

IN THE HO-CHUNK NATION
SUPREME COURT

FILED
IN THE HO-CHUNK NATION
TRIAL/SUPREME COURT

JUL 03 2007

ME
Clerk of Court/Assistant

ROBERT GERHARTZ,

DECISION

Appellee,

vs.

HCN GAMING COMMISSION,

Case No.: SU 06-06

Appellant.

This is an appeal from the Ho-Chunk Nation (hereinafter HCN) Trial Court overturning a suspension given by the Gaming Commission. *Robert Gerhartz v. Ho-Chunk Nation Gaming Commission*, CV 05-104 (HCN Tr. Ct. Sept. 13, 2006). This case was heard by this Court on Saturday, March 31, 2007. Brian Stevens of the HCN Department of Justice represented the Appellant. Douglas Kammer represented the Appellee.

PROCEDURAL HISTORY

This case began as an appeal of a HCN Gaming Commission's decision to suspend Robert Gerhartz's license. On June 28, 2005, Appellee, as acting security shift supervisor, removed an individual from the Ho-Chunk Casino for panhandling. Upon his removal, the individual sat outside the door of the casino and refused to respond to casino employees. The Sauk County Sheriff's Department was then called. While waiting for the police, the individual soiled himself, resulting in the officer refusing to take the individual away until he was cleaned. The individual was taken behind the building where he was stripped from the waist down and cleaned. Because of these actions, the

Gaming Commission issued to the Appellee an Order to Suspend Gaming License (S005-004) on August 18, 2005. A *Show Cause Hearing* took place on September 30, 2005. On October 5, 2005, Appellee's attorney, Douglas Kammer, submitted a Motion for the dismissal of Case No. SC05-014, which was denied on October 21, 2005. The Gaming Commission found that Appellee was in violation of the HCN Class III INTERNAL CONTROL MANUAL (hereinafter ICM), Sec 100.01 and the HCN AMENDED AND RESTATED GAMING ORDINANCE (hereinafter ORDINANCE), Sec 1203(b). However, the Gaming Commission did acknowledge that in deferring to the Sauk County police, the Appellee was acting in accordance with the Security Department *Procedural Manual*. Therefore, the Appellee was reinstated, and the suspension period served as a penalty imposed for violating the ICM and ORDINANCE.

Appellee then filed an appeal with the Trial Court on November 28, 2005, seeking backpay and his record expunged. In its decision rendered on September 13, 2006, the Trial Court addressed two issues. First, the Trial Court ruled that the Gaming Commission does have the power to regulate employees. *Id.* at 16. Second, the Trial Court addressed whether the suspension was warranted. *Id.* at 17. Although the Trial Court agreed with the Gaming Commission that Appellee should have taken further steps to ensure the safety of the individual, it disagreed with the Gaming Commission that GAMING ORDINANCE 1203(b) can be used to suspend a license. *Id.* at 15-16. Additionally, the Trial Court found that a suspension based on the Security Department *Procedural Manual* is invalid because it had not been approved by the Legislature. *Id.* at 17. The Trial Court awarded Robert Gerhartz back pay and his record expunged. *Id.*

Appellant then filed an appeal with the HCN Supreme Court on November 13, 2006. On December 13, 2006, Appellant submitted its brief, and Appellee responded on January 9, 2007. Oral Arguments were scheduled for February 24, 2007 but, at the request of Appellant, were rescheduled and heard on March 31, 2007.

ISSUES

1. Did the Trial Court err in ruling that GAMING ORDINANCE 1203(b) did not apply to suspensions of licenses?
2. Did the Trial Court err in applying GAMING ORDINANCE 1801(e) and not 1212?
3. Should the Trial Court have remanded the case to the Gaming Commission without ordering back pay and Appellee's record expunged?

ARGUMENT

I. The Trial Court did not err in ruling that the Gaming Commission should have applied GAMING ORDINANCE 1803(b) and not 1203(b).

