NATIONAL INDIAN GAMING COMMISSION

IN THE MATTER OF		
JPW CONSULTANTS, INC.	Docket No.	NIGC 97-4 NIGC 98-8
		November 13, 1998

Decision of the National Indian Gaming Commission

Appeal to the National Indian Gaming Commission ("Commission")[1] from a notice of violation and an assessment of a proposed civil fine issued by the Chairman of the Commission ("Chairman") in regard to the management of Hollywood Seminole Gaming ("HSG")[2], a gaming operation owned by the Seminole Tribe of Florida ("Tribe").

APPEARANCES: Christine Lambert, Esq., Darla M. Silva, Esq., and Richard Schiff, Esq., National Indian Gaming Commission, Washington, D.C., for the Chairman; Henry Latimer, Esq. and Angelia M. Baldwin, Esq., Fort Lauderdale, Florida, for Respondent JPW Consultants, Inc.

ORDER

After careful and complete review of the administrative record, the brief filed by the Chairman and JPW Consultants, Inc. ("JPW"), the depositions, the hearing transcripts, the exhibits and the Presiding Official's Recommended Decision, the Commission finds that:

1. The Chairman bears the burden of proof in administrative appeals of administrative enforcement actions. The proper standard of review is a preponderance of the evidence.

2. JPW did manage HSG without a management contract approved by the Chairman. The period of violation was from July 2, 1996, to June 6, 1997, for a total of 340 days.

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[1]"Commission" refers to the body that is hearing this appeal and is currently comprised of Chairman Montie R. Deer and Vice-Chairman Philip N. Hogen. "NIGC" refers to the agency which includes the Commission and its staff.

[2]Hollywood Seminole Gaming was formerly known as Hollywood Seminole Bingo or Seminole Indian Bingo of Hollywood.. It is also referred to as the Hollywood facility in the record. "HSG" will be used to encompass all of these names.

3. The Chairman did not meet his burden of proof in establishing that JPW offered class III gaming without an approved Tribal-State compact at HSG.

4. JPW's management of HSG prior to the approval of the management contract is a substantial violation for which an assessment of a civil fine was proper. However, the Commission does not believe that the violation was so egregious as to merit the maximum fine of $25,000 per day. Rather, the more appropriate amount should be $10,000 per day. Therefore, the civil fine assessment is reduced to $3.4 million.

FACTUAL BACKGROUND

The Seminole Tribe of Florida is a federally recognized tribe which has owned HSG, formally known as Seminole Indian Bingo of Hollywood, since 1979. The Tribe does not have an approved Tribal-State compact for Class III gaming. HSG is located on Tribal lands in Hollywood, Florida. Seminole Management Association, Ltd. ("SMA") managed HSG under a management contract approved by the Bureau of Indian Affairs on September 5, 1979. SMA managed HSG until on or about May 15, 1996, when the Tribe purchased SMA's right to continue performing under the contract and terminated the contract.

In May 1996, about the same time that the SMA contract was terminated, the Tribe signed a management contract with JPW ("JPW Contract"). James "Skip" Weisman is the only principal of JPW. When the JPW Contract was signed, Mr. Weisman was already employed as the general manager of HSG. He had been employed at HSG since December 1979. Since 1982 the Tribe paid JPW for services performed by Mr. Weisman. The JPW Contract was submitted to the NIGC in February 1997. The Chairman has not approved the contract.

NIGC Field Investigator Tim Harper visited HSG in January 1997, to observe the games offered at the facility. He saw video pull tab machines, Superpick lotto machines, and Touch 6 Lotto machines at the facility. NIGC Senior Field Investigator Carl Olson and Fred Stuckwisch, NIGC Director of Contracts and Audits, visited HSG on February 12, 1997, and spoke with several employees including Kenneth R. Smith, the then Security Director of HSG.

On May 30, 1997, the Chairman issued Notice of Violation No. NOV-97-M02 ("NOV") to JPW alleging two substantial violations. The first is that JPW had been managing HSG without an approved contract in violation of 25 C.F.R. Part 533. The second is that JPW "offered" Class III gaming in the absence of an approved Tribal-State compact in violation of 25 U.S.C. §2710(d) and 25 C.F.R. §573.6(a)(11). By letter dated June 6, 1997, Mr. Weisman wrote to Acting Chair Ada Deer, stating inter alia, that JPW "hereby agrees to cease, and has ceased, all management activities at Seminole Indian Bingo of Hollywood."

