . (ii) The licensee may have violated any condition or requirement imposed on the licensee by the Gaming Regulatory Commission or applicable laws[.]” This Court discussed this provision in *Gaming Regulatory Commission v. Milligan*, A-006-0707 (October 1, 2008). There, the general manager of the Victories Casino redeemed gift certificates for cash. In response to the Regulatory Director’s written directive “to stop immediately,” the general manager scaled back the practice, but continued to cash gift certificates for a few select players. The Commission suspended him for defying the directive, and after a hearing, maintained the suspension. On appeal, the Tribal Court invalidated the suspension because the Commission failed to identify any violation of a condition or requirement of the general manager’s gaming license or of applicable regulations or law. Absent a violation, the Commission exceeded the scope of its duties and authority.

This Court affirmed, finding that “the GRC is not a body that is empowered to issue spontaneous management directives for key employees of the Casino.” *Id.* at 5. After reviewing the scope of the powers conferred to the Commission by the gaming statute and regulations, the Court determined that the Commission “operates through the promulgation of regulations, rather than spontaneous management directives.” *Id.* at 6. Compounding the error, the directive pertained to a business decision, not regulatory compliance. Hence, the Commission’s issuance of the directive did not comport with its duties and authority, either procedurally or substantively. *Milligan*, while not involving an immunity defense, explored the contours of the GRC’s suspension authority. The holding counsels that the GRC must act in the area of its authority in accordance with its enumerated powers.

Appellees did just that. The Gaming Statute and Regulations — both of which are valid tribal law — vest Appellees with the authority and obligation to suspend licenses where a “licensee may have violated any condition or requirement imposed on the licensee by the Gaming Regulatory Commission or applicable laws,” section VI(A)(2)(a)(i). The GRC — including its staff — bears the power and the responsibility to ensure all key employees and primary management officials are eligible and suitable for employment. In contrast to the Commission’s overreaching attempt to use its licensing authority to override a licensee’s business decision in *Milligan*, here the Appellees exercised delegated authority in their substantive area in conformance with established procedures.

They suspected Appellant might have violated two conditions or requirements of licensure. First, his no-contest plea may have constituted “a plea of guilty or no contest to [any criminal offense not described in subsection (C)(2), whether committed in this state or any other jurisdiction, that is, or would be, a crime under the provisions of the Michigan Penal Code . . . section IV(C)(3)(a)] within the immediately preceding five years.” This justification fails, Appellant argues, because the conviction was non-criminal. The argument challenges the interpretation and application of the regulations, not their constitutional validity. Given this status, we do not scrutinize the Appellees’ independent judgments because the Constitution and valid laws

authorized the conduct. Accordingly, a factual inquiry into whether Appellees reasonably believed Appellant had pled to a criminal charge is unnecessary. The predominant rationale for official immunity is to enable employees and officials to exercise the judgment and discretion necessary to execute the responsibilities of their positions. Erroneous or not, the decision regarding whether a licensee satisfies the criteria to maintain a license is at the very core of Appellees' discretionary functions.

As the second basis for the suspension, the Appellees deemed the plea to have diminished Appellant's suitability, warranting Commission review. The Appellees cited the obligation of a licensee to abide suitability criteria, which prohibit licensing an applicant "whose prior activities, criminal records, reputation, habits, and/or associations pose a threat to the public interest or to the effective regulation and control of gaming," section IV(C)(4). Appellant argues that the preceding language, "No . . . license may be issued to any applicant who: . . . (4) Is determined by the Gaming Regulatory Commission to . . ." reserves the exercise of this authority to the Commission, to the exclusion of Appellees. He further suggests the regulations authorize a suitability assessment only prior to issuing a license.

These arguments falls flat. First, the decision of the Commission is entitled to agency deference. "[I]n 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." *Milligan*, at 3. In enacting the Gaming Statute and approving the regulations, the Tribal Council delegated plenary licensing authority to the Commission. In recognition of the Commission's specialization and expertise interpreting and applying its regulations, we accord a degree of deference to its suspension protocols.

Second, the regulatory scheme contemplates Appellees exercising Commission authority. The Statute and Regulations define the Gaming Regulatory Commission as "three to five appointed officials, assisted by regulatory staff, to fulfill the duties required for regulation of the tribal gaming operations." WOTCL 7.402(B); Section II(I). The plain language of the statute authorizes Appellees "to fulfill the duties required for regulations" in an assistive capacity, exactly as they have done here. Moreover, as the Court recognized in *Roberts*, "the Commission has the authority to make delegations of its authority to the Regulatory Director." *Roberts*, at 11. For purposes of suspending licenses, the distinction between the GRC and its staff is immaterial.

Third, this arrangement facilitates the Commission's compliance with regulatory obligations under federal law, tribal law, and the gaming compact. The compact, for example, prohibits the Tribe from licensing or hiring anyone "whose prior activities, criminal records, reputation, habits and/or associations pose a threat to the public interest." Section 4(D)(4). The GRC may construe the prohibition to impose an ongoing obligation. As a body that acts by majority vote, and whose determinations require "[t]he concurrence of a majority of the members appointed to the Commission," Gaming Regulatory Statute, WOTCL 7.406(H), the GRC lacks the capacity to take immediate actions to address pressing concerns. Prior to a final determination by the Commission, a temporary suspension by the daily operations staff fulfills the Tribe's regulatory obligations.

III.

Immunity precludes the suit because the Appellees acted within the scope of their duties and authority when they suspended Appellant's license. The Appellate Court AFFIRMS the decision of the Tribal Court granting the Motion to Dismiss and/or for Summary Disposition.

SO ORDERED.



HONORABLE SEAN E. CAHILL

Dated: October 10, 2017