

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NO. 2013 CA 2166

BIG EASY GAMING, L.L.C. AND CHARLES M. LOESCHER, II

VERSUS

THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF
PUBLIC SAFETY AND CORRECTIONS, OFFICE OF STATE
POLICE, VIDEO GAMING DIVISION, AND LOUISIANA GAMING
CONTROL BOARD

[Handwritten signature]
RHP by [signature]

Judgment Rendered: AUG 18 2014

On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. C613408, Div. F, Sec. 22

The Honorable Timothy E. Kelley, Judge Presiding

* * * * *

Timothy A. Porteous
Kenner, Louisiana
and
Frank G. DeSalvo
New Orleans, Louisiana

Attorneys for Appellees,
Big Easy Gaming, L.L.C. and Charles
M. Loescher, II

James D. "Buddy" Caldwell
Attorney General
and
Ashley Miller Scott
Assistant Attorney General
Baton Rouge, Louisiana

Attorneys for Appellants,
State of Louisiana, through the
Department of Public Safety and
Corrections, Office of State Police,
Video Gaming Division, and
Louisiana Gaming Control Board

* * * * *

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Guidry, J. concurs.

DRAKE, J.

This appeal involves the revocation of a video gaming license. The Department of Public Safety and Corrections, Office of State Police, Video Gaming Enforcement Division (“the Division”) recommended that the Louisiana Gaming Control Board (“the Board”) revoke the license of the plaintiff, Big Easy Gaming, L.L.C. (“Big Easy”), based on the fact that an owner in the company, Charles M. Loescher, II, was unsuitable to participate in Louisiana’s video gaming industry. Big Easy and Mr. Loescher opposed the revocation through the administrative process, which upheld the revocation. The plaintiffs petitioned for judicial review in the district court, where the case was remanded back to the Board for a full administrative hearing. The Board now appeals the decision of the district court. For the following reasons, we reverse.

FACTS AND PROCEDURAL HISTORY

On March 13, 2009, the Division received information from Big Easy, the holder of a Type 6 Video Poker License, License Number 4400615410, that owner Patricia A. Loescher had transferred 25% of her 50% ownership interest in the company to Mr. Loescher. As a one-fourth owner of Big Easy, Louisiana gaming law required Mr. Loescher to submit to a full suitability investigation.¹ In compliance therewith, Mr. Loescher submitted a personal history questionnaire to the Division, which began its background investigation.

¹ La. R.S. 27:310(D), which was repealed by Acts 2012, No. 161, § 3, effective August 1, 2012, and reenacted by that same Act as La. R.S. 27:427, provides that:

Every person who has or controls directly or indirectly more than a five percent ownership, income, or profit interest in an entity which has or applies for a license in accordance with the provisions of this Chapter, or who receives more than five percent revenue interest in the form of a commission, finder's fee, loan repayment, or any other business expense related to the gaming operation, or who has the ability, in the opinion of the division, to exercise a significant influence over the activities of a licensee authorized or to be authorized by this Chapter, shall meet all suitability requirements and qualifications for licensees. For the purposes of this Chapter, all gaming related associations, outstanding loans, promissory notes, or other financial indebtedness of an applicant or licensee must be revealed to the division for the purposes of determining significant influence and suitability.

The Division discovered during its investigation that Mr. Loescher, a former officer with the New Orleans Police Department (“the NOPD”), was administratively reassigned in 2004 pending the investigation of his involvement in providing protection to an illegal gambling operation, known as “Razzle Dazzle,” which was being conducted on Bourbon Street in the French Quarter of New Orleans. Mr. Loescher was jointly investigated by the Federal Bureau of Investigation (“the F.B.I.”) and the Office of State Police. Mr. Loescher failed to disclose to the Division the Office of State Police investigation and his administrative reassignment by the NOPD, but he did disclose the F.B.I. investigation. The 2004 investigation of Mr. Loescher’s activities was turned over to the United States Attorney’s Office for the Eastern District of Louisiana, and then to the Orleans Parish District Attorney’s Office, both of which declined to pursue charges.

Mr. Loescher also failed to disclose to the Division that he was investigated by the NOPD Public Integrity Bureau (“PIB”) in 2006 for falsifying time records in order to receive service pay while he was actually operating a separate, personal business venture. After submitting an administrative statement explaining his activities, Mr. Loescher resigned and retired from the NOPD. The PIB concluded its investigation and found sufficient evidence to confirm that Mr. Loescher had misused his time while on duty.

