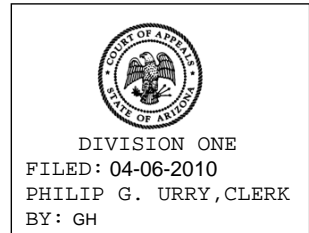


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

TP RACING, L.L.L.P. dba TURF PARADISE ) 1 CA-CV 08-0723  
RACE TRACK; and JEREMY ELLIS SIMMS, )  
 ) DEPARTMENT C  
Plaintiffs/Appellants, )  
 ) **MEMORANDUM DECISION**  
v. ) (Not for Publication -  
 ) Rule 28, Arizona Rules  
ARIZONA DEPARTMENT OF GAMING; PAUL ) of Civil Appellate  
BULLIS, Director, ) Procedure)  
 )  
Defendants/Appellees. )  
 )

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Appeal from the Superior Court in Maricopa County

Cause No. LC2007-000256-001 DT

The Honorable Paul J. McMurdie, Judge

**AFFIRMED**

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Jennings, Strouss & Salmon, P.L.C. Phoenix  
By David B. Earl  
Gerald W. Alston  
Attorneys for Plaintiffs/Appellants

Terry Goddard, Attorney General Phoenix  
By Charles A. Grube, Assistant Attorney General  
Attorneys for Defendants/Appellees

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**K E S S L E R**, Judge

¶1 Appellants TP Racing, L.L.L.P. ("TP Racing"), and Jeremy Ellis Simms ("Simms") appeal the superior court's order affirming the decision by the Arizona Department of Gaming ("Gaming") to deny

Appellants certification as a supplier of gaming services to Indian tribes in Arizona. For the reasons that follow, we affirm.

#### **BACKGROUND**

¶12 Simms is the controlling principal of TP Racing, which has been licensed by the Arizona Department of Racing ("Racing") since 2000 to conduct horse racing and teletracking at Turf Paradise Racetrack in Phoenix. On May 1, 2000, TP Racing and Simms applied for certification from Gaming to provide off-track betting services to Arizona tribal casinos. Gaming retained Ronald Asher ("Asher"), a former FBI agent and head of the Nevada Gaming Control Board's enforcement division, to render an independent opinion as to Simms' suitability for gaming certification. Asher reviewed information from previous investigations into Simms' suitability, including 110 exhibits, and conducted his own investigation. He prepared a fifty-three page report outlining and justifying his conclusion that Simms is unsuitable for certification as a gaming services provider under sections 5(f)(5), (6), (10) and (12) of the Arizona Tribal-State Gaming Compact ("Compact"). Asher later testified at the administrative hearing in this case, and his report was entered into evidence.

¶13 After Asher's investigation, Gaming notified Simms by letter dated July 19, 2006 of its intent to deny certification due to concerns about Simms' "suitability."<sup>1</sup> Gaming's concerns were

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<sup>1</sup> Gaming first notified Simms of its intent to deny certification on March 12, 2001, and before a hearing was held on

based generally on Simms' "history of inappropriate and corrupt dealings with state officials in California, his dishonest business activities, his questionable personal associations, and the false statements he has made to . . . [Gaming] and . . . [Racing] during their licensing and certification processes."

¶4 Simms appealed and requested a hearing, which was subsequently held at the Office of Administrative Hearings. The administrative law judge ("ALJ") found three examples of Simms' participation in corrupt dealings with former California State Senator Alan Robbins ("Robbins") and former California Coastal Commissioner Mark Nathanson ("Nathanson") in the late 1980's.<sup>2</sup> The first instance involved Simms paying Nathanson, at Robbins' suggestion, \$10,000.00 for Nathanson's assistance in achieving a favorable result for Simms in a consumer fraud investigation

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Simms' appeal of that decision, Gaming denied Simms' request to withdraw his application. Simms thereafter sought injunctive relief in the superior court to prevent Gaming from taking any action to deny certification. The superior court ruled that Simms could unilaterally withdraw his application and, consequently, granted Simms relief. Gaming appealed, and this Court reversed holding that Gaming "has the power to prevent the withdrawal of an application for gaming certification, when [Gaming] determines in its discretion that the protection of the public is advanced by completing the certification process." *Simms v. Napolitano*, 205 Ariz. 500, 506, ¶ 26, 73 P.3d 631, 637 (App. 2003). Simms subsequently updated his application, Gaming conducted further investigation, affirmed its previous reasons for denial, and "revealed new areas of concern."

