

MISSOURI GAMING COMMISSION  
COMMISSION RESOLUTION NO. 13-094

BRYAN DUFFY  
December 4, 2013

WHEREAS, Bryan Duffy (“Duffy”), requested a hearing to contest the proposed disciplinary action initiated against him on August 6, 2012, by the Commission's issuance of a Disposition of Occupational Gaming License Application; and

WHEREAS, pursuant to 11 CSR 45-13.010, et. seq., an administrative hearing has been held on Duffy’s request and the Hearing Officer has submitted the proposed Findings of Fact, Conclusions of Law and Final Order dated October 25, 2013 attached hereto (collectively the "Final Order") for approval by the Commission; and

NOW, THEREFORE, BE IT RESOLVED, that the Commission has reviewed the Final Order and hereby approves and adopts the attached Final Order in the matter of DC-12-424; and

BE IT FURTHER RESOLVED, that this shall be considered a final decision of the Missouri Gaming Commission.

**BEFORE THE MISSOURI GAMING COMMISSION**

In Re: Bryan Duffy

License Number: 103481

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)  
) Case No. 12-424  
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**ORDER GRANTING RECONSIDERATION**

The above-captioned matter comes before the undersigned Hearing Officer by a Motion for Reconsideration of Hearing Officer's Findings of Fact, Conclusions of Law and Final Order from Christopher Hinkley, counsel for the Missouri Gaming Commission. The designated Hearing Officer, Bryan W. Wolford, conducted a hearing on the matter via conference call on October 25, 2013. Licensee's attorney, Mr. Richard Johnson, and the Commission's attorney, Mr. Christopher Hinkley, appeared to present argument.

Upon the Commission's motion, the applicable law, and the argument presented, the Hearing Officer finds that, contrary to Mr. Hinkley's assertion, the defense of waiver may be considered in rendering a Final Order. However, upon review of the controlling statutes and administrative regulations, the Hearing Officer does not have the discretionary authority that properly belongs with the Commission. The Hearing Officer must follow the law, and allow the Commission to use or not use its discretion pursuant to 11 CSR 45-4.260(4)(E).

It is hereby determined and ORDERED as follows:

1. The Findings of Fact, Conclusions of Law and Final Order entered by the Hearing Officer on September 13, 2013 is hereby VACATED.
2. The Hearing Officer enters the Findings of Fact, Conclusions of Law and Final Order attached hereto.

IT IS SO ORDERED.

DATED: October 25, 2013

  
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BRYAN W. WOLFORD  
Hearing Officer



occupational license application from 1995 revealed that in 1988, the Petitioner plead guilty to the felonies cited in paragraph 2 above.

7. On August 6, 2012, Commission Investigator David Leitman, while employed as an investigator and acting as an agent of the Commission, conducted the interview in paragraph 6 above and learned that Petitioner's 1988 felony convictions made Petitioner ineligible to hold an occupational gaming license.
8. Petitioner neither failed to disclose his previous felony convictions nor did Petitioner attempt to conceal said felonies.
9. During Petitioner's initial application and interview in 1995, the Commission officer was unable to locate a record of Petitioner's 1988 felony convictions, so Petitioner located the records himself from St. Louis County and provided them to the Commission.
10. Petitioner has been subject to renewal and review of his occupational gaming license annually for the past seventeen years that he has held his license. The issue of his 1988 felony convictions did not prevent the annual renewal of his occupational gaming license.
11. Petitioner's occupational gaming license and employment in the Missouri gaming industry for the past seventeen years has been Petitioner's source of income and livelihood.

### **CONCLUSIONS OF LAW**

1. "The Commission shall have full jurisdiction over and shall supervise all gaming operations governed by Section 313.800 to 313.850." Section 313.805 MO. REV. STAT. 2010.
2. "A holder of any license shall be subject to the imposition of penalties, suspension, or revocation of such license, or if the person is an applicant for licensure, the denial of the application, for any act or failure to act by himself or his agents or employees, that is injurious to the public health, safety, morals, good order, and general welfare of the people of the state of Missouri, or that would discredit or tend to discredit the Missouri gaming industry of the state of Missouri unless the licensee proves by clear and convincing evidence that it is not guilty of such action . . . the following acts may be grounds for such discipline: (1) Failing to comply with or make provision for compliance with Sections 313.800 to 313.850, the rules and regulations of the commission or any federal, state, or local law or regulation." Section 313.812.14 MO. REV. STAT. 2010.

