

DIVISION OF GAMING ENFORCEMENT,

Petitioner,

v.

WYNETTE HARRIS,

Respondent.

Decided August 29, 1981

Initial Decision**SYNOPSIS**

The Division of Gaming Enforcement filed a complaint with the Casino Control Commission seeking both temporary suspension and ultimate revocation of the casino employee license of Wynette Harris based on allegations that Ms. Harris had committed welfare fraud. On May 1, 1981 the Commission issued an order temporarily suspending the license and advised the licensee she had a right to an expedited hearing which she requested.

The administrative law judge assigned to the case issued an order directing the Division to show cause why an interim order should not be granted reinstating the licensee's employee license pending a final hearing. After argument, the administrative law judge concluded that the Office of Administrative Law and its administrative law judges are not authorized to grant such interim relief where, as here, the agency head has issued an interlocutory order and the application for interim relief seeks a review of the propriety of the agency head's order.

The judge noted that while the general power of the OAL to act in a particular subject area is normally coexistent with the power of the agency generating the case, the OAL's power may not always be so broad. The judge noted that the extent of the OAL's power may depend on the function to be performed in order to grant the relief sought. Here the basis for the requested relief is not a presentation of new facts going to the merits of the matter, but is instead a challenge to the propriety of the agency head's action on the merits based on an accusation of constitutionally defective procedures. Such a review of the Commission's decision to suspend would require the administrative law judge to act as an appellate reviewer of the agency head's action - a function assigned to the Appellate Division where the Commission's interlocutory decision is appealable pursuant to *R. 2:2-4*.

The judge pointed out, however, that such a limitation on the OAL's function is to be contrasted to a situation where an agency

takes interim action through some internal division or through some official below the level of an agency head. In such an instance a challenge to the action of an agency can come before the OAL on application for interim relief.

As to the licensee's contention that she had not been provided with the expedited hearing promised by the agency, the administrative law judge noted that although it relates to a fact which arose after the agency head acted and thus could not serve as a basis upon which to review the propriety of the agency head's decision, it could constitute a separate basis for reinstatement of the license. Where the allegation is that the provision of such a speedy hearing has been thwarted by an agency's misconduct, an administrative law judge may properly consider such complaints and, if the equities require it, may order reinstatement. Such action would not constitute interlocutory review of an agency head's decision, since the facts forming the basis for review do not require an analysis of the agency head's initial action. In this case, however, the administrative law judge found no such basis for ordering reinstatement of the license pending a hearing.

Accordingly, the licensee's application for reinstatement of her license was denied.

Howard M. Barman, Deputy Attorney General for Petitioner
(James R. Zazzali, Attorney General of New Jersey, Attorney)

David G. Sciarra, Esq. for Respondent (Cape-Atlantic Legal Services, Attorney)

MASIN, ALJ:

On April 29, 1981, the Casino Control Commission voted to suspend temporarily the casino employee license of Wynette Harris. The order became effective on May 1, 1981, when it was signed by the then Chairman of the Commission, Joseph P. Lordi. The Division of Gaming Enforcement had filed a complaint with the Commission, seeking both temporary suspension and ultimate revocation of the license, based on allegations that Ms. Harris had committed welfare fraud. An indictment had been returned against her by the Atlantic County Grand Jury.

The Commission's order temporarily suspending the license was served upon the respondent, by certified mail, on May 1, 1981. A letter from Dennis Daly, Senior Assistant Counsel for the Commission, accompanied the order and advised the respondent that she had the right to request an expedited hearing and that she had the right to

be represented by an attorney at the hearing. Ms. Harris telephoned Mr. Daly to request the hearing and on May 15, 1981, Daly wrote Harris, informing her that the matter would be transferred to the Office of Administrative Law (OAL). On May 19, 1981, the case was docketed in the OAL. A notice sent to the parties June 8, advised them that the matter had been filed with the OAL and that discovery should commence. On June 18, 1981, a notice to the parties advised them that the matter had been set down for a prehearing conference before Administrative Law Judge Jeff S. Masin on July 15, 1981.

The Commission's order stated in part that "if the Respondent requests, a hearing on this matter shall be held within 30 days of the receipt of the request for such accelerated hearing date."

On July 15, the respondent appeared at the prehearing conference without counsel, but stated that she anticipated procuring an attorney. The administrative law judge notified the parties that since the petitioner anticipated obtaining counsel, the setting of a hearing date would be postponed for two weeks. The respondent was advised to notify the court as soon as she had retained counsel, so that the court could discuss the date of the hearing with the attorneys.