The Vice-Chairman issued a Proposed Civil Fine Assessment ("CFA") of $8.5 million to JPW on June 27, 1997. JPW timely appealed the NOV and the CFA. The NOV was assigned Docket No. NIGC 97-1 and the CFA was assigned Docket No. NIGC 98-8. Both appeals were

consolidated on May 15, 1998.

Mr. Weisman was deposed in Florida on June 9, 1998. Mr. Smith and Chairman Billie of the Tribe were deposed in Florida on June 10, 1998. A hearing before the Presiding Official was held in Arlington, Virginia, on July 15-16, 1998, to take testimony of Mr. Harper, Mr. Olson, Mr. Stuckwisch and Ms. Linda Sue Sumner, Chief of the NIGC Tribal Background Investigation Section. Mr. Weisman also testified at the hearing.

Both the Chairman and JPW filed post-hearing briefs. The Presiding Official issued her Recommended Decision on October 16, 1998. The Chairman filed his opposition to the Recommended Decision on October 23, 1998. JPW filed a response to the Chairman's objection on November 9, 1998. Pursuant to NIGC regulations, the Commission finds that there are no provisions providing for the Respondent's response. In addition, this reply was filed more than 10 days from the date of the Recommended Decision.

DISCUSSION

The Commission has determined that there are four issues before it. They are: (1) who bears the burden of proof and what is the correct standard of review; (2) whether JPW managed HSG in the absence of an approved management contract; (3) whether JPW "offered" class III gaming at HSG; and (4) what is the appropriate civil fine assessment, if any.

Burden of Proof and Standard of Review

Neither the Indian Gaming Regulatory Act nor its implementing regulations specify which party bears the burden of proof or what standard of review applies in an administrative hearing to review the issuance of a notice of violation or the assessment of a proposed civil fine. Because of the lack of clarity on these issues, the parties in several NIGC cases were given an opportunity to discuss them.

In response, JPW cited 5 U.S.C. §556(d) and several Federal court cases in arguing that the Chairman bore the burden of proof because he was the proponent of the action; the proper standard of review was a preponderance of the evidence; and, under a preponderance of the evidence standard of review, the person with the burden of proof must show that the facts are "more probable than not in light of the totality of the circumstances." JPW's Initial Post-Hearing Brief at 12.

The NIGC's Deputy General Counsel, on behalf of the Chairman, responded to the same questions in a filing on September 2, 1998, In the Matter of Shingle Springs Band of Mewok Indians, Docket No. NIGC 97-1. That response contains an extensive analysis of the allocation of burdens of proof and standards of review in administrative enforcement actions. Citing 5 U.S.C. §556(d) as "instructive as to general principles of administrative law and procedure," several Federal court cases, and the regulations of other agencies having enforcement authority, the

Chairman "accept[ed] the burden of proving the allegations set forth in the Notice of Violation" at issue in Shingle Springs. September 2, 1998, Response at 5. After a similar analysis, the Chairman stated his opinion that "the correct standard of review is by a preponderance of the evidence." Id. at 7.

Based on the analysis of the law presented both by JPW and the Chairman in Shingle Springs, we hold that, as a matter of fundamental due process, both the Chairman and the regulated public have a need and right to know which party bears the burden of proof and what standard of review will be applied in all administrative hearings to review the issuance of a notice of violation or of a proposed civil fine assessment. We also hold that for this and all present and future administrative appeals of enforcement actions undertaken pursuant to 25 C.F.R. Part 573 the Chairman bears the burden of proof and the standard of review is a preponderance of the evidence.[3] Preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

Management of HSG

The Chairman alleges that "JPW has operated gaming at the Hollywood gaming operation without obtaining approvals necessary to fulfill the provisions of the Indian Gaming Regulatory Act ("IGRA") and the requirements set forth in Section 533.1 of the NIGC regulations." NOV at 2. In support of this allegation the Chairman points to the activities of Mr. Weisman and argues that it is through Mr. Weisman that JPW managed HSG. In order to sustain this allegation, the Chairman must prove that Mr. Weisman managed HSG, that he did so as a contractor and not a tribal employee and that his action should be imputed to JPW.