<sup>2</sup> With respect to a fourth example of Simms' corrupt dealings cited by Gaming in its Notice, the ALJ found insufficient evidence of Simms' involvement.

conducted by the California Attorney General into Simms' Datsun auto dealership. On the memo line of the check to Nathanson, Simms wrote "Consulant [sic] Laurel Way" referring to Simms' residential address although Simms admitted the check was not for any consulting services, but rather, was paid in connection with the favorable result Nathanson obtained regarding the consumer fraud investigation. Second, the ALJ found Simms loaned Nathanson \$100,000.00 to assist in getting approval from the Coastal Commission for construction of a lap pool at Simms' residence and to defeat a commercial real estate development that would be a potential competitor of Simms. When Simms was granted immunity in a federal criminal investigation into Nathanson and Robbins, Simms admitted to the grand jury in 1992 that the \$100,000.00 payment was a bribe. Finally, the ALJ found Simms participated in the extortion of Jack Naiman ("Naiman"), a California real estate developer, for the payment of \$250,000.00 to Nathanson -- at Robbins' request -- for assistance in defeating the construction of a project that would threaten the value of another development in which Naiman was involved.<sup>3</sup>

¶15 The ALJ also found Simms engaged in two dishonest business dealings involving Robbins during the same time period.

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<sup>3</sup> Because Simms and Naiman subsequently decided to not obstruct the competitor's project, Naiman was hesitant to pay the \$250,000.00 requested by Robbins and Nathanson, but he eventually succumbed when urged by Simms to do so and when Nathanson threatened that Naiman would be "damaged" and "hurt" if the money was not paid.

The first regarded Simms using Robbins' influence in an unsuccessful attempt to obtain an Acura dealership through American Honda Motor Company. When a group formed by Robbins without Simms did obtain a dealership, Robbins insisted one of the members pay Simms \$150,000.00 for a covenant not to compete. Simms and Robbins also purchased a car for a Honda lobbyist in gratitude for the work he had performed on their behalf. The other instance involved a legal action by Simms' and Robbins' partnership against a seller of real property. To support their litigation strategy, Simms and Robbins asked Naiman, who was not involved in the transaction at issue, to testify that he was willing and able to lend them \$400,000.00.<sup>4</sup>

¶16 In addition to the troubling associations with Robbins and Nathanson, the ALJ further found Simms had long-term personal and financial relationships with Las Vegas casino-owner Allen Glick ("Glick"), whose Nevada gaming license was permanently revoked based on his involvement in skimming profits at his casinos, and

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<sup>4</sup> The amount testified to at the hearing was \$4,000,000.00, not the \$400,000.00 referred to by the ALJ. It appears from the record that Naiman actually did have access to the funds *at the time he would have testified*; however, as the ALJ noted, to the extent Simms and Robbins argued they were capable of performing the contract at the time of purchase based on Naiman's ability to loan them money, they were misleading the court and likely suborning perjury. The evidence at the hearing reveals that Simms and Robbins never intended to actually borrow the funds. In any event, the ALJ found Simms' conduct was questionable based on his deposition testimony that he believed Robbins, as a state senator, could influence the judge presiding over the contract dispute.

Patrick Valenzuela ("Valenzuela"), a well-known jockey who at one point lived with Simms and had been disciplined for drug violations. Regarding Simms' relationship with Glick, the ALJ found that, over a nine-month period, Simms loaned Glick an average of \$250,000.00 nine times, and each time the loan was quickly repaid and invested in treasury bills that were then cashed before maturity. The ALJ and Gaming found that Simms had never explained the purpose of these loans and his relationship with Glick continued as of the year 2000. The ALJ noted that the evidence "established that this was a very questionable business practice that poses a threat to the State, the Tribes, the public and the gaming industry . . . ." With respect to Valenzuela, the ALJ found Simms loaned him money on several occasions, which was questionable because Valenzuela was a known drug addict. Naiman had also stated that Simms had "bragged that he had had certain horse races fixed" while Valenzuela was residing with Simms.

