

**Task Force on Gaming
August 18, 2008
Room 8E—B, East Wing**

Testimony of PGCB

The licensing process of the PGCB has been developed in a deliberate and methodical fashion to comply with mandates of law, to be applied uniformly to all applicants, and to promote the purposes of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §§1101 et seq. The process, which includes the preparation of a Suitability Report is undertaken to assure the appropriate presentation of facts based upon substantiated information and evidence, the consistent treatment of all applicants, and the formulation of an evidentiary record in a manner which is consistent with Pennsylvania administrative law and constitutional due process principles.

The PGCB Licensing Process

Recognizing that Gaming was a new industry in Pennsylvania with no established track record for process issues in this context, during the summer of 2006, the Gaming Control Board's staff undertook the development of a process for conducting licensing hearings and awarding the licenses authorized under the Gaming Act. The Gaming Act itself does not establish a specific licensing process but rather simply establishes that the Gaming Control Board shall issue the licenses judged against a number of eligibility and suitability criteria. Therefore, the process of licensing began with researching and applying Pennsylvania administrative law, other relevant State statutes, concepts of due process as embodied in the Pennsylvania and United States Constitutions, and case law, all with the goal of developing a

system which meets these requisites ingrained in our legal system with the goal of licensing appropriate applicants.

The starting point in the process demanded recognition of the ending point: in the competitive licensing situation facing the PGCB at the end of the hearing process, the Board was required to issue Adjudications and Orders which granted licenses to some applicants and denied licenses to others. Moreover, the Gaming Act specifically provides a right of appeal directly to the Pennsylvania Supreme Court to consider appeals of any final order, determination or decision of the Board involving the approval, issuance, denial or conditioning of a slot machine license, and provided a standard of review for that Court to exercise: the Court shall affirm the Board's final Order unless it shall find the Board committed an error of law or that the order or determination was arbitrary and there was a capricious disregard of the evidence. 4 Pa.C.S. §1204. Thus, the Adjudications and Orders to be issued by the Board had to follow a process and be based upon an evidentiary record which would survive any appeals by disappointed applicants in order to properly implement gaming in the Commonwealth.

1. Adjudications and Orders

Under established law, an administrative agency that issues a final order affecting the personal or property rights, privileges, immunities, duties, liabilities or obligations of parties to a proceeding must do so in an order and adjudication. 2 Pa.C.S. §101; 58 Pa.Code § 491a.2. The Supreme Court has stated that since an adjudication cannot be in accordance with law if it is not decided on the basis of law and facts properly adduced, the review of an agency adjudication for capricious disregard of material, competent evidence

is an appropriate component of appellate consideration. *Wintermyer v. WCAB*, 571 Pa. 189, 812 A.2d 478 (2002). To satisfy due process requirements, “administrative decisions of an adjudicatory nature must be based exclusively on evidence contained in the formal record which has been made known to the parties and which they have had an opportunity to refute.” *Mercy Regional Health Sys. v. Dep’t of Health*, 645 A.2d 924, 928 (Pa.Cmwlth. 1994), *cited in Turner*, 683 A.2d at 946 (Pa.Cmwlth 1996). The Board is required to set forth its findings in an adjudication, and that adjudication must include all findings necessary to resolve the issues raised by the evidence and which are relevant to a decision. 2 Pa.C.S. 507. *See Green Township Bd. of Supervisors v. Pennsylvania Pub. Util. Comm’n*, 642 A.2d 541 (Pa.Cmwlth. 1994).

The Board’s Adjudication must contain findings of fact and conclusions of law supported by credible, legally competent and substantial evidence. 2 Pa.C.S. 507. Substantial evidence is such evidence that a reasonable man, might have reached the decision based upon an examination of the whole record. Substantial evidence must do more than create a suspicion of the existence of a fact to be established.” *A.P. Weaver v. Sanitary Water Bd.*, 284 A.2d 515, 517 (Pa.Cmwlth. 1971). Thus, within this context, Pennsylvania law requires the Board’s decisions be based upon findings of fact contained in the evidentiary record, not upon rumor or suspicion.

In considering this obligation to issue an adjudication based upon evidence of record, we acknowledge that Administrative Agencies are not bound by the technical rules of evidence in conducting any hearing or investigation (*see* 2 Pa.C.S. §505). However, “within the administrative forum there has

not been a complete abandonment of all the rules of evidence.” *Gibson v. Workers’ Compensation Appeal Board*, 861 A.2d 938 (Pa. 2004). Certain evidentiary rules are considered more than technical and are fundamental rules of law that are to be followed by agencies when facts crucial to the issue are sought to be placed on the record. *Id.* The Supreme Court has identified a number of rules of evidence that are fundamental including the hearsay rule, the personal knowledge rule, and rules regarding expert and lay-witness testimony.

a. Hearsay

Hearsay evidence under Pa.R.E. 801, properly objected to, is **not** competent evidence to support a finding in an administrative hearing. Furthermore, hearsay evidence that is admitted without objection may support a finding only if corroborated by competent evidence in the record. *See Burks v. Department of Public Welfare*, 408 A.2d 912 (Pa.Cmwlt. 1979). The rule was designed to ensure that when evidence is presented that cuts to the heart of a case, a party has a reasonable opportunity to examine or cross-examine the source of information. *See Smith*, 333 A.2d at 805; *See also 2 Pa.C.S. 505; State Board of Medical Education v. Contakos*, 346 A.2d 850 (Pa.Cmwlt. 1975).

b. Personal Knowledge

First-hand, personal knowledge is another non-technical, fundamental rule of law that administrative agencies are bound to follow. *See Gibson*, 861 A.2d 947 (Pa. 2004). According to the Pennsylvania Rules of Evidence, “a witness may not testify to a matter unless evidence is introduced sufficient to

support a finding that the witness has personal knowledge of the matter. Pa.R.E. 602.

c. Lay and Expert Witness Opinion Testimony

Those who provide opinion testimony are typically categorized as either lay or expert witnesses. Lay witness testimony “in the form of opinion or inference is limited to those opinions or inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge.” Pa.R.E. 701. Testimony by experts, however, is necessary “if scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue. Pa.R.E. 702. The rules regarding lay and expert witness testimony have also been viewed by our Court as fundamental rules of law applicable to administrative agencies. *See Gibson*, 861 A.2d 947 (Pa. 2004).

In conclusion, the desired flexibility in administrative procedure does not justify an order without substantial evidence to support it. An order cannot be based upon hearsay, rumor, speculation or statements made by those without personal or specialized knowledge. An order based on invalid or inadequate findings would violate due process rights and would not withstand judicial review under the capricious disregard standard.

2. The Investigative Process

With the goal of formulating a legally sufficient Adjudication and Order in mind, PGCB staff undertook the task of investigating applicants and