JPW does not dispute that Weisman exercised management authority at the Hollywood facility. Weisman testified that he was the general manager of the facility under the SMA contract from 1979 through 1996. Chief Billie corroborated this statement. Billie Deposition (Dep.) at 5. Weisman further testified that he continued to serve as the general manager after the termination of the SMA contract, although during that time he reported directly to the Tribe. Chief Billie also corroborated this statement, testifying that Weisman stayed on as general manager after the termination of the SMA contract (Id. at 8, 11), "worked for us to run the operation" (Id. at 6), and continued "[b]asically, same routine, running the operation for us, hiring and firing, except now he reported directly to us." Id. at 28. Chief Billie's further testimony clarified that by "us," he meant the Tribal Council. Id. at 29. Thus, we find that Mr. Weisman did manage HSG.

The next question before us is whether Mr. Weisman managed HSG as a tribal employee as he contends or as a contractor as the Chairman asserts. In determining this issue, we look to

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[3]However, the standard of review, by regulation, will be clear and convincing evidence when the Chairman issues a notice of violation alleging that a gaming operation has defrauded a tribe or a customer. 25 C.F.R. § 573.6(a)(6).

the discussion in the American Law Reporters concerning whether a person is an employee or an independent contractor for tax withholding purposes. The tax cases look to common law to decide whether a person performing a service for another was doing so as an employee or as an independent contractor. The following are factors which indicate whether the relationship between the parties was one of employer-employee or of contractor-contractee: right to control; length of employment; opportunity for profit or loss; services in course of recipient's business; right to discharge workers; substantial investment or cost by person performing services; skill or training required; method of payment; right to employ assistants or substitutes; supplier of tools, equipment, or place to work; designation or description of relationship by parties; distinct trade or business; right to change or specify job, job site, or hours of work; offering of services to public; belief or intention of parties; employee-type benefits; and custom in trade. No one factor is determinative. Rather, the circumstances must be examined as a whole.

Several factors indicate that Mr. Weisman's relationship to the Tribe was that of a contractor-contractee. They include opportunity for profit or loss; substantial investment or cost by person performing services; skill or training required; method of payment; distinct trade or business; employee-type benefits; and belief of the parties. We believe that the existence of several factors support the Chairman's assertion that Mr. Weisman was not an employee of the Tribe but rather a contractor related to JPW.

"[A]n independent contractor is generally one who has either the opportunity to make a profit or the risk of taking a loss and/or, conversely, that an employee generally does not have that opportunity or risk." 51 A.L.R. Fed. 59 at §5 (citations omitted). Chief Billie testified that Mr. Weisman was paid of HSG's net revenues. Billie Deposition at 17. The monthly financial statements indicate that JPW was paid roughly of the net revenues. Items 20-24 of the Administrative Record. This indicates that Mr. Weisman had an opportunity to make a profit if HSG performs well. Thus, this factor seems to indicate that Mr. Weisman functioned as a contractor.

"[A]dministrative decisions explicitly support the view that if a person performing a service undertakes a substantial cost or has a substantial investment, it is indicative of an independent contractor-contractee relationship." 51 A.L.R. Fed. 59 at §8 (citations omitted). JPW's 1996 Income Tax Return ;

Item 19 of the Administrative Record. Mr. Weisman testified that the Tribe paid JPW for his services as a general manager since 1982 instead of a salary. Weisman Deposition at 38. Mr. Weisman also testified that JPW was established primarily to provide a pension for him and had no other purpose. Id. at 89-90. The record indicates that JPW had no other major source of income other than Mr. Weisman's compensation from HSG. See id. at 98. Because HSG represented JPW's major source of income, it is logical to conclude that HSG would be the major expense item for JPW and that the was related to Mr. Weisman's activities at HSG. Given the amount of money involved, we would characterize the

as a substantial cost that is indicative of a contractor-contractee relationship.

