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NATIONAL
INDIAN
GAMING
COMMISSION

Indian Community School of Milwaukee
3134 W. State Street
Milwaukee, Wisconsin 53208

January 14, 1996

John Burke, Jr.
Omni Bingo of Wisconsin, Inc.
N81 W12920 Leon Road
Menomonee, Wisconsin 53051

Re: The Appeal of the Disapproval of the Amendment to the Management Contract Between the Forest County Potawatomi Community, the Indian Community School of Wisconsin, Inc., and Omni Bingo of Wisconsin, Inc.

INTRODUCTION

The Indian Community School of Milwaukee, Inc. (School) and Omni Bingo of Wisconsin, Inc. (Omni) appeal the decision of the Chairman of the National Indian Gaming Commission (Commission) disapproving an amendment to a management contract between the Gaming Commission of the Forest County Potawatomi Indian Community (on behalf of the Community), the School, and Omni. The amendment to the management contract was signed by the parties on August 17, 1993, and submitted to the Commission on November 17, 1993. The Chairman disapproved the amendment on November 17, 1995, because the thirty (30)-day period in which amendments must be acted upon by the Chairman had expired and the amendment was deemed disapproved. See 25 C.F.R. § 535.1(d)(2).

Pursuant to section 539.2, the parties had thirty (30) days from the date of the Chairman's decision to appeal to the full Commission. Appeals were to be filed no later than December 17, 1995. The appeal of the School was received by the Commission on December 15, 1995. The appeal of Omni was received by the Commission on December 17, 1995, via facsimile. That transmission was only partially received due to a transmission failure. The balance of the submission was received on December 18, 1995. Because the transmission was begun on December 17, Omni's appeal is considered by the Commission to have been timely filed. Neither the Community or the Community's Gaming Commission appeals the Chairman's decision.

OPINION

The attorneys for the School argue that the deadline for appeal should be extended because they did not receive the Chairman's decision until November 21, 1995. They argue that the Chairman's decision was addressed to Loretta Ford who is no longer President of the School. The Chairman's decision was sent to the School

using the latest information the School had provided the Commission. If Ms. Loretta Ford was no longer the President of the School, the School failed to notify the Commission. In any event, the Commission has received the School's timely appeal and the issue is moot.

The School also argues that their attorney were advised by a Commission attorney that the appeal deadline was December 18, 1995. The regulations are clear that a decision of the Chairman may be appealed within thirty (30) days after the Chairman serves his decision and that failure to file an appeal within the thirty (30)-period shall result in a waiver of the opportunity to appeal. 25 C.F.R. § 539.2. The regulations control, not the statement of a Commission attorney. Again, the issue is moot; the Commission has received the School's timely appeal.

The School argues that the Commission has no jurisdiction to disapprove the amendment two years after its submission to the Commission. The Commission disagrees. Nothing in the Indian Gaming Regulatory Act (IGRA) mandates a loss of authority to disapprove an amendment to a management contract for failing to take action within a specified period of time. The IGRA authorizes the Commission to promulgate regulations to implement the provisions of the IGRA. 25 U.S.C. § 2706(b)(10). The Commission has done so with respect to management contract and amendments to management contracts. Section 535.1(d)(2) clearly requires disapproval of amendments to management contracts when the Chairman has not acted within thirty (30) days. Requiring the disapproval of an amendment to a management contract for failure by the Chairman to take action within a thirty (30)-day period is well within the authority of the Commission.

Both the School and Omni argue that the Commission is estopped from disapproving the amendment because the parties have been operating under the amendment for two years and the Community will lose revenue and the School will suffer some unspecified tax consequences. The Commission disagrees. The parties implemented the amendment at their own risk. The regulations are clear that modifications to management contracts are void in the absence of approval by the Chairman. 25 C.F.R. § 535.1(f).

The School argues that its constitutional right to due process has been violated by the statutes and regulations relied on by the Commission to disapprove the amendment citing Mathews v. Eldridge, 424 U.S. 319, 332 (1975). The Commission disagrees that the regulation requiring an amendment to be deemed disapproved for failure by the Chairman to take action within a specified period of time denies the parties due process. The School is not being deprived of a property or liberty interest within the meaning of either the Fifth or Fourteenth Amendments. The parties knew or should have known that the amendment was not valid until approved by the Chairman.

The Commission also disagrees with the parties argument that the appeal procedures promulgated by the Commission pursuant to the IGRA violate due process standards. The parties have exercised their right to appeal the Chairman's decision to the Commission and have submitted briefs and other relevant information for consideration by the Commission. The Commission finds that the parties have not been denied due process.

Omni argues that the Commission is taking a different position here than it did in Great Western Casinos v. Monteau, No. CV-95-1465 (C.D. Cal. 1995). Great Western concerned the review of a management contract, not an amendment to a management contract. The time frames for reviewing management contracts are different than for reviewing amendments to management contracts. See 25 C.F.R. Parts 533 and 535.

Both the School and Omni suggest that Commission should withdraw the disapproval of the amendment because there is substantial evidence of taint in the proceedings. In the alternative, the parties assert that the Commission should conduct a hearing to determine if Chairman Monteau, Commissioner Foley, and certain staff attorneys should recused themselves from the proceedings because of prior contacts with the Community. The Commission strongly rejects the assertion by the parties that the proceedings have been tainted or that Chairman Monteau, Commissioner Foley or certain staff attorneys are biased against the parties to this appeal. While there were contacts with the Tribe, none concerned the amendment. Furthermore, communications with the tribe is insufficient evidence establishing that Commission members or staff are incapable of rendering an impartial decision.

In summary, the issue before the Commission is a narrow one. Did the Chairman err in disapproving the amendment? The regulations of the Commission are very clear. The Chairman was required to deem the amendment disapproved pursuant to 25 C.F.R. § 535.1(d)(2).

For all the foregoing reasons, the decision of the Chairman is affirmed.

Michael Cox for
Harold A. Monteau, Chairman

Michael Cox for
Tom Foley, Commissioner

Michael Cox for
Phil Hogen, Commissioner