

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas D. Forte, :
Petitioner :
 :
v. : No. 821 C.D. 2008
 : Submitted: October 10, 2008
Pennsylvania Gaming Control Board, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: November 7, 2008

Thomas D. Forte (Applicant) appeals from an order of the Pennsylvania Gaming Control Board (Board) denying his application for a non-gaming employee registration, arguing that the Board capriciously disregarded evidence that his omissions in listing criminal offenses were innocent and that his criminal history did not pose a threat to the public interest.

On January 8, 2008, Applicant submitted through a computer a non-gaming employee registrant application (application) to the Board as a prerequisite to continue working as a food and beverage server at Harrah's Chester Casino & Racetrack. The application required that applicants list all arrests or criminal charges to which they had been subjected. On his application, Applicant only

listed a 1985 conviction for possession of a controlled substance with a sentence of five years probation and failed to report eight arrests and five convictions.¹

¹Specifically, he omitted:

- 4/4/1981 - Lotteries, Driving Under the Influence, quashed/dismissed/demurrer sustained;
- 8/3/1981 - Altered, Forged or Counterfeit Documents and Plates, pled guilty and placed in the Accelerated Rehabilitation Disposition (ADR) Program;
- 8/27/1982 - Aggravated Assault, Simple Assault, Persistent Disorderly Conduct; Resisting Arrest, found guilty of Simple Assault and sentenced to two years county probation, other charges were *nolle prossed*;
- 12/3/1982 - Aggravated Assault, Simple Assault, Recklessly Endangering Another Person, Possessing an Instrument of Crime, Firearms Not to be Carried Without a License, Carrying Firearms on Public Streets or Public Property, all charges quashed/dismissed/demurrer sustained;
- 5/3/1984 - Driving Under the Influence of Alcohol or a Controlled Substance, placed in ARD;
- 3/11/1985 - Two counts of Aggravated Assault, which were *nolle prossed*, two counts of Simple Assault, also *nolle prossed*, two counts of Recklessly Endangering Another Person, which were *nolle prossed*, Possessing an Instrument of Crime, also *nolle prossed*, Carrying Firearms on Public Streets or Public Property, pled guilty and sentenced to fines and costs, Firearms Not to be Carried Without a License, pled guilty and sentenced to five years of county probation as well as fines and costs, Possession with Intent to Distribute or Deliver a Controlled Dangerous Substance, pled guilty and sentenced to fines and costs, Possession of a Controlled Substance, pled guilty and sentenced to three years of county probation;

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When a background check of Applicant revealed his omissions, the Board's Office of Enforcement Counsel (Counsel) issued a notice of recommendation of denial of the application and informed Applicant that he had the right to request an administrative hearing, which Applicant requested.

At the hearing, the Board presented the testimony of Officer Michael Wilbur (Officer Wilbur), an agent for the Board. Officer Wilbur testified that applicants for a non-gaming license were required to provide their criminal history background and submit fingerprints to the Board. He noted that the computerized form explicitly stated that applicants were required to answer "yes" to whether they had a criminal history and explain that history, even if they did not commit the offense they were charged with; whether the charges or arrest were dismissed or downgraded to a lesser charge; whether they pled not guilty or *nolo contendere*;

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- 12/18/1985 - Dealing in Counterfeit Obligations/Securities, dismissed by US Magistrate;
- 7/11/1986 - Distribution of Methamphetamine, Conspiracy to Distribute Methamphetamine, two counts of Delivery of Methamphetamine, convicted and sentenced to 48 months in prison and 10 years parole;
- 4/9/1991 - Criminal Conspiracy, Pool Selling and Bookmaking, all charges quashed/dismissed/demurrer sustained;
- 8/11/1994 - Simple Assault, Recklessly Endangering Another Person, charges quashed/dismissed/demurrer sustained;
- 2/18/2007 - Theft by Unlawful Taking, Receiving Stolen Property, charges quashed/dismissed/demurrer sustained.

whether they completed an ARD program; whether the charges were expunged from their record; whether they were not convicted or found not guilty; whether they did not serve any time in prison; whether the arrests, charges or offenses happened many years earlier; whether they were arrested or charged in a state other than Pennsylvania; and whether they were never physically taken into custody or transported to jail. Officer Wilbur stated that applicants were only instructed by the form to answer “no” if they were never arrested or charged in any jurisdiction, or were under the age of 18 when such an event occurred. Officer Wilbur further testified that the form also required an applicant to verify that he or she had read and understood the definitions and instructions regarding criminal history, and in this case, Applicant had verified that he had read and understood the criminal history instructions, but had only listed the 1985 charge and probation. Officer Wilbur also testified that according to the background check, Applicant had multiple arrests, charges and convictions not listed on the application.

