



Eckert Seamans Cherin & Mellott, LLC
213 Market Street - 8th Floor
Harrisburg, PA 17101

TEL 717 237 6000
FAX 717 237 6019
www.eckertseamans.com

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Mark S. Stewart
717.237.7191
mstewart@eckertseamans.com

May 26, 2009

VIA HAND DELIVERY

Richard Sandusky
Director of Regulatory Review
Pennsylvania Gaming Control Board
303 Walnut Street, Strawberry Square
Verizon Tower, 5th Floor
Harrisburg, PA 17106

Re: Comments to Proposed Rulemaking No. 125-102

Dear Mr. Sandusky:

Downs Racing, L.P., t/d/b/a Mohegan Sun at Pocono Downs (“MSPD”), is a Category 1 slot machine licensee that owns and operates a licensed facility located at 1280 Highway 315, Wilkes-Barre, Pennsylvania. MSPD respectfully submits the following comments to the Pennsylvania Gaming Control Board (the “Board”) in connection with its proposed rulemaking #125-102.

The proposed rulemaking represents a dramatic expansion of the persons required to obtain licensure as a key employee under the Pennsylvania Race Horse Development and Gaming Act (“Gaming Act”) and the Board’s current regulation. This expansion – which both codifies previous informal additions and implements new additions to the definition – will impose significant additional and ongoing costs upon slot licensees, without providing any benefit to the public. The individuals serving in the most recently targeted positions have all been subjected to criminal background checks and fingerprinting, often have little direct involvement with slot operations (the purported justification for the proposed key employee status), and have been performing their duties as gaming employees for approximately 2 ½ years without incident of any kind. Moreover, this type of unjustified regulation results in unnecessary regulatory costs for the slot licensees and the Commonwealth, and is directly contrary to current legislative sentiment. Accordingly, the Board should decline to expand the definition of key employee in 58 Pa. Code § 401a.3.

Likewise, the proposed rulemaking would change the current Section 465a.7, regarding internal controls addressing complimentary services or items. Under the existing regulation, such

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internal controls are not subject to Board approval. Without any explanation of why, what problem the Board is attempting to address or how the proposed changes will mitigate that problem, the proposed rulemaking would subject internal controls related to complimentary services and items to Board approval and increase the requirements on slot licensees in relation to such matters. The proposed intrusion into slot licensees' discretion in managing and operating their facilities is completely unwarranted by fact or law.

I. PROPOSED CHANGES TO SECTION 401a.3 AND THE DEFINITION OF KEY EMPLOYEE

A. The New Key Employee Requirements and their Consequences

The proposed rulemaking reorganizes the positions that will be subject to key employee licensure into various categories, adding both new categories of positions and new positions to existing categories. The definitions of key employee in both Section 1103 of the Gaming Act and Section 401a.3 of the regulations envision the ability of the Board to designate additional positions as key employees. However, the Board may only invoke this discretion "based on detailed analyses of the job descriptions as provided in the internal controls of the licensee." 4 Pa. C.S. § 1103. The proposed rulemaking makes no reference to any "detailed analyses" conducted by the Board, nor does it explain how or why those analyses lead to the conclusion that enhanced licensure is required for the identified positions. Moreover, the proposed rulemaking fails to explain why a change in licensure status is required now, despite the fact that the job descriptions for the positions have not changed and the employees in the positions previously functioned without incident as gaming employees.

As is set forth in Section 1103 of the Gaming Act and the existing Section 401a.3 definition, the term key employee includes the directors or heads of certain specified departments. The proposed rulemaking, at subsection (ii), would add seven (7) departments to the already extensive list of departments in the Gaming Act and current regulation for which the directors/heads must be key employees.

Those additional departments include: Count Room Operations; Purchasing; Finance; Revenue Manager; Internal Audit; Compliance; and Legal Affairs. Notably, none of these departments are included in the litany of departments requiring key employee licensure under the Gaming Act. An additional department, Human Resources, is also not included in the Gaming Act's definition, but has been part of the existing Section 401a.3 definition. While the Board has nonetheless previously required key employee licensure for the directors of these departments, the departments are not enumerated in the Gaming Act's definition and, as explained herein, their inclusion in the key employee definition is not supported by the proposed rulemaking's purported rationale.

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Beyond the additional departments added to the key employee definition, the proposed regulation establishes two completely new groups of positions requiring key employee licensure in proposed subsections (iii) and (vi).¹ The first is shift managers or other persons overseeing certain departments when the department head is not present. Those departments include: Slot Operations; Cage Operations; Count Room Operations; Surveillance; and Security.² The second new category of key employees added through the proposed regulation includes *any* person who has the authority to award \$50 of free slot play or the equivalent in player reward points during any consecutive five day period.