Finally, the Division’s investigation determined that Mr. Loescher failed to disclose that he had previously held a Type 1 video gaming license. When confronted with this fact, Mr. Loescher stated that he forgot that he had previously held a video gaming license and executed an affidavit of correction.

After the conclusion of the Division’s investigation, on August 25, 2011, Big Easy received a “Notice of Revocation” from the Board, which informed the company that the Division recommended revocation of its video draw poker

license and that Mr. Loescher be found unsuitable to participate in the gaming industry. The notice, signed by the Chairman of the Board, explained that the revocation sought by the Division was based on LAC 42:XI.2405(B)(1)(a),² LAC 42:XI.2417(B)(4),³ and La. R.S. 27:310(B)(1),⁴ which provides, in pertinent part:

B. (1) No person shall be granted a license under the provisions of this Chapter unless the applicant has demonstrated to the division that he is suitable for licensing. For purposes of this Chapter, suitability means the applicant or licensee is:

(a) A person of good character, honesty, and integrity.

(b) A person whose prior activities, arrest or criminal record if any, reputation, habits, and associations do not pose a threat to the public interest of this state or to the effective regulation of video draw poker, and do not create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and operations in the activities authorized by this Chapter and financial arrangements incidental thereto.

In response, Big Easy and Mr. Loescher requested an administrative hearing before a hearing officer of the Board, which was held on February 13, 2012. Following the hearing, the hearing officer submitted his decision, signed March 15, 2012, to the Board, Big Easy, and Mr. Loescher, which included sections entitled “Findings of Fact,” “Applicable Law,” and “Reasons for Decision.” Regarding the suitability standards a license applicant must demonstrate in order to participate in

² LAC 42:XI.2405(B)(1)(a) states:

No person shall be granted a license, and no license shall be renewed unless the applicant demonstrates to the division that he is suitable for licensing, and thereafter continues to maintain suitability, as provided in the Act.

³ LAC 42:XI.2417(B)(4) states:

[A]ny person required to be found suitable or approved in connection with the granting of any license or permit shall have a continuing duty to notify the division of his/her/its arrest, summons, citation or charge for any criminal offense or violation including D.W.I.; however, minor traffic violations need not be included. All licenses and permittees shall have a continuing duty to notify the division of any fact, event, occurrence, matter or action that may affect the conduct of gaming or the business and financial arrangements incidental thereto or the ability to conduct the activities for which the licensee or permittee is licensed or permitted. Such notification shall be made within ten calendar days of the arrest, summons, citation, charge, fact, event, occurrence, matter or action[.]

⁴ Since the filing of this suit, La. R.S. 27:310 was repealed by 2012 La. Acts No. 161, § 3, effective August 1, 2012. The same Act reenacted the repealed statute as La. R.S. 27:427.

the video gaming industry, the hearing officer cited La. R.S. 27:28(A) (which regulates casino gaming licenses), La. R.S. 27:310(B) (which regulates video draw poker licenses), and LAC 42:XI.2417(B) (which is the video draw poker licensees' code of conduct) in the "Applicable Law" portion of his decision, but only cited La. R.S. 27:28 in his "Reasons for Decision." The hearing officer ordered that the Type 6 Video Poker License of Big Easy be revoked and found Mr. Loescher unsuitable to participate in the video gaming industry in Louisiana.

Big Easy and Mr. Loescher appealed the decision of the hearing officer to the Board. In a decision signed on June 21, 2012, the Board affirmed the decision of the hearing officer. The plaintiffs then sought judicial review and a stay of the Board's decision in the Nineteenth Judicial District Court. After a hearing on July 22, 2013, the district court reversed the decision of the Board and remanded the matter to the Board with instructions that a full administrative hearing be conducted. It is from that October 1, 2013 judgment of the district court that the Board now appeals.

LAW AND DISCUSSION

Standard Of Review

The Board has regulatory authority, control, and jurisdiction over all aspects of gaming activities and operation, including licensing, in Louisiana. *Twin B. Casinos, Inc. v. State ex rel. Louisiana Gaming Control Bd.*, 00-1681 (La. App. 1 Cir. 9/28/01), 809 So. 2d 995, 999; See La. R.S. 27:15(B)(1) and La. R.S. 27:24(A). A party aggrieved by an action or decision of the Board may appeal to the Nineteenth Judicial District Court in accordance with the Louisiana Administrative Procedure Act. *Women's and Children's Hosp. v. State, Dept. of Health and Hospitals*, 07-1157 (La. App. 1 Cir. 2/8/08), 984 So. 2d 760, 765, *writ granted*, 08-0946 (La. 6/27/08), 983 So. 2d 1287, and *aff'd.*, 08-0946 (La. 1/21/09), 2 So. 3d 397; La. R.S. 27:26; see La. R.S. 49:950-973. When reviewing an