The Appellant's brief contends that although section 1203(b) of the ORDINANCE is entitled "Application for License," the standard found within it should be used when evaluating suspension of licenses as well. *Appellant Br.* at 5-6. In making this argument, the Appellant is asking this Court to not only reverse the Trial Court's decision in *Gerhartz* but to overturn *Hiller* as well. *Hiller v. Ho-Chunk Nation Gaming Commission*, CV 97-72 (HCN Tr. Ct. July 5, 2005). *Id.*

To support this contention, Appellant first turns to the ORDINANCE and notes that Section 807 gives the Commission the power to interpret and enforce the ORDINANCE. *Id.* at 6. The ORDINANCE further empowers the Commission in stating that the "trial court

shall not set aside or modify any decision unless it finds that the decision was arbitrary and capricious, unsupported by substantial evidence or contrary to law." GAMING ORDINANCE 1101(c)(v). Next, Appellant cites case law and notes that the Trial Court should give deference to the Gaming Commission because of the Commission's familiarization with the ORDINANCE and the importance of achieving internal consistency within the document. *Appellant Br.* at 6, citing *Cholka v. HCN Gaming Commission*, CV 95-07 (HCN Tr. Ct. Feb. 5, 1996).

Although the Appellant is correct in noting that the Trial Court owes the Gaming Commission great deference, this Court cannot accept the Appellant's reasoning in regards to Section 1203. As Section 1101(c)(v) states, the Trial Court may modify a decision if it finds that it was contrary to law. Here, the Gaming Commission applied the wrong provision of the ORDINANCE, so their decision is contrary to law. The Court is under no obligation to stretch the meaning of the law in order to comport with the Gaming Commission's decision, yet this is exactly what the Appellant would have the Court do.

The ORDINANCE has two sections devoted to maintaining high standards in regards to licensees. Section 1203 is entitled "Application for Licenses," while Section 1803 is entitled "Investigations," which deals with evaluations post application. If the Legislature intended for Section 1203 to be a standard for both applications and investigations, then it would not have created two sections. Alternatively, the legislature could have specifically incorporated Section 1203 into Section 1803. If Section 1203 were to be applied to investigations after a license has been issued, it would render Section 1803 meaningless as the language of Section 1803 is found entirely within

Section 1203. It cannot be presumed that the Legislature would create a meaningless provision. Therefore, the Court will presume that Legislature viewed the two standards as separate from each other. Finally, although the Court sympathizes with Appellant's argument that a strict interpretation of Section 1803(b) may not allow the Gaming Commission to take into account a person's criminal record (although even this is unlikely) when conducting evaluations of licensees, it is not the Court's job to essentially rewrite legislation by interpreting the law so broadly as to change its meaning. *Id.* at 7. If indeed the lack of the words, "criminal record, if any" within Section 1803(b) poses a problem, the way to correct it is through the Legislature, not the Courts. Consequently, the Trial Court's ruling that Section 1803(b) was the controlling section is affirmed.

II. The Trial Court Erred in its Application of GAMING ORDINANCE 1801(e).

Unfortunately, the Appellant's brief, the Trial Court's opinion and even the ORDINANCE itself are unclear about the relationship between Section 1801(e) and Section 1212. Appellant asserts that Court erred in ruling that the standard for suspensions can only be found in Section 1801(e) and not Section 1212. *Id.* at 9. However, the Trial Court does not seem to address this issue. The Trial Court focuses solely on whether or not the Security Department *Procedural Manual* is included within Section 1801(e). Presumably, this is what the following sentence refers to: "The section [Section 1801] does not establish rules for different departments, such as the Security Department." *Gerhartz*, CV 05-104 at 17. The Trial Court concludes by declaring that because Appellant did not provide evidence that the HCN Legislature approved the Security Department *Procedural Manual*, there was insufficient evidence to warrant a suspension of a gaming license. *Id.*

at 17. Appellant's brief correctly points out the flaw in this argument: it was never asserted that the Security Department *Procedural Manual* was the basis for the suspension. *Appellant Br.* at 10-11. Rather, the Security Department *Procedural Manual* was used as a defense to the Appellee's violation of the ICM. If anything, the lack of the Legislature's approval of the Security Department *Procedural Manual*, strengthens the case against Appellee. Consequently, the Trial Court erred by judging the validity of the suspension based on the validity of the Security Department *Procedural Manual*.