According to the affidavit of Wynette Harris, filed in connection with this application for interim relief, she secured the services of Cape-Atlantic Legal Services, and more specifically, David G. Sciarra, Esq., on July 23, 1981. On or about August 1, 1981, Mr. Sciarra advised Judge Masin that he was counsel for the respondent and indicated that he wished to apply for an Order to Show Cause. Judge Masin met with counsel for the respondent and the Division on August 6, 1981, and at that time signed an order which required the Division to show cause why an order should not be entered granting an interim order "reinstating respondent's casino hotel employee license pending a final hearing. . . ; accelerating the final hearing date for this matter in accordance with the Order Suspending Casino Hotel Employee License. . . ; and . . . amending the prehearing conference order previously entered to permit respondent to challenge the prehearing suspension procedures set forth at *N.J.S.A.* 5:12-109, *N.J.S.A.* 5:12-129 and regulations thereunder. . . as violative of the Due Process Clause of the 14th Amendment of the United States Constitution and Article I, Section 1 of the New Jersey Constitution." The parties appeared before me on August 12, 1981 to present argument on the request.

In essence, the respondent contends that the temporary suspension order entered by the Casino Control Commission was defective be-

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cause the manner in which the suspension was granted violated the respondent's due process rights. Further, she alleges that the Commission has violated the constitutional mandate for a prompt hearing when a license is suspended without procedural due process. The licensee contends that she did not receive constitutionally required notice of the Division's application for temporary suspension or of the Commission's intention to consider the matter at its April 29, 1981 meeting.

For the reasons expressed below, I **CONCLUDE** that the Office of Administrative Law and its administrative law judges are not authorized to grant such interim relief where the agency head has issued an interlocutory order and the application for interim relief seeks to have the OAL review the propriety of the agency head's order.

Discussion

The Office of Administrative Law was established by the Legislature to function as the agency in which administrative adjudicatory hearings would be held. By statute, those agencies whose contested cases may be referred to the OAL for hearing retain the right to conduct hearings themselves, so long as the agency head personally hears the matter. *N.J.S.A.* 52:14F-8b. The decisions of administrative law judges are subject to review by the agency head, who may adopt, reject or modify the judge's decision. *N.J.S.A.* 52:14F-7a.

The Casino Control Act, *N.J.S.A.* 5:12-1 *et seq.*, authorizes the Casino Control Commission to "suspend the license of any person pending hearing and determination in any case in which license revocation could result." *N.J.S.A.* 5:12-129(3).¹ The Commission is also authorized to grant emergency orders. *N.J.S.A.* 5:12-109. The Commission's emergency orders are "effective until further order of the Commission or final disposition of the case." *N.J.S.A.* 5:12-109c.

In the present action, the Division sought an emergency order of suspension and the Commission, after hearing the application, granted the relief sought. That relief, an order suspending the respondent's license pending the hearing on the application for permanent revocation, constitutes an interlocutory decision or action by a State administrative agency, appealable to the Appellate Division of the Superior Court, pursuant to Rule 2:2-4.

Counsel for the respondent contends that despite the apparent ability of the respondent to appeal the order of the Commission to the

¹That a permanent revocation could result from this proceeding is not disputed.

Appellate Division, this judge may review the matter and reinstate the license. He argues that when the Commission itself has the power to issue orders subsequent to its emergency order, and thus could vacate its original order of suspension, the OAL and the administrative law judge assigned to the hearing of the contested case can also issue such an order, since the judge has the same power to act as has the Commission, a power which the OAL and its judges derive "from the legislatively granted powers of the generating agency." *Hayes v. Gulli*, 175 *N.J. Super.* 294, 302 (Ch. Div. 1980).

While the general power of the OAL to act in a particular subject area is normally coexistent with the power of the generating agency, the OAL's power may not, in all cases and under all circumstances, be quite so broad. The determination of the authority of OAL to act may depend, as I believe it does in the instant case, on the function which must be performed in order to grant the relief sought. The basis for the reinstatement of the license is not a presentation of new facts going to the merits of the matter, *i.e.*, a dismissal of the indictment or a redetermination by the welfare board exonerating the respondent, but a challenge to the propriety of the agency head's action on the merits, a challenge founded on an accusation of constitutionally defective procedures which cause the Order to be defective. Any review of the Commission's decision to suspend would require the administrative law judge to act as an appellate reviewer of the agency head's action which is, a function assigned to the Appellate Division.