"[I]f the person performing the services requires a particular skill that would be indicative that the person is an independent contractor and/or, conversely, that if the person performing the services needs little or no skill for the job that would be indicative that the person is an employee." 51 A.L.R. Fed 59 at §9 (citations omitted). A gaming operation is complex business especially one the size of HSG with its numerous games, departments and transactions. To manage such a facility successfully, a person would have to acquired a deal of skill and knowledge. A person with little or no skill would not be hired to manage a business with an annual net income of over The Tribe was willing to pay a substantial amount to keep Mr. Weisman after the SMA contract was terminated, presumably because of his expertise. See Billie Deposition at 9. Mr. Weisman testified that he has had over twenty years of experience in the gaming industry. See Weisman Deposition at 9-21. We conclude that managing a gaming facility requires a particular skill and that the Tribe believed that Mr. Weisman possessed the requisite skill.

"[A]n employee is generally paid a salary or on an hourly basis, although he may be paid on a piece-work basis and/or, conversely, that an independent contractor is generally paid an agreed amount or according to an agreed formula for a given job." 51 A.L.R. Fed 59 at §10 (citations omitted). Chief Billie testified that the Tribe paid Mr. Weisman of net or gross revenues. Billie Deposition at 17. The monthly financial statements of HSG from July to November 1996 indicates that JPW was paid roughly of the net revenues. Items 20-24 of Administrative Record. Mr. Weisman testified that he was paid a percentage of HSG's revenues from July 1996. Weisman Deposition at 55. These facts establish that Mr. Weisman's pay for his services as the general manager of HSG was in the form of a percentage of HSG's net revenues and was not a salary.

"[If] the person engaged to perform the services is in a recognized trade or calling, that would be indicative that the person is an independent contractor and/or, conversely, that the absence of a distinct occupation or a recognized trade or calling would be indicative that the person performing the services is an employee." 51 A.L.R. Fed. 59 at §14 (citations omitted). We would characterize general manager of gaming operation as a recognized trade or calling. Every gaming operation needs a general manager who has the knowledge and skill to oversee its operations.

"[T]he presence of those benefits normally associated with an employer-employee relationship-paid vacation, sick leave, insurance, pension benefits, and the like-is indicative of an employer-employee relationship and/or, conversely, that the absence of these benefits is indicative of an independent contractor-contractee relationship." Id. at §18 (citations omitted). Mr. Weisman established JPW because the Tribe did not provide a pension plan. JPW, not the Tribe made payments to Mr. Weisman's pension. Weisman Deposition at 101-104. It is also important to note that Mr. Weisman's payroll taxes were not deducted from the Tribe's payments to JPW but from JPW's payments to Mr. Weisman. Id. at 102-103. Nothing in the record indicates that

Mr. Weisman received the normal employee benefits from the Tribe.

Another factor is the belief of the parties involved. "[I]f the person for whom the services are rendered and the person rendering the services intend or believe that an employer-employee relationship exists between them, that indicates an employer-employee relationship and/or, conversely, that the absence of such an intention or belief is indicative of a relationship of independent contractor-contractee." Id. at §17. Mr. Weisman argues that he was an employee of the Tribe. Respondent Post-Hearing Reply Brief at 9. It is not clear that Chief Billie believed the same thing. He intended that their relationship to be contractual when Mr. Weisman continued as the general manager after the SMA contract was terminated as evidenced by the JPW Contract. It is unclear that he believed that Mr. Weisman was functioning as a tribal employee pending the review and approval of the JPW Contract. He was aware, however, that the NIGC may have some problems with Mr. Weisman receiving [redacted] while a contract was pending before it. Billie Deposition at 19. This suggests that he may have believed that the relationship was contractual. We find that Mr. Weisman's argument that he was a tribal employee is inconsistent with his June 6, 1997 letter to Acting Chair Ada Deer and the Tribe's documents. We are unable to discern with absolute certainty the parties' belief given this inconsistency and the ambiguity of the Tribe's beliefs as distilled from Chief Billie's testimony but in viewing the record as a whole, we are inclined to find that the parties believed that they had a contractual relationship.