administrative final decision in an adjudication proceeding, the district court functions as an appellate court. Once a final judgment is rendered by the district court, an aggrieved party may seek review of the same by appeal to the appropriate appellate court. La. R.S. 49:965; *Smith v. State Dept. of Health and Hospitals*, 39,368 (La. App. 2 Cir. 3/2/05), 895 So. 2d 735, 739, writ denied, 05-1103 (La. 6/17/05), 904 So. 2d 701. On review of the district court's judgment, no deference is owed by the court of appeal to factual findings or legal conclusions of the district court, just as no deference is owed by the Louisiana Supreme Court to factual findings or legal conclusions of the court of appeal. *Maraist v. Alton Ochsner Medical Foundation*, 02-2677 (La. App. 1 Cir. 5/26/04), 879 So. 2d 815, 817. Thus, an appellate court sitting in review of an administrative agency's final decision reviews the findings and decision of the administrative agency and not the decision of the district court. *Smith*, 895 So. 2d at 739.

Our review of the district court's judgment is governed by La. R.S. 49:964. Subsection F of La. R.S. 49:964 provides that a reviewing court is confined to the record established before the agency. A reviewing court's function is not to weigh *de novo* the available evidence and to substitute its judgment for that of the agency. *Smith*, 895 So. 2d at 739. Nevertheless, Subsection G of La. R.S. 49:964 provides that the reviewing court:

...may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

- (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

The district court applies the manifest error standard of review in reviewing the facts as found by the administrative tribunal; the district court applies the arbitrary and capricious test in reviewing the administrative tribunal's conclusions and its exercise of discretion. *Samuels v. Goodwin*, 05-2131 (La. App. 1 Cir. 11/3/06), 950 So. 2d 736, 738. A reviewing court should afford considerable weight to an administrative agency's construction and interpretation of its rules and regulations adopted under a statutory scheme that the agency is entrusted to administer, and its construction and interpretation should control unless they are found to be arbitrary, capricious, or manifestly contrary to its rules and regulations. *Delahoussaye v. Board of Sup'rs. of Community and Technical Colleges*, 04-0515 (La. App. 1 Cir. 3/24/05), 906 So. 2d 646, 649 (citing *Matter of Recovery I, Inc.*, 93-0441 (La. App. 1 Cir. 4/8/94), 635 So. 2d 690, 696, writ denied, 94-1232 (La. 7/1/94), 639 So. 2d 1169). An interpretation used by the state administrative agency may be persuasive, but inconsistent interpretation of the overall scheme or use of the wrong rule cannot stand. *Varner v. Day*, 00-2104 (La. App. 1 Cir. 12/28/01), 806 So. 2d 121, 125. If the evidence, as reasonably interpreted, supports the determination of an administrative agency, its orders are accorded great weight and will not be reversed or modified in the absence of a clear showing that the administrative action is arbitrary and capricious. *Recovery I*, 635 So. 2d at 699 (citing *Blackett v. Louisiana Dept. of Environmental Quality*, 506 So. 2d 749, 752 (La. App. 1 Cir. 1987)). Hence, the test for determining whether the action is

arbitrary and capricious is whether the action taken is reasonable under the circumstances. *Recovery I*, 635 So. 2d at 699-700 (citing *Castle Investors, Inc. v. Jefferson Parish Council*, 472 So. 2d 152, 154 (La. App. 5th Cir.), *writ denied*, 474 So. 2d 1311 (La. 1985)). Stated differently, the question is whether the action taken was without reason. *Recovery I*, 635 So. 2d at 700.

On legal issues, however, the reviewing court gives no special weight to the findings of the administrative tribunal, but conducts a *de novo* review of questions of law and renders judgment on the record. *Schackai v. Louisiana Board of Massage Therapy*, 99-1957, 99-1958 (La. App. 1 Cir. 9/22/00), 767 So. 2d 955, 960, *writ denied*, 00-2898 (La. 12/8/00), 776 So. 2d 464. The court is free to make its own determination of the correct legal meaning of the appropriate statutes and render judgment on the record. Appellate review of questions of law is simply review of whether the lower court was legally correct or legally incorrect. *Twin B. Casinos*, 809 So. 2d at 999.