The new key employee requirements render numerous employees who would otherwise be merely gaming employees subject to the enhanced licensure obligations of key employees. This broad expansion of the filing requirements will lead to multiple unjustified and unnecessary burdens and costs to both the licensees and the impacted employees. As the Board is aware, each key employee application requires a \$2,500 filing fee. Significantly, these costs will be incurred annually upon renewals.

Further, as MSPD must pay all of the Board's costs in investigating and processing the filings, it and other slot licensees will experience a substantial increase in their regulatory costs. Notably, these costs will be in addition to the considerable regulatory, legal and administrative costs that MSPD will incur to assist employees with their filings, respond to PGCB demands, shepherd the applications to approval and deal with those that are denied and the related business disruption.

In addition, despite the apparent lack of any need for this increased licensing scrutiny, the individual gaming employees affected by the new requirements will experience real consequences from the change. The Multi-Jurisdictional Personal History Disclosure Form and the Pennsylvania Supplement entail a dramatically increased level of disclosure and scrutiny as compared to the process for obtaining a gaming employee permit.

¹ As further addressed below, with the exception of the Count Room Operations, the Board imposed the requirements of subsection (iii) in July 2007. This action was taken by the Bureau of Licensing, and compliance was demanded from slot licensees, despite the Board's failure to promulgate a regulation and adhere to the Commonwealth Documents Law and Regulatory Review Act. 45 P.S. §§ 1201-1208; 71 P.S. §§ 745.5-745.5a. The inclusion of the Count Room Operations within subsection (iii)'s list of shift managers requiring key employee status and the addition of the employees covered by proposed subsection (vi) represent the newest expansion of the definition.

² Again, it is noteworthy that, under the Gaming Act, the Count Room department head is not even considered a key employee. Now, under the proposed regulation, not only will the department head be required to be a key employee, but all shift managers or persons overseeing that department must secure such enhanced licensure status.

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Even more disconcerting to the affected employees is the fact that their continued employment and livelihood depend on the outcome of this new process. Employees will feel this fear of job loss even more acutely during the current economic crisis. While all of the subject employees have been fingerprinted and had criminal background checks, they have not endured the exhaustive review associated with key employee licensure. It is not unlikely that some portion of the affected employees, who presently perform their jobs well, have satisfactory character and integrity and are no threat to the public, will be denied licensure and lose their jobs. In that scenario, MSPD will suffer from workflow disruptions until a replacement is found, which may well be an extended period given the enhanced requirements that any new applicant must be able to satisfy.

Significantly, the proposed rulemaking actually would be the second major expansion of the key employee definition. In July 2007, the Bureau of Licensing declared that the positions included in subsection (iii) of the proposed regulation (with the exception of Count Room Operations) would be designated for key employee status, and that slot licensees had to comply with the new requirements.³ As a result of the July 2007 changes, MSPD was required to file for an additional 28 new key employees. These filings cost \$70,000 in filing fees alone. On top of those costs, MSPD suffered *well over* \$100,000 additional Board-related investigative fees and other costs related to the applications. Moreover, those costs – both filing and investigative fees – have been incurred annually since the 2007 expansion.

MSPD and other slots licensees expressed their grave concerns to the Bureau over the substantial costs and burdens its action had caused them. Unfortunately, the proposed rulemaking's significant additional expansion of the key employee definition is directly contrary to the licensees' concerns. MSPD appreciates that the Board is *now* pursuing the rulemaking process for both the July 2007 and the newest expansions to the key employee definition, as opposed to illegally imposing such requirements and demanding compliance.⁴ However, as both expansions

³ This expansion – implemented without conducting Section 1103's statutorily required job description analyses – was implemented unlawfully, by a simple letter directive. The Board may only promulgate or implement binding, substantive rules of general application via the rulemaking process and in compliance with the requirements of the Commonwealth Documents Law, 45 P.S. §§ 1201-1208, and the Regulatory Review Act, 71 P.S. §§ 745.5-745.5a. See *Pennsylvania Human Relations Commission v. Norristown Area School District*, 374 A.2d 671, 679 (Pa. 1977); *Eastwood Nursing and Rehabilitation Center v. Dept. of Public Welfare*, 910 A.2d 134, 142-43 (Pa. Cmwlth. 2006).