3. "The burden of proof is at all times on the petitioner. The petitioner shall have the affirmative responsibility of establishing the facts of his/her case by clear and convincing evidence . . ." Regulation 11 CSR 45-13.060(2).
4. "Clear and convincing evidence" is evidence that "instantly tilts the scales in the affirmative when weighed against the opposing evidence, leaving the fact finder with an abiding conviction that the evidence is true." *State ex. rel. Department of Social Services v. Stone*, 71 S.W.3d 643, 646 (Mo. App. 2002).
5. "The state has a legitimate concern in strictly regulating and monitoring riverboat gaming operations. As such, any doubt as to the legislative objective or intent as to the Commission's power to regulate riverboat gaming operations in the state must be resolved in favor of strict regulation." *Pen-Yan Investment, Inc. v. Boyd Kansas City, Inc.*, 952 S.W.2d 299, 307 (Mo. App. 1997).
6. Under 11 CSR 45-9.060(3), violations of the Commission's Minimum Internal Control Standards ("MICS") by a Class A licensee or an agent or employee of the Class A licensee are deemed to be unsuitable conduct for which the Class A licensee and/or its agent or employee is subject to administrative penalty pursuant to Section 313.805(6) RSMo. (2012) and 11 CSR 45-1 *et. seq.*; as amended from time to time.
7. Under 11 CSR 45-9.060(4), violations of the Class A licensee's internal control system ("ICS") by a Class A licensee or an agent or employee of the Class A licensee shall be prima facie evidence of unsuitable conduct for which the Class A licensee and/or its agent or employee is subject to discipline pursuant to Section 313.805(6) RSMo. (2012) and 11 CSR 45-1 *et. seq.*; as amended from time to time.
8. "A license shall not be granted if the applicant has not established his good repute and moral character or if the applicant has pled guilty to, or has been convicted of, a felony. No licensee shall employ or contract with any person who has pled guilty to, or has been convicted of, a felony to perform any duties directly connected with the licensee's privileges under a license granted pursuant to this section, except that employees performing nongaming related occupations as determined by the commission shall be exempt from the requirements of this subsection." Section 313.812.8 RSMo. (2012).
9. The equitable defense of waiver by acquiescence may be considered when properly raised in an administrative hearing. *Boland v. State Dept. of Social Services*, 910 S.W.2d 754, 757 (Mo. App. 1995).

10. "The defense denominated as waiver by acquiescence does not arise in the absence of some fact or circumstance which warrants the invocation of equitable considerations in order to avoid injustice ..." *Grommet v. Grommet*, 714 S.W.2d 747, 751 (Mo. App. 1986).
11. "The commission may . . . revoke or suspend an occupational license of any person . . . who has failed to comply with or make provision for complying with Chapter 313, RSMo, the rules of this commission, or any federal, state, or local law or regulation." Regulation 11 CSR 45-4.260(4)(E).

## DISCUSSION

The law provides broad authority to the Commission regarding the regulation of the gaming industry in order to assure that the public health, safety, morals, and good order are maintained and protected.

Petitioner argues first that the Commission has waived its right to revoke his license for conduct that occurred prior to licensure, of which the Commission was fully aware at the time of initial licensure. Petitioner cites no applicable statute or administrative regulation in support of his argument. Petitioner's argument asserts the equitable defense of waiver by acquiescence, and such defense may be considered in administrative hearings. *Boland v. State Dept. of Social Services*, 910 S.W.2d 754, 757 (Mo. App. 1995). Because waiver by acquiescence is an equitable doctrine, Petitioner must assert some fact or circumstance that tends to show resulting injustice. *Willing v. Div. of Child Support Enforcement*, 993 S.W.2d 568, 571 (Mo. App. 1999).

In this case, Petitioner testified that he disclosed his 1988 felony convictions to the Commission in his initial application for occupational gaming license in 1995 and in his application for transfer in 2012. The Commission granted Petitioner his occupational gaming license in 1996 despite the felony convictions, and granted renewal of Petitioner's license annually since 1996. Petitioner further testified that his continuous employment in the Missouri gaming industry for seventeen years is his livelihood and source of income to support himself and his family. He argues that revocation of his occupational license after the Commission had been aware of his felony convictions for seventeen years is an injustice.

In his second and third points, Petitioner argues that even if the Commission possesses the right to revoke Petitioner's license, a revocation is not mandatory because the Commission has administrative discretion to allow Petitioner to keep his license. Petitioner suggests that Section 313.812.8 RSMo. (2012) does not apply to Occupational Level II licenses, but rather to Level A and Level B licenses. The plain language of Sections 313.800 to 313.850 RSMo. (2012) indicates that the General Assembly intended the Section to apply to Occupational Level II licenses.

Administrative agencies, like judicial bodies, must adhere to the law in the absence of statutory exemptions or where the statute language specifically or implicitly grants an agency discretionary enforcement power. Neither scenario exists here. To the contrary, the state's gaming statute is clear and unambiguous as to the Commission's powers and duty regarding persons who have in their past pled guilty to a felony - they are not eligible to hold a gaming license.

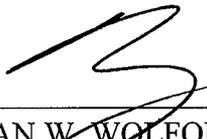
Petitioner posits that the Commission may use its discretion pursuant to 11 CSR 45-4.260(4)(E) to grant Petitioner an occupational gaming license over the statutory prohibition contained in Section 313.812.8 RSMo. (2012). Regulation 11 CSR 45-4.260(4)(E) is properly promulgated pursuant to Section 313.004.4 RSMo. (2012). The General Assembly intended for the Commission to have broad discretionary powers in carrying out its duties in regulating Missouri's gaming industry, including licensing gaming employees. The Commission may use its discretion to grant or deny an Occupational Level II gaming license in circumstances where an applicant may be otherwise prohibited from obtaining a license. Indeed, the regulatory licensing standards cited by the Petitioner do reflect the Commission's discretionary powers of enforcement with regard to licensing. They do not, however, contradict the statutory provision against persons who have pled guilty to a felony to be licensed.

The felony conviction prohibition contained in Section 313.812.8 RSMo. (2012) makes Petitioner ineligible to hold an occupational gaming license, and the Commission may not adopt a rule in conflict with said statute. §536.014 RSMo. (2012). The Petitioner has not met his burden of proof by clear and convincing evidence that he should maintain his license.

**FINAL ORDER**

WHEREFORE, IT IS ORDERED AND ADJUDGED that the decision of the Commission dated August 6, 2012 to revoke the Petitioner's Occupational Level II gaming license is affirmed.

DATED: October 25, 2013

  
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BRYAN W. WOLFORD  
Hearing Officer