Assignments of Error

The appellants urge three errors by the district court: (1) error in reversing the decision of the Board, since Mr. Loescher failed to satisfy his burden of proof and affirmatively demonstrate that he is suitable to participate in the gaming industry; (2) error in holding that the Board based its decision on incorrect law; and (3) error in remanding the matter for a full administrative hearing, as one was previously conducted and the record on review is complete.

Burden of Proof Regarding Suitability & Remand

In its first assignment of error, the Board argues that Mr. Loescher had the burden to affirmatively prove his suitability to participate in the gaming industry. The Board contends that Mr. Loescher failed to satisfy his burden, and thus, the district court erred in reversing the decision of the Board. In its related third assignment of error, the Board contends that because Mr. Loescher failed to satisfy

his burden to demonstrate suitability, remand for a full administrative hearing is improper. We agree.

The State of Louisiana has a clear, legitimate, and compelling interest in regulating the gaming industry. The Legislature has provided for the strict regulation of the gaming industry in La. R.S. 27:2. Furthermore, the Legislature has explicitly provided that a video gaming license is a pure and absolute revocable privilege and not a right, property, or a protected interest under the constitutions of either the United States or the State of Louisiana. See La. R.S. 27:2(B); La. R.S. 27:301(D); *Leslie Bonano, Inc. v. State ex rel. Dep't of Pub. Safety & Corr.*, 01-1912 (La. App. 1 Cir. 6/21/02), 822 So. 2d 104, 108. As part of the regulation of the gaming industry, Louisiana law requires that applicants for video gaming licenses demonstrate suitability (i.e., good character, honesty, and integrity) for licensing. La. R.S. 27:310 provides, in pertinent part:

A. No person may be eligible to apply or be granted a license under the provisions of this Chapter if he has been convicted in any jurisdiction of any of the following offenses...:

- (1) Any offense punishable by imprisonment for more than one year.
- (2) Theft or any crime involving false statements or declarations.

B. (1) No person shall be granted a license under the provisions of this Chapter unless the applicant has demonstrated to the division that he is suitable for licensing. For purposes of this Chapter, suitability means the applicant or licensee is:

- (a) A person of good character, honesty, and integrity.
- (b) A person whose prior activities, arrest or criminal record if any, reputation, habits, and associations do not pose a threat to the public interest of this state or to the effective regulation of video draw poker, and do not create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and operations in the activities authorized by this Chapter and financial arrangements incidental thereto.

(c) Likely to conduct business as authorized by this Chapter in complete compliance with the provisions of this Chapter.

(d) Not prohibited from making application or disqualified from licensure under the provisions of Subsection A of this Section.

C. All licensees and persons required to be qualified under this Chapter shall have a continuing duty to inform the division of any action which they believe would constitute a violation of this Chapter.

As an owner with a more than five percent ownership interest in Big Easy, Mr. Loescher had the obligation to demonstrate his suitability for licensing. See La. R.S. 27:310(D). In La. R.S. 27:310(B), it is clearly mandated that evidence of character, prior activities, reputation, habits, and associations must be considered by the Division when reviewing suitability requirements of license applicants.

At the hearing before the hearing officer, Mr. Loescher did not present any evidence to disprove the allegations of his alleged unsuitability that were advanced by the Division. The record reveals that, aside from a few questions to the Division's witnesses and arguments that he was never arrested, charged, or prosecuted for any of the allegations presented by the Division, Mr. Loescher did not put on any evidence to demonstrate his suitability. La. R.S. 27:310(B)(1) states that it is Mr. Loescher's duty to affirmatively demonstrate his suitability for licensing, and not the Division's duty to prove his unsuitability.

Mr. Loescher received notice of, and was present and represented by counsel, at the administrative hearing held on February 13, 2012, regarding his suitability. Mr. Loescher and his attorney had notice and opportunity to gather and put on evidence to support his case. The district court even noted to Mr. Loescher's attorney during the hearing:

Here's one of my concerns though, and I am not unsympathetic to your position, but aren't you in effect asking me to send this back for you to have a second bite at the apple to present evidence that at

the time you strategically felt you weren't going to go put forward because you felt it was not necessary?

The failure of the plaintiff to present evidence to prove his suitability, and the district court's decision to remand the matter for a full evidentiary hearing, is unnecessary and a waste of administrative and judicial resources. Thus, we find that the district court erred in remanding this matter back to the Board for a full administrative hearing, as Mr. Loescher failed to prove his suitability for licensing.