¶17 The ALJ also received expert testimony on how Simms' background would impact his suitability for participation in Indian Gaming. For example, Nelson Rose, a law professor specializing in gaming law, reviewed Asher's report and testified that, based on Simms' associations with Glick and Robbins, no state would give Simms a license for "anything to do with casino gambling." He further testified that, given Simms' position at TP Racing and control of the off-track betting signal, Simms could adversely

affect the gaming industry. Asher testified that Simms, because of his admitted bribery and "certain kinds of associations" would "be a threat simply through influence in the contract in the business process as well as being on the floor of the casino." Asher also stated Simms' past history could be detrimental to gaming in Arizona, and he specifically testified: "The State is charged to protect the state and the integrity of tribal gaming . . . . I don't know how you do that and certify a person with Mr. Simms' checkered past."<sup>5</sup>

¶18 On March 9, 2007, the ALJ issued her decision recommending Simms' appeal be denied. On March 21, 2007, Gaming accepted the ALJ's recommendation in its entirety and ordered Simms' application for certification be denied.<sup>6</sup> Simms sought judicial review in superior court pursuant to Arizona Revised Statutes ("A.R.S.") section 41-1092.08(H) (2004). On August 14, 2008, the superior court affirmed Gaming's decision. Simms appealed, and we have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

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<sup>5</sup> Indeed, Asher stated: "I personally in my personal experience have never been [sic] met anybody with such a checkered past that got a gaming license in the 16 years that I've been involved in gaming . . . . I didn't think that it was even a close call."

<sup>6</sup> Pursuant to the State's request and without a response from Simms, Gaming subsequently made various revisions to the ALJ's recommended decision. These revisions have no bearing on the disposition of this appeal.

## DISCUSSION

¶9 Simms argues that Gaming's decision should be reversed because: (1) There was insufficient evidence to support that decision as it related to a threat to gaming activities; (2) Gaming did not balance his prior conduct with his record while approved by Racing; and (3) He was denied due process. To understand his arguments, we must discuss the requirements for gaming certification and the facts supporting the denial of his application.

### I. The Compact

¶10 The Compact between the State and various Indian tribes regulates the licensing of entities that provide Class III gaming services to tribal casinos.<sup>7</sup> See <http://www.gm.state.az.us/compacts.htm>; A.R.S. § 5-601.02 (Supp. 2009). The stated purpose of the Compact is

to provide a regulatory framework for the operation of certain Class III Gaming which is intended to (a) ensure the fair and honest operation of such Gaming Activities; (b) maintain the integrity of all activities conducted in regard to such Gaming Activities; and (c) protect the public health, welfare and safety[.]

¶11 Gaming executes the State's responsibilities under the Compact, including the certification of gaming services providers "to ensure that unsuitable individuals or companies are not

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<sup>7</sup> Examples of Class III gaming include slot machines, blackjack, and off-track pari-mutuel wagering. 25 U.S.C. § 2703 (6-8).



involved in Indian gaming . . . ." A.R.S. § 5-602(A), (C) (2002). To fulfill this responsibility, Gaming is charged with investigative duties. A.R.S. § 5-602(D). Section 5(f) of the Compact sets forth specific grounds for denial of certification, including when an applicant (i) makes a misrepresentation of or fails to disclose a material fact to Gaming ("§ 5(f)(5) Factor"); (ii) fails to prove by clear and convincing evidence that he, she or it is qualified ("§ 5(f)(6) Factor"); (iii) has pursued economic gain in an occupational manner or context that is violative of any state criminal law if such pursuit creates probable cause to believe that the participation of the applicant in gaming would be detrimental to the proper operation of authorized gaming activities ("§ 5(f)(10) Factor"); or (iv) is someone whose prior activities, reputation, habits and associations pose a threat to the public or to the effective regulation of Class III gaming ("§ 5(f)(12) Factor"). The applicant bears the burden of proving eligibility for a gaming certification. Compact § 5(f)(6).

¶12 A State certification of a gaming services provider under the Compact provides a single certification for all gaming services. Therefore, Gaming may consider the threat a person poses to gaming as a whole, not merely the threat associated with the initial gaming service that an applicant intends to provide. Section 5(1) of the Compact provides that "[a] State Certification shall be valid for any Gaming Operation in Arizona." This means

that a certified person or entity may provide gaming services related to any gaming activity at any gaming facility without further certification by Gaming. Compact § 2(p). Therefore, each potential disqualifying 5(f) factor focuses on the qualification of the individual to participate in Indian gaming and not on the particular plan he proposes.<sup>8</sup> Compact § 5(f).