Despite twice incorrectly referring to 1801(e) as 1803(e) which does not exist, the Appellant does correctly state the first issue of determining whether Section 1212 (and not just 1801(e)) can be used as a basis for suspensions. Appellant asserts that because Section 1212 allows for "any rules promulgated in pursuance to this Ordinance," the ICM may be used as a basis for suspension because it is a rule promulgated for the regulation of gaming. *Id.* at 10. In making this argument, the Appellant fails to note that a strict reading of Section 1212 would only allow rules promulgated in pursuance to the ORDINANCE to be a basis for cancellation and not suspension: "Any License issued hereunder may be *cancelled* by the Commission for the breach of any of the provisions of the License, this Ordinance, or any rules promulgated pursuant to this Ordinance, as provided in Chapter 18..." GAMING ORDINANCE §1212 (emphasis added).

The Court declines to accept this strict interpretation that Section 1212 only applies to cancellations and not suspensions. If the Court adopted this strict interpretation and ruled that "rules promulgated in pursuant to this Ordinance, as stated in Chapter 18" applied only to cancellations, then it could be argued that Section 1801 would only apply to cancellations as well, since the sentence that incorporates Chapter 18 into Section 1212

only mentions cancellations explicitly. In doing so, the Court would deprive suspensions of any standard. Suspensions are only explicitly mentioned in Section 1212(b), which addresses permissible lengths of suspensions and notice requirements but does not state what triggers a suspension. Consequently, the Court adopts the more reasonable interpretation that the Legislature intended that Section 1212 and, therefore, Section 1801 apply to both suspensions and cancellations. This contention is further supported by the fact that Section 1212 is entitled "Cancellations and Suspensions."

Having resolved this statutory ambiguity, the Court can then turn to the Appellant's contention that a Court should look to the standard found in Section 1212 and Section 1801 when determining if suspensions are warranted. The Court also rejects the narrow application of Section 1801 that the Appellant erroneously imputed to the Trial Court's decision and agrees with the Appellant that the language found in Section 1212 can be used when determining suspensions. Section 1212 reads: "any rules promulgated pursuant to this Ordinance, *as provided in Chapter 18. . . .*" The words "as provided" suggest that the Legislature believed that the "rules promulgated pursuant to this Ordinance" were currently stated or implied within Chapter 18. Indeed, "rules promulgated in pursuant to this Ordinance" and Section 1801's "License conditions imposed by the Commission or Legislature" could be viewed as similar standards. Because there are circumstances in which both standards may not apply though, the Court now adopts the approach of using both the standards found in Section 1212 and Section 1801 in determining whether suspensions and cancellations are warranted.

The second, more pressing issue which neither the Appellant, the Appellee nor the Trial Court addressed in detail is whether the INTERNAL CONTROL MANUAL can be

considered either as a "rule Promulgated in pursuance of this Ordinance" as Section 1212 states or as a license condition imposed by the Legislature as Section 1801 demands. The Appellee had argued at the Trial Court level that this case was not a licensing issue but a personnel matter. However, the Appellee did not pursue this argument again on appeal in regards to interpreting 1801(e). The Appellants states that it can be, pointing out the fact that the Legislature originally approved it in December of 1994 and has been repeatedly amended and modified since then. *Appellant Br.* at 9-10. The introduction of the ICM states that the ICM is a document that integrates controls that the Gaming Commission must follow into one operational system. INTERNAL CONTROL MANUAL at 1. Therefore, the ICM falls within the category of "rules promulgated in pursuance of this Ordinance."

In conclusion of this issue, the Court notes that a great deal of this confusion in regards to whether or not the ICM can be used in disciplining could have been avoided if the Gaming Commission had used the ORDINANCE's Chapter 7 standard for public safety instead of the ICM's standard for guaranteeing the safety of its patrons. In the original allegation against Appellee in front of the Gaming Commission, Appellee was charged with "Ignorance and/or negligence of basic sanitary hazard. Potential exposure to unsanitary area after human defecation occurred." *Ex. A* at 1. Sanitation concerns are explicitly mentioned in the ORDINANCE. GAMING ORDINANCE Ch. 7. The Court sympathizes with the Gaming Commission's desire to specifically censure the Appellee for ceding all authority to the police officer and allowing a patron to be horribly mistreated. However, if the Gaming Commission had made an argument like the Trial Court did that the Appellee's behavior was potentially dangerous to others, the Appellee's behavior may still have fallen under Chapter 7. *Gerhartz*, CV 05-104 at 16. The Court

acknowledges that this argument would be difficult to make. However, the judicial resources expended in the multiple adjudications of this case must be balanced against the desire to discipline a person for a specific reason, especially if the person will likely be censured for other aspects of his behavior.