The analysis of the factors discussed above support the argument that Mr. Weisman was a contractor rather than an employee of the Tribe. The record does not contain enough information to make an adequate analysis of the following factors: right to control; length of time of employment; right to discharge; right to employ assistants or substitutes; supplier of tools, equipment, or place to work; right to change or specify job, job site, or hours of work; offering of services to public; and custom of trade.

We next look to the factor that seems to indicate that Mr. Weisman is an employee of the Tribe. "[I]f the services performed are in the course of the recipient's business, rather than in an ancillary capacity, it is indicative of an employer-employee relationship." 51 A.L.R. Fed. 59 at §6 (citations omitted). The service that Mr. Weisman performed was to manage a gaming facility which is in the course of the Tribe's business. This fact would seem to indicate that Mr. Weisman is an employee. We find that this factor is not compelling against the weight of the other factors that support the conclusion that Mr. Weisman was a contractor of the Tribe.

In evaluating these factors based on the facts available to us, we conclude that the Chairman has met his burden of proof in establishing that Mr. Weisman was a contractor and not a tribal employee. JPW did not offer sufficient evidence to refute this conclusion. They did not offer evidence that Mr. Weisman was treated in the same manner as other tribal employees. Mr. Weisman did not produce any W-2 forms indicating that he was paid a salary or that he received any benefits associated with being an employee. It is also interesting to note that no employment contract was introduced into evidence. The only written document detailing Mr. Weisman's relationship to the Tribe is the JPW Contract. Having concluded that Mr. Weisman was not an

employee, we now look to determine whether Mr. Weisman acted on behalf of JPW. To make that determination we must examine Mr. Weisman's relationship to JPW and the Tribe's interactions with JPW.

Mr. Weisman testified that the Tribe paid JPW for his services as the general manager. Weisman Deposition at 39. Having concluded that Mr. Weisman was a contractor to the Tribe, this fact alone would establish that the Tribe paid JPW for management contracting services. The Respondent argued that this arrangement existed before the JPW Contract was signed and therefore, is not indicative of a contractual relationship. While that may be the case, that fact could be interpreted to indicate that Mr. Weisman ceased to be a tribal employee when the Tribe began to pay JPW for Mr. Weisman's services.

There are other facts that support the conclusion that JPW was performing under an unapproved management contract during the period alleged in the NOV. Notwithstanding the findings of the Presiding official, we find that Mr. Smith's statements on February 12, 1997, to Messrs. Olson and Stuckwisch regarding JPW's management of HSG is consistent with the documentary evidence provided by the Tribe. See Item 2 of the Administrative Record (Olson Declaration). The audit report inferred that JPW assumed management responsibilities under a management contract from May 1996 to May 1997. Smith Deposition Exhibit 2 at 9. Respondent argued that the audit is hearsay and unreliable. We disagree. Hearsay evidence is admissible in administrative proceedings and we find audit reports to be a reliable source of information. Audit reports are prepared annually after an audit as required by IGRA and the NIGC's regulations. They are conducted by independent auditors who are disinterested parties whose responsibility is to report fairly and honestly the financial state of the gaming operation. We find no reason to believe that the auditor in this case has lied or misrepresented that JPW was the Tribe's management contractor for HSG. Also, the characterization of JPW as a management contractor is corroborated by the Tribe's monthly financial statements from May 1996 to November 1996 which indicates a management fee paid to JPW. See Items 20-25 and 27 of the Administrative Record. This item was listed separate from salaries paid to employees. The monthly financial statements also indicate that from July 1996 to November 1996, JPW received roughly of the net revenues which is what it would have received under the JPW Contract. See Item 18 of the Administrative Record at 4 and Items 20-24 of the Administrative Record.

Respondent argued that JPW was established simply as a mechanism to provide Mr. Weisman with a pension and not as a management contractor. If that was the case, then why did JPW contract with the Tribe to provide management services. JPW's tax returns

See Items 19, 32, 51, 71-72 of the Administrative Record. JPW incurred substantial

indicating that it had some activity or purpose beyond providing Mr. Weisman a pension. It is reasonable to conclude that this expense was incurred in connection with the management of HSG because that was Mr. Weisman primary business.