¶13 Here, the ALJ and Gaming concluded Simms failed to satisfy his burden with respect to the §§ 5(f)(5), (6), (10), and (12) factors, and thus denial of certification was proper. Simms contends the denial of his application was not supported by substantial evidence that he poses a danger to Indian gaming. We disagree.

## II. Standard of Review

¶14 In reviewing an administrative agency's decision, the superior court examines whether the agency's action was arbitrary, capricious, or an abuse of discretion. *Webb v. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, 557, ¶ 7, 48 P.3d 505, 507 (App. 2002). The court must defer to the agency's factual findings and affirm them if supported by substantial evidence. *Sanders v. Novick*, 151 Ariz. 606, 608, 729 P.2d 960, 962 (App. 1986). If an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different

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<sup>8</sup> Because State Certification grants such a far reaching privilege, Simms' argument that the specific provision of simulcasting and pari-mutuel wagering poses no threat to Indian gaming is irrelevant.

conclusion. *DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App. 1984).

¶15 We engage in the same process as the superior court when we review its ruling affirming an administrative decision. *Webb*, 202 Ariz. at 557, ¶ 7, 48 P.3d at 507. Thus, we reach the underlying issue of whether the administrative action constituted reversible error. See *Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc.*, 167 Ariz. 383, 386, 807 P.2d 1119, 1122 (App. 1990). Whether substantial evidence exists is a question of law for our independent determination. See *Pinal Vista Prop., Inc. v. Turnbull*, 208 Ariz. 188, 189-90, ¶ 6, 91 P.3d 1031, 1032-33 (App. 2004); *Havasu Heights*, 167 Ariz. at 387, 807 P.2d at 1123. We are not bound by an agency's or the superior court's legal conclusions. *Sanders*, 151 Ariz. at 608, 729 P.2d at 962. Issues regarding witness credibility are for the ALJ to decide, not the superior court or this Court. *Siler v. Ariz. Dep't of Real Estate*, 193 Ariz. 374, 382, ¶ 41, 972 P.2d 1010, 1018 (App. 1998). "That a judge of the superior court, or that this court, might be of the opinion that a different order should have been entered than that which the [agency] did enter, does not, of itself, warrant reversal of the [agency]." *Ariz. Water Co. v. Ariz. Corp. Comm'n*, 217 Ariz. 652, 659, ¶ 23, 177 P.3d 1224, 1231 (App. 2008) (quoting *Ariz. Corp. Comm'n v. Fred Harvey Transp. Co.*, 95 Ariz. 185, 189, 388 P.2d 236, 238 (1964)). We view the evidence in the light most

favorable to upholding an administrative decision. *Special Fund Div. v. Indus. Comm'n of Ariz.*, 182 Ariz. 341, 346, 897 P.2d 643, 648 (App. 1994).

**III. § 5(f)(5) Factor: Misrepresentation**

¶16 The ALJ and Gaming found Simms' application to Gaming contained material misrepresentations that pertained to his improper dealings with Robbins and Nathanson. The first misrepresentation was: "It is my understanding that . . . Nathanson, alleged that I was involved in an illegal payment in connection with his official duties as a member of the California Coastal Commission. The allegation is and was false." The other misrepresentation concerned Simms' statement that he went to the federal authorities when he learned in 1989 from Naiman that Robbins and Nathanson were attempting to extort Naiman. Simms claims these statements were in fact true. However, substantial evidence supported the ALJ's and Gaming's conclusions that they are false.

¶17 Simms admitted to a grand jury he had bribed Nathanson with a loan of \$100,000. *Supra*, ¶ 4. Simms' statement to Gaming that Nathanson falsely alleged Simms was involved in making illegal payments to Nathanson was a misrepresentation. Simms' statement regarding the timing of his disclosure to federal authorities of the Naiman extortion was also false. The hearing evidence showed that Naiman was actively involved in the extortion attempt in 1987,

and that he did not initially contact the authorities regarding Nathanson's and Robbins' misdeeds until two years later.<sup>9</sup> Sufficient evidence supports a finding that Simms made two material misrepresentations in his application for gaming certification.