Law Applied by the Hearing Officer

In its second assignment of error, the Board argues that the district court erred in finding that the hearing officer based his decision on incorrect law. The hearing officer cited the correct statutory provision for suitability in video draw poker gaming, La. R.S. 27:310, as part of the portion of his decision entitled "Applicable Law"; however, the hearing officer did not cite that statute in the portion of his decision entitled, "Reasons for Decision," but instead, cited the suitability provision for casino gaming, La. R.S. 27:28. The Division argues that the hearing officer's exclusion of the video poker suitability statute in his "Reasons for Decision" does not affect the decision of the hearing officer or the outcome in this matter. We agree. Under both La. R.S. 27:28 and La. R.S. 27:310, a license applicant is required to affirmatively demonstrate his suitability in order to obtain a license, whether for casino gaming or video gaming. La. R.S. 27:28(A) requires an applicant to demonstrate "by clear and convincing evidence to the board or division ... that he is suitable." La. R.S. 27:310(B)(1) requires an applicant to demonstrate "to the division that he is suitable for licensing."

Both statutes describe that suitability is met when a licensee demonstrates that he is a person "of good character, honesty, and integrity." La. R.S. 27:310(B)(1)(a); La. R.S. 27:28(A)(1). Additionally, both statutes require that a licensee be a person whose prior activities, arrest or criminal record if any,

reputation, habits, and associations do not pose a threat to the public interest of this state or to the effective regulation of video draw poker or casino gaming. La. R.S. 27:310(B)(1)(b); La. R.S. 27:28(A)(2). The major difference between Sections 28 and 310 is the burden of proof standard – Section 28 requires proof by clear and convincing evidence,⁵ while Section 310 does not. In this case, Mr. Loescher put on no evidence of his suitability, under either standard. Thus, the difference in the burden of proof required by Sections 28 and 310 is of no consequence in this matter since both statutes have nearly identical suitability standards that must be met by license applicants.

Furthermore, the hearing officer's failure to cite to La. R.S. 27:310 in his "Reasons for Decision," despite citing that statute in the "Applicable Law" section of his decision, is of no consequence and not an error of law that substantially prejudiced Mr. Loescher or the outcome of his case. The district court judge even stated, after indicating his intention to reverse and remand the case for a full administrative hearing, that he "suspect[ed] at the end of the day [the parties were] probably going to get the same result." *See Duzon v. Stallworth*, 01-1187 (La. App. 1 Cir. 12/11/02), 866 So. 2d 837, 861, *writ denied sub nom., Duzon ex rel. Cmty. of Acquets & Gains v. Stallworth*, 03-0589 (La. 5/2/03), 842 So. 2d 1101 and *writ denied*, 03-0605 (La. 5/2/03), 842 So. 2d 1110. (In determining the effect of legal error, the party alleging error has the burden of showing the error was prejudicial to his case. Error is prejudicial when the error is material and, when compared to the record in its totality, has a substantial effect on the outcome of the

⁵ Proof by clear and convincing evidence requires more than "a preponderance of the evidence," the traditional measure of persuasion, but less than "beyond a reasonable doubt," the stringent criminal standard. *Succession of Bartie*, 472 So. 2d 578 (La. 1985); *Succession of Lyons*, 452 So. 2d 1161 (La. 1984). Proof by a preponderance requires that the evidence, taken as a whole, show that the fact sought to be proved is more probable than not. *Prestenbach v. Sentry Ins. Co.*, 340 So. 2d 1331 (La. 1976). To prove a matter by clear and convincing evidence means to demonstrate that the existence of a disputed fact is highly probable, that is, much more probable than its nonexistence. *Louisiana State Bar Association v. Edwins*, 329 So. 2d 437 (La. 1976); *Succession of Sanders*, 485 So. 2d 126 (La. App. 2 Cir.), *writ denied*, 487 So. 2d 443 (La. 1986).

case. Prejudicial error is reversible error. Error that is not prejudicial is harmless error and is not reversible error.) Therefore, we find that the district court erred in holding that the hearing officer based his decision on incorrect law.

DECREE

For the foregoing reasons, the October 1, 2013 judgment of the district court, reversing the decision of the Louisiana Gaming Control Board and remanding the case to the Board for a full administrative hearing, is hereby reversed. The decision of the Board is reinstated, and all costs of this appeal are assessed to the appellees, Big Easy Gaming, L.L.C. and Charles M. Loescher, II.

REVERSED.