It is presumably true that the Commission itself could act to change its prior decision. That it has the power to review its own acts is not disputed. The statute implies this power through the Commission's ability to issue emergency orders terminating prior emergency orders. However, the mere fact that the agency head has that power does not mean that the administrative law judge has it. Nothing in the statute creating the OAL, nor in the Administrative Procedure Act, *N.J.S.A. 52:14B-1 et seq.*, indicates that a judge can review a determination of the agency head, where the facts to be considered are the same before the agency head and the judge, and the challenge to the determination is in the form of an attack on the procedures used by the agency head to make the determination. Such a limitation is to be contrasted to a situation where an agency takes an interim action through some internal division or official below the level of the agency head. In that instance, a challenge to the action of the agency can come before the OAL on an application for interim relief. *See, In the Matter of Blue Anchor Environmental Corp.*, OAL DKT. ESW 7123-80 (Dec. 17,

1980), *rev.*, N.J. Dept. Environmental Protection (Jan. 7, 1981) *stay reinstated*, N.J. Sup. Ct. App. Div. (Jan. 27, 1981).

The respondent contends that there exist facts for consideration which the agency head did not have before it when it acted. These are:

- (1) the fact that the respondent did not receive the notice sent to her until after the agency had acted, and
- (2) the failure of the agency to have a hearing within thirty days of the request for a hearing.

As to the first of these contentions, since the petitioner's argument is that the agency head violated the respondent's rights when it initially acted without affording her proper notice, the challenge is still from, and of, the agency's order and interlocutory in nature. The second ground relates to a fact which arose after the agency head acted, thus it cannot serve as a basis upon which to review the propriety of the agency head's decision. However, it may constitute a separate and independent basis for a consideration of a reinstatement of the license. A judge may consider the allegation that the provision of a speedy hearing has been thwarted by agency misconduct, negligence or inaction, and, if convinced that the equities require it, order reinstatement. Such an action would not constitute an interlocutory review of the agency head's decision, since the facts forming the basis for a review do not require an analysis of the propriety of the agency head's initial action.

In this case, I **FIND** no basis for ordering reinstatement pending the hearing. The chronology of events listed above indicates that the request for hearing was made promptly, the case was transferred to the OAL with dispatch and the matter was set down for normal pre-trial hearing procedures within 30 days following the request. Delay thereafter arose from normal scheduling difficulties. At the prehearing conference, the licensee appeared *pro se* and had apparently not yet attempted to secure counsel. The failure to advise the OAL of the retention of counsel until the beginning of August further delayed the setting of a hearing date. Given the purpose of the statutory provisions permitting revocation of casino employee licenses and the normal delays involved in judicial proceedings, the Commission's order for a prompt hearing cannot reasonably be read to mandate a hearing and decision within 30 days. The language is directory, not mandatory. Since the applicant made no further request for an expedited hearing between May 15 and early August, I **CONCLUDE** that the circumstances do not warrant a reinstatement of the license at this time.

The licensee's application for reinstatement of her license, pending the final disposition of the administrative proceedings, is **DENIED**.

After reviewing this Initial Decision the
Division of Gaming Enforcement on
September 30, 1981 issued the following Order:

This matter having been opened to the New Jersey Casino Control Commission upon the motion of the Respondent pursuant to *N.J.A.C.* 1:1-9.7(b), for relief from the Interim Decision of the Office of Administrative Law, filed August 27, 1981, which denied the Respondent's motion to reinstate the Respondent's casino hotel employee license or, alternatively for vacation of the Order of the Commission of May 1, 1981, which suspended the Respondent's casino hotel employee license; and it appearing that the Commission, by its Order of May 1, 1981 and pursuant to *N.J.S.A.* 5:12-109, has suspended the Respondent's casino hotel employee license pending final disposition of the pending license revocation proceeding or until further Order of the Commission; and the Commission, after considering the Interim Order, the briefs of the parties, the affidavit of the Respondent and the oral arguments of counsel for the parties, having found that the Respondent has not demonstrated sufficient good cause to warrant a vacation or modification of the Commission Order of May 1, 1981; and the Commission having resolved at its public meeting of September 16, 1981, to deny said alternative motions and to affirm the said Interim Decision,

IT IS on this 30th day of September 1981 ordered that the Interim Decision of the Office of Administrative Law in this matter be and hereby is affirmed and adopted by the Commission; and

IT is further ordered that the motion by Respondent Wynette Harris for an Order for relief from the Interim Decision of the Office of Administrative Law or alternatively for an Order vacating the Commission's Order of May 1, 1981, in this matter be and hereby is denied based upon the reasons set forth in the said Interim Decision, which is incorporated herein by reference and made a part hereof, and further upon the finding of the Commission set forth herein; and

IT is further ordered that a copy of this Order be served upon the Respondent and the Division of Gaming Enforcement within ten days of the date hereof.