#### **IV. §§5(f)(10) and (12) Factors**

¶18 On appeal, Simms contends because the incidents and associations "did not involve gaming at all" they do not support a conclusion that he would pose a danger to gaming in Arizona. Indeed, Simms suggests no evidence was presented that showed Simms would be a threat to the public interest if he were certified by Gaming. We find evidence of record to the contrary. The evidence discussed above was sufficient for Gaming to conclude that certification of Simms as a gaming services provider would pose a threat to the Arizona gaming industry and would otherwise be detrimental to pari-mutuel off-track gaming activities. The fact that none of Simms's misconduct related specifically to gaming is not persuasive. Under the Compact, certification allows a plethora of gaming activities. Gaming did not have to show how any of Simms's specific acts of misconduct under § 5(f) of the Compact could expressly effect simulcasting and off-track gaming. In light of the policy of shielding Indian gaming from influence by

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<sup>9</sup> Simms' implication in his application that he was motivated by altruistic purposes to report the extortion is also suspect. He initially approached federal officials and agreed to assist in investigating Robbins one week after Simms filed a \$75,000,000.00 lawsuit against Robbins.

organized crime, it is enough that he committed acts of bribery and extortion and was involved with organized crime figures.

¶19 We have already concluded that because certification as an Indian gaming services provider would be valid for all services without additional approval by Gaming, Gaming need not articulate the specific manner in which Simms would harm authorized Indian gaming. Rather, it is enough that Simms have a demonstrated historical propensity to conduct which would be inappropriate for Indian gaming. Simms' history of bribery, extortion, and association with organized crime figures is sufficient evidence that certification of Simms as a gaming services provider would pose a threat to the Arizona gaming industry and would otherwise be detrimental to pari-mutuel off-track gaming activities.

**V. § 5(f) (6) Factor**

¶20 The ALJ concluded Simms did not satisfy his burden of establishing his suitability for certification in light of his prior dealings with Robbins and Nathanson and his false statement to Gaming regarding those dealings. Based on the foregoing, we find no error in this finding. Simms did not testify at the hearing. The evidence he presented bearing on his suitability was provided by TP Racing's president and general manager, investigators for Racing, the FBI agent for whom Simms was a confidential informant in the federal investigation of Robbins and Nathanson, and the FBI agent who worked with Glick in the

investigation of organized crime's activities in Las Vegas in the 1970s. To the extent testimony presented in favor of Simms contradicted the evidence presented by Gaming, we do not reweigh the evidence, and we do not assess the credibility of witnesses.<sup>10</sup> See *Curtis v. Richardson*, 212 Ariz. 308, 313, ¶ 22, 131 P.3d 480, 485 (App. 2006); *Siler*, 193 Ariz. at 382, ¶ 41, 972 P.2d at 1018. Even if we were to engage in such an exercise, we note that, although TP Racing and Simms have had a seven-year "clean record" with Racing, Simms has been under investigation by either Gaming or Racing or both since he has been licensed by Racing. Simms' good behavior under such circumstances has little evidentiary significance. See *In re Lazcano*, 573 Ariz. Adv. Rep. 30, 31-32, ¶ 11 (Ariz. Jan. 10, 2010) (clear and convincing evidence of rehabilitation not established by applicant for admission to State Bar of Arizona when good behavior occurred while applicant was on probation; "probationers typically behave well while on probation").

¶21 In sum, we conclude the ALJ's and Gaming's findings and conclusions regarding Simms' unsuitability for certification as a gaming services provider are supported by substantial evidence and are not arbitrary, capricious, or contrary to law.<sup>11</sup>

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<sup>10</sup> We do point out, however, that one of Simms' witnesses conceded that Simms had illegally bribed Nathanson.

<sup>11</sup> Although Simms' failure to prove his suitability under any one factor in Compact § 5(f) is alone sufficient to deny certification, the ALJ also recommended denial "on the grounds that Mr. Simms' aforementioned activities and associations, taken as a

## **VI. The ALJ is Not Required to Balance Simms' Good Conduct Against His Disqualifying Conduct**

¶22 Simms' asserts that evidence of his lack of regulatory discipline by Racing for the preceding seven years was ignored by Gaming. The ALJ, however, expressly did consider such evidence; she merely afforded it little weight because the Compact "does not provide for balancing an applicant's favorable [and] disqualifying points," and it is "not intended to determine who is nice and who is not." We agree with the ALJ and Gaming that the f(5), (10), & (12) factors do not call for balancing.