III. The Trial Court Should have Remanded the Case to the Gaming Commission Without Specific Instructions in Regards to Remedies.

The Trial Court did not make it clear why it awarded backpay and Appellee's record expunged instead of remanding the case to the Gaming Commission. The Trial Court makes a point of distinguishing this case from *Hiller* by noting that the Gaming Commission in *Gerhartz* did not allege it had made a technical error in relying on Section 1203(b). However, the significance of this distinction is never explained.

The Appellant's brief seems to imply that the Trial Court can never impose a remedy without "exceed[ing] its statutory authority." *Appellant Br.* at 4. This statutory limitation cannot supersede the Constitution's grant of power to the Trial Court. The Trial Court has the authority to "issue all remedies in law and equity." CONST., ART. VII, §6(a). Because of this Constitutional mandate, it cannot be an error for the Trial Court to exercise its remedial power as the Appellant suggests. This Court sees no reason why the Trial Court chose to exercise its remedial power here though. In its Conclusion, the Trial Court states that the Gaming Commission lacked the authority to suspend the Appellee under Section 1203 and does not mention Section 1801(e) at all. *Gerhartz*, CV 05-104 at 17. If the sole problem is that the Gaming Commission applied the wrong Section, then the Trial Court's ruling does not follow the precedent set in *Hiller*. The trial court in *Hiller* did not remand to the Gaming Commission and allowed an erroneous 1203 ruling by the Gaming Commission to stand because the same conclusion would have been

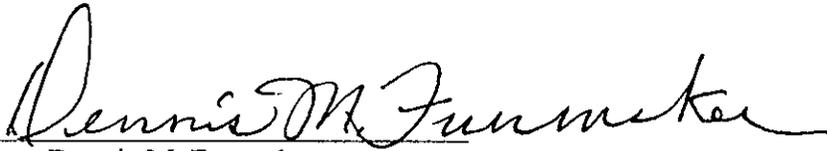
reached under 1801(e). *Hiller*, CV99-72 at 19. It then follows that if a different conclusion would have been reached by using Section 1803, the Trial Court should have remanded it with instructions to use the correct law. *Appellant Br.* at 8. Furthermore, because this is the second time that the Gaming Commission has made this error in regards to Section 1203(b), hopefully remanding with the instruction to apply the right Section 1803(b) will prevent the same mistakes being made in the future.

CONCLUSION

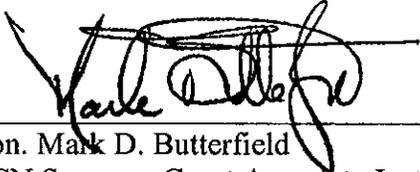
Based on the foregoing, this Court upholds the Trial Court in part but reverses in part. It upholds the application of Section 1203 to applications only. It further holds that both GAMING ORDINANCE Section 1212 and Section 1801 can be used in determining whether suspensions are warranted. Finally, this Court remands the case back to the Trial Court with instructions to remand it to the Gaming Commission to evaluate Appellee's conduct in accordance with this decision. Furthermore, the Court notes that this decision in no way condones the horrible manner in which the individual was treated and suggests, at the very least, that the Sauk County police should be notified when one of their officers behaves in such an irresponsible and offensive fashion. Finally, the Court also reminds the Gaming Commission that their primary function is to ensure the integrity in the operation of gaming.

IT IS SO ORDERED. EGI HESKEKJENET.

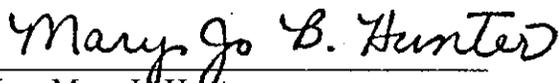
Per Curiam.



Hon. Dennis M. Funmaker
HCN Supreme Court Associate Justice



Hon. Mark D. Butterfield
HCN Supreme Court Associate Justice



Hon. Mary Jo Hunter
HCN Supreme Court Chief Justice