⁴ Like the July 2007 expansion, the Bureau of Licensing initially attempted to add proposed subsections (iii)(C) and (vi) to the definition of key employee by letter directive, dated December 16, 2008. The Bureau chose this implementation course despite then Chairman Colins rightly inquiring during the December 2008 Public Meeting whether such action required a rulemaking. While styled as a change in policy, the Bureau's December 16 directive demanded licensee compliance by January 16, 2009. After MSPD's protests to the Bureau failed to result

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are without merit, the Board should reverse the informal 2007 additions and reject the newest expansions to the key employee definition.

B. No Public Need or Benefit Justifies the New Requirements

While the burdens of the new requirements are plainly significant, there is no public need for or benefit from them. As to the newest additions to the definition, Pennsylvania's slot licensees have been operating for over 2 ½ years with the identified employees requiring only a gaming employee permit. During that period, the job descriptions for the subject positions, upon which the expanded regulation was to be based, did not materially change in any way that would demand enhanced licensure requirements. Nor, to MSPD's knowledge, has any incident occurred or public harm resulted as a result of the positions' gaming employee status.

Additionally, the application of the new requirements retroactively to the existing gaming employees in the identified positions is particularly devoid of public benefit. All of these employees have been subjected to a criminal background check and fingerprinting. 4 Pa. C.S. §§ 1801, 1804. The public interest is not furthered by making the employees resubmit for the enhanced licensure. Instead, even if the Board sanctions the new requirements, key employee licensure could be implemented as the positions open and are filled with new employees.

Likewise, the requirements involving the Marketing Department and employees who have the cited ability to award \$50 free slot play or adjust a patron's players club account fail to advance any public interest. The players points system involves marketing dollars – not state revenues. As such, heightened PGCB regulation is, respectfully, misplaced. This is particularly true since MSPD has not experienced any problems with player point access by employees, much less ones which would have been prevented by conversion of employees to key employee status. To the extent the Board has identified problems of this nature on an industry-wide basis, it should identify those problems with specificity and explain how they might be addressed by the proposed licensure redesignation. In any case, any additional regulation must survive a cost-benefit analysis, an analysis which does not appear to have been conducted at all in this instance.⁵

in any change to its position, MSPD complied under protest and filed an administrative appeal, objecting to the Bureau's action as an unlawful regulation. The Board subsequently issued the pending proposed rulemaking.

⁵ During the December 2008 Public Meeting at which the most recent expansion of the key employee definition was first addressed, the Bureau of Licensing indicated that the restructuring was being implemented in order to align the rules more closely with certain other gaming jurisdictions. However, such a rationale, even if true, is not compelling unless the increased regulation is designed to address a specific problem encountered in Pennsylvania, **and** unless the benefit of the increased regulation justifies the increased cost, **and** unless there is not a more efficient or less costly way to address the problem.

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Nor do the stated justifications in the proposed rulemaking support increased licensure. The explanation of the amendments states that the departments listed in proposed subsection (ii), for which department heads must secure key employee licensure, are included in the definition because the individuals serving in those capacities have “the authority to make discretionary decisions regarding slot machine operations.” Applying that rationale to the proposed department list not only fails to support the inclusion of the previously unlisted departments, but also calls into question the requirement of key employee licensure for the heads of several of the existing departments. The heads of Count Room Operations, Purchasing, Finance, Revenue Manager, Internal Audit, Compliance, Legal Affairs, Controller, Marketing and Human Resources are not, in fact, involved in slot machine operations.

Similarly, the explanation related to the employees with authority to award free slot play or players points worth more than \$50 fails to hold water. The rulemaking asserts that key employee licensure is needed because the issuance of significant amounts of credits for free slot play directly affects gross terminal revenue. First, this explanation fails to offer any rationale for the subsection’s inclusion of employees with the authority to approve \$50 or more of player reward points. As noted above, player reward points, which may be redeemed for *non-gaming* goods and services, implicate marketing dollars only and not gross terminal revenue.

Second, as to free slot play, the interests of slot licensees and the Commonwealth are aligned – both want free play to be used to generate additional, not reduce, gross terminal revenue. The facility operators are in the best position to ensure that such a balance is achieved, and requiring employees awarding small amounts of free slot play to become key employees is wholly irrelevant to that goal. Third, the proposed rulemaking will undermine the licensee’s ability to provide great service to its patrons. Facility operators carefully permit their patron services employees to have greater levels of authority and discretion so that customer issues may be addressed to the greatest degree possible through a single employee contact, and without requiring the patron to jump through endless hoops. By expanding the key employee definition to capture every employee with a modicum of discretion in customer relations, the Board will limit licensee management flexibility and their ability to empower employees to resolve patron service issues.