¶23 The f(5) factor, misrepresentation, has no balancing provision in its text.<sup>12</sup> This is reasonable given the necessity of truthfulness in order for the certification process to properly function. Concealment of adverse facts prevents Gaming from considering the impact of possibly disqualifying conduct on Simms' suitability for participation in Indian gaming. This hinders the balancing Simms claims Gaming should conduct and jeopardizes the integrity of the entire certification process. Thus, even if none of the conduct Simms concealed or misrepresented in his application

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whole, enhance the danger of unsuitable, unfair or illegal practices, methods or activities in the conduct of gaming and its associated business activities[]" as an alternative justification of denial under Compact § 5(f)(12). Thus, we have addressed each factor supporting the decision to deny Simms a gaming certificate.

<sup>12</sup> At oral argument, Simms' counsel conceded that Gaming has no independent duty to show that a material misrepresentation on his application is a threat to authorized gaming.



were disqualifying, the mere fact that he hindered the certification process is disqualifying.<sup>13</sup>

¶24 The f(10) factor does call for consideration of conduct's relationship to Indian gaming, but the standard is not a balancing test. The standard is whether there is probable cause to suspect that Simms' participation in Indian gaming would be detrimental to the gaming industry. The f(10) factor provides that Gaming may deny a license to a person who "[h]as pursued or is pursuing economic gain in an occupational manner or context which is in violation of the criminal laws of any state if such pursuit creates probable cause to believe that the participation of such Person in gaming or related activities would be detrimental to the proper operation of an authorized gaming or related activity in this State." The ALJ and Gaming found a litany of transactions in which Simms participated in and benefitted from illegal conduct in connection with his business. Those transactions involved bribing public officials. Simms also participated in criminal business transactions with multiple persons who committed Federal RICO violations. Given the expressed policy goal of protecting Indian gaming from infiltration by organized crime, that is enough to

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<sup>13</sup> Additionally, while much of the evidence pertained to Simms' misconduct from several decades ago, misrepresenting that misconduct on his application is a current disqualifying act of dishonesty. Further, Simms' demonstrated willingness to deceive Gaming relates directly to his suitability for certification as a gaming services provider.

support a finding of probable cause that Simms' participation in Indian gaming will be detrimental to authorized gaming in Arizona.

¶25 The f(12) factor is even broader, because it dispenses with the probable cause requirement. This factor allows Gaming to deny certification if an applicant's "reputation, habits and associations pose a threat to the public interest." The ALJ and Gaming found that Simms had a history of association with organized crime figures and participation in illegal transactions. The ALJ and Gaming found that granting a certification to someone with Simms' reputation could threaten public interest by encouraging corrupt individuals to seek involvement in Arizona Indian gaming.

#### **VII. Simms Received Due Process**

¶26 Simms contends he was denied due process because "Gaming's application of the Compact does not give fair notice or provide readily ascertainable standards." We find no merit to this argument. We review allegations of denial of due process de novo. See *Mack v. Cruikshank*, 196 Ariz. 541, 544, ¶ 6, 2 P.3d 100, 103 (App. 1999). It is Simms' burden to show he was denied due process. See *Pavlik v. Chinle Unified Sch. Dist. No. 24*, 195 Ariz. 148, 151, ¶ 9, 985 P.2d 633, 636 (App. 1999).

¶27 Procedural due process ensures that a party receives adequate notice, an opportunity to be heard at a meaningful time and in a meaningful way, and an impartial judge. *Mathews v. Eldridge*, 424 U.S. 319, 333-34 (1976); *Goldberg v. Kelly*, 397 U.S.

254, 267-68 (1970); *Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351, 355, ¶ 17, 132 P.3d 290, 294 (App. 2006); *Comeau v. Ariz. State Bd. of Dental Exam'rs*, 196 Ariz. 102, 107, ¶ 20, 993 P.2d 1066, 1071 (App. 1999). The amount of process due a party is a matter determined by the facts and circumstances of the case. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985); *Mathews*, 424 U.S. at 332, 334, 349; *Goldberg*, 397 U.S. at 262-63. See also *Berenter v. Gallinger*, 173 Ariz. 75, 82, 839 P.2d 1120, 1127 (App. 1992) ("The requirements of due process vary with the nature of the proceedings, the private and governmental interests at stake, and the risk that the procedure will lead to erroneous results.") (citation omitted); *Carlson v. Ariz. State Personnel Bd.*, 214 Ariz. 426, 430-31, ¶¶ 14-15, 153 P.3d 1055, 1059-60 (App. 2007) (noting the flexible nature of due process does not require elaborate administrative hearings as long as there is notice and opportunity to be heard).