In his testimony, Applicant explained that although he had confirmed on the form that he understood the criminal history requirements and instructions, he was hesitant to put what he considered private information into a computer-based application. He stated that he had asked the person who helped him turn on the computer various questions regarding his lack of docket number information for some charges as well as his privacy concerns, but that she was unable to answer his questions. Applicant stated that he wanted to be “upfront” with the Board, but wanted to explain his criminal history in person so that the matter would not be on a computer system that might not be secure. Applicant also stated that the majority of his criminal history dated back 20 years, and that he had been of good character

since then. He further testified that he had been able to obtain other professional licenses.

The hearing examiner filed a report and recommendation that Applicant's application be granted because he found that his omissions had been innocent and were corrected by his testimony at the hearing. The Board, however, rejected the recommendation of the hearing examiner and denied Applicant's application, finding that his explanation for non-disclosure of his full criminal history was not credible. Additionally, the Board found that Applicant's history of criminal activity, which had included arrests and convictions for simple assault, firearms and narcotics offenses, rendered Applicant not suitable for licensure because issuing a non-gaming employee registration to Applicant would be inimical to the public interest pursuant to 4 Pa. C.S. §1202(b)(23).² Applicant then filed this appeal.³

² 4 Pa. C.S. §1202 (b)(23) provides that:

The board shall not issue or renew a license or permit unless it is satisfied that the applicant is a person of good character, honesty and integrity and is a person whose prior activities, criminal record, if any, reputation, habits and associations do not pose a threat to the public interest or the effective regulation and control of slot machine operations or create or enhance the danger of unsuitable, unfair or illegal practices, methods and activities in the conduct of slot machine operations or the carrying on of the business and financial arrangements incidental thereto.

³ When reviewing decisions of the Board not involving appeals under 4 Pa. C.S. §1204, our scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or whether necessary findings of fact were supported by substantial **(Footnote continued on next page...)**

On appeal, Applicant maintains that the Board capriciously disregarded evidence that his omissions were innocent and corrected through his oral testimony, and that his prior criminal record did not pose a threat to the public interest. An agency capriciously disregards competent evidence when it arrives at a decision where the losing party has presented overwhelming evidence that could require the agency to arrive at a different outcome that the agency has not addressed by resolving critical conflicts in the evidence or by making essential credibility determinations. *Leon E. Wintermyer v. Workers' Compensation Appeal Board (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002); *Hinkle v. City of Philadelphia*, 881 A.2d 22 (Pa. Cmwlth. 2005).

In this case, the Board did not disregard any competent testimony and relevant evidence. It stated that it had reviewed the reasons Applicant gave for not listing his entire criminal record on his application, but found those reasons not to be credible. Once it found that Applicant had submitted a false application, it was within the Board's power to deny the application solely for that reason alone. See 4 Pa. C.S. §1207.⁴ Similarly, the Board did not abuse its discretion when it found,

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evidence. *Makris v. Bureau of Professional and Occupational Affairs, State Board of Psychology*, 599 A.2d 279 (Pa. Cmwlth. 1991).

⁴ 4 Pa. C.S. §1207 provides that:

The board shall have the power and its duties shall be to: (1) Deny, deny the renewal, revoke, condition or suspend any license or permit provided for in this part if the board finds in its sole discretion that a licensee or permittee under this part, or its officers, employees or agents, have furnished false or misleading

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in light of his criminal history, that granting Applicant's application was not in the public interest. He had a lengthy criminal history, and although most of the charges spanned the early 1980s, the last reported charge of receiving stolen property and theft occurred in 2007. Given his criminal history, coupled with his failure to properly disclose that history to the Board on his application, the Board properly found that Applicant failed to sustain his burden of proving his suitability to be a non-gaming employee registrant by clear and convincing evidence. *See* 58 Pa. Code §412a.1(h).

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

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information to the board or failed to comply with the provisions of this part or the rules and regulations of the board and that it would be in the public interest to deny, deny the renewal, revoke, condition or suspend the license or permit.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas D. Forte, :
 Petitioner :
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 v. :
 :
 :
 No. 821 C.D. 2008
 :
Pennsylvania Gaming Control Board, :
 Respondent :

ORDER

AND NOW, this 7th day of November, 2008, the April 24, 2008
Order of the Pennsylvania Gaming Control Board at No. 25330 is affirmed.

DAN PELLEGRINI, JUDGE