Moreover, the identified employees only award such credits/points in conjunction with marketing or operational plans and parameters developed and approved by persons who are key employees. Extending key employee licensure from the persons developing the promotional plans to those on the front line implementing them provides no additional public benefit. Exactly what is it that the Board believes key employee licensure will accomplish in this circumstance? Will it change the licensed facility’s marketing plan? No. Will it control how the employee

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exercises his or her \$50/five day discretion? No. There simply is no nexus between the rulemaking's stated goal and the enhanced licensure requirement.

Accordingly, without any indicia of compliance with Section 1103 of the Gaming Act's required detailed analyses of the pertinent job descriptions, and absent any public need for or benefit from the proposed expansion of the key employee definition, the Board should reject the changes to that definition in the proposed rulemaking.

II. PROPOSED CHANGES TO SECTION 465a.7

The proposed rulemaking would also expand the Board's oversight of slot licensees' provision of complimentary services and items to patrons. Presently, under Section 465a.7 of the Board's regulations, licensees are required to have internal controls related to such matters, but those internal controls are not subject to Board approval. The proposed subsection (a) would change that so as to require Board approval of the internal controls, and proposed subsection (b)(3) would significantly increase the level of detail that licensees must include in their internal controls concerning the employees authorized to issue complimentaries and the types of items and services they may award. Because the proposed regulation is completely unnecessary, the Board should reject it.

First, the proposed rulemaking offers no justification whatsoever for this significant expansion of the Board's authority in this area. The explanation of the amendment simply states that the Board has found the licensees' existing internal controls on the subject to be "not adequate." The explanation fails to state why or how the internal controls are inadequate, what problems in facility operations or the awarding of complimentary services or items have manifested as a result those inadequacies, and how the proposed regulation will remedy any such perceived problems. Clearly, a cost-benefit analysis has not been conducted in regard to these changes.

Second, as noted above in relation to player's reward points, there is simply no public need for or benefit from this type of regulation of licensee practices regarding complimentary services and items. The provision of such complimentaries involve facility marketing and marketing dollars – not slot operations or gross terminal revenue. The Board suggests that the proposed rulemaking will strengthen the effectiveness of its oversight in this area. Yet, there is no need for such strengthening, nor is its oversight of marketing or complimentaries explicit in the Gaming Act.⁶

Ultimately, the proposed changes to Section 465a.7 extend too far into the licensee's management of the operations of its facility, and for no apparent public need or benefit. The

⁶ The one exception to this would be Section 1512 of the Gaming Act, which restricts the provision of complimentary goods or services to certain public officials, public employees and political officials. Section 465a.7, whether in its present form or as proposed, is not directed at ensuring compliance with Section 1512 of the Act.

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Board is not a super board of directors of each licensed facility. Further, by demanding the level of detail in the internal controls required by the subsection (b)(3), the proposed rulemaking unnecessarily curtails licensee operational flexibility and creates the potential for frivolous compliance issues.

III. THE PROPOSED CHANGES TO SECTIONS 401a.3 AND 465a.7 IMPOSE UNNECESSARY REGULATORY COSTS

For all of the foregoing reasons, the proposed rulemaking is illustrative of onerous and overly burdensome regulation, and the type of over regulation that unnecessarily drives up regulatory and operating costs for slot machine licensees and the Board. Clearly, the proposed rulemaking, which will greatly increase the Board's regulatory costs for no good reason, is moving Pennsylvania regulatory costs in the wrong direction and exacerbating the disparity between it and other gaming jurisdictions. In a high tax jurisdiction like Pennsylvania, operational efficiency is paramount and unnecessary and/or excessive regulatory costs are very detrimental. Moreover, the proposed regulation is squarely at odds with the sentiments voiced by the authors of the Gaming Act, the Pennsylvania General Assembly. During the recent budgetary hearings before the Pennsylvania Senate, senators urged the Board to engage in less, not more, unnecessary regulation and to reduce, not needlessly increase, its regulatory and operating costs. The proposed rulemaking is directly contrary to those legislative directives.

For all of these reasons, MSPD urges the Board to:

- (a) reject the proposed changes to the definition of key employee at 58 Pa. Code § 401a.3; or
- (b) in the alternative, eliminate proposed subsections (ii)(C) and (G)-(O), (iii) and (vi) from the rulemaking; and
- (c) eliminate the proposed changes to Section 465a.7 from the rulemaking.

Thank you for considering the comments of MSPD in regard to the proposed rulemaking. We will be happy to answer any questions the Board has on these comments.

Very truly yours,



Mark S. Stewart

MSS/jls

cc: Mike Bean, Esquire