¶28 Gaming provided Simms with a thirteen-page detailed explanation of how Simms' prior dealings, personal associations and misrepresentations on his application supported denial under the Compact. Gaming attached Asher's report to the July 19, 2006 Notice of Intent to Deny. At the administrative hearing, Simms presented evidence that attempted to contradict Asher's conclusions regarding Simms' past conduct as it relates to his suitability to be certified by Gaming. Simms was certainly aware of the bases for

Gaming's intent to deny his application. Consequently, we conclude Simms was afforded more than sufficient notice to satisfy any due process concerns.

¶129 Simms also argues that he was denied due process because the standards are unduly vague. Simms bases his argument on the allegations that he did not violate any express provisions in section 5(f) of the Compact, there was no evidence that his certification would be detrimental to tribal gaming and Gaming based its decision solely on the vague notion that certifying him would endanger the certification process in the future. His contentions are factually and legally erroneous.

¶130 Simms' argument that he was not covered by an express provision in the Compact has already been addressed. We have already determined that he misrepresented facts on his application, that he pursued economic gain in violation of criminal law, and that his reputation and associations render him unfit for participation in Indian Gaming. We have already determined that the evidence supports the conclusion that the relationship of his prior offenses to crime figures and the likelihood that certifying someone with his reputation would attract corrupt individuals to Arizona Indian gaming supports denial of a gaming certification. Finally, we note that the ALJ's written decision was not based on a vague notion that approving Simms would threaten future certification. Rather, it considered Simms' prior conduct and its

relationship to his suitability for participation in Indian gaming and rejected his application based on the standards set forth in the Compact.

¶31 Further, the relevant standards in the Compact are not unduly vague.<sup>14</sup> The 5(f)(5) criteria states that an application may be denied for misrepresentation. The 5(f)(10) factor applies to persons who engage in criminal enterprises when there is probable cause that the person will be detrimental to authorized gaming. It is as clear as the criminal law of any state in which Simms does business. The 5(f)(12) factor grants Gaming the broadest discretion, permitting it to deny certification whenever a person's reputation or associations pose a threat to authorized Gaming. However, the 5(f)(12) factor is at least as specific as other standards that Arizona courts have affirmed as not unduly vague.<sup>15</sup> See, e.g., *Curtis*, 212 Ariz. at 314, ¶ 27, 131 P.3d at 486 (holding that standard requiring "good character" to obtain a real estate

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<sup>14</sup> We need not determine whether 5(f)(6)'s requirement of "suitability" is unduly vague, because the ALJ's use of that factor was limited to noting that Simms failed to prove by clear and convincing evidence that he was suitable under the more specific standards of 5(f)(5), (10), & (12).

<sup>15</sup> Additionally, even if the 5(f)(12) standard were unconstitutionally vague, Simms would not have standing to challenge it because his disqualifying conduct clearly falls within the core of the prohibited conduct. *State v. McLamb*, 188 Ariz. 1, 6, 932 P.2d 266, 271 (App. 1996) ("A defendant whose conduct is clearly proscribed by the core of the statute has no standing to attack the statute [for vagueness].") (citing *Parker v. Levy*, 417 U.S. 733, 756 (1974)). Simms' disqualifying conduct includes bribery, extortion, and involvement with organized crime. This clearly falls within the core of what the 5(f) standards are

license is permissible). The 5(f) standards are not unconstitutionally vague.

#### CONCLUSION

¶132 The superior court's order affirming Gaming's denial of Simms' application for gaming certification is affirmed. Because he did not prevail on appeal, we deny Simms' request for attorneys' fees.

/s/  
DONN KESSLER, Presiding Judge

CONCURRING:

/s/  
ANN A. SCOTT TIMMER, Chief Judge

/s/  
PATRICIA A. OROZCO, Judge

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intended to keep out of Arizona Indian gaming. Therefore we would affirm even if the 5(f)(12) standard were unduly vague.