JPW in a June 6, 1997 letter to Acting Chair Ada Deer implicitly admitted that it was managing HSG by agreeing to cease such activities. Respondent argued that Mr. Weisman sent that letter to protect the Tribe from a threat of closure on the advice of counsel and should not be taken as an admission of guilt. Given that Mr. Weisman had received advice from counsel, it is difficult to accept that he was not aware of the implication in the letter. The letter could have stated that Mr. Weisman ceased to be the general manager while admitting no liability. Rather the letter states that "*JPW Consultants, Inc.* hereby agrees to cease, and has ceased, all management activities at Seminole Indian Bingo of Hollywood." Weisman Deposition Exhibit 3 (emphasis added). Based on this letter along with the other evidence presented in the record, we conclude that Mr. Weisman was managing HSG on behalf of JPW.

Based on the discussion above, we find that the Chairman has met his burden of proving that JPW was managing under the JPW Contract without approval from the Chairman in violation of IGRA and the NIGC regulations.

Class III Gaming at HSG

Paragraph 3(b) of the NOV alleges that JPW "has offered video pull tab machines, Superpick lotto machines, and Touch 6 machines for play at the Hollywood gaming operation. In addition, [JPW] has operated poker games in the Hollywood facility which are not consistent with state limitation." The Chairman contends that each of these games constitutes Class III gaming under IGRA and its implementing regulations.

In support of his allegation that Class III games were being offered at the Hollywood facility, the Chairman presented the testimony of Mr. Harper. Mr. Harper testified that he observed and played pull-tab machines, Superpick Lotto machines, and Touch 6 Lotto machines at the HSG sometime in January 1997. JPW did not offer any evidence to refute the Chairman's assertions.

The Chairman concentrated his proof and argumentation on the machines available at the HSG. Without citing the regulation, the Chairman contends that "[t]he current regulatory definition of electronic or electromechanical facsimile of any game of chance is 'any gambling device as defined in 15 U.S.C. Sec. 117(a)(2) or (3)." See 25 C.F.R. §502.8. The Chairman relies on 15 U.S.C. §1171(a)(2), which provides that a gambling device is

> any other machine or mechanical device (including but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

The Chairman cites a number of Federal court cases in support of its argument, including Cabazon Band of Mission Indians v. National Indian Gaming Comm., 827 F. Supp. 26 (D.D.C. 1993), affd, 14 F.3d 633 (D.C. Cir.), cert. denied, 114 S. Ct. 2709 (1994); Sycuan Band of Mission Indians v. Roache, 54 F.3d 535 (9th Cir. 1994); United States v. 294 Various Gambling Devices, 718 F. Supp. 1236 (W.D. Penn. 1989); United States v. 137 Draw Poker-Type Machines, 606 F. Supp. 747 (N.D. Ohio 1984); United States v. Sixteen Electronic Gambling Devices, 603 F. Supp. 32 (D. Hawaii 1984); and United States v. Various Gambling Devices, 368 F. Supp. 661 (N.D. Miss. 1973).

The Chairman distills from these cases several general characteristics of a game which have been relevant to determining whether or not the game constitutes a "gambling device" within the meaning of 15 U.S.C. § 1171. These characteristics include the length of time it takes to play a particular game, whether the player can extend play, the absence of skill elements, the existence of a retention ration, the potential for inordinate numbers of free games, and a multiple coin feature.

Based on the information which the Chairman presented concerning the machines offered at the Hollywood facility, the regulatory definition of Class III gaming, the cited case law, and the lack of opposition to the Chairman's arguments, we conclude that the Chairman has carried his burden in this case of proving that the machines offered at the Hollywood facility constituted Class III gaming within the meaning of the IGRA.

We do not find a definition of the term "offer" in the IGRA or its implementing regulations. Based on its usual meaning combined with the context of gaming, we believe that the term "offer" was most likely used to mean that JPW had made these games available for play in the Hollywood facility. In the context of the IGRA, we conclude that JPW would be responsible for "offering" the games only if it had authority to determine what games would be placed in the facility.

The Chairman relies on a statement attributed to Smith by to Stuckwisch and Olson to the effect that Weisman had decided not to purchase certain machines for the facility. Assuming that Smith's alleged statement was correct, nothing which the Chairman presented showed that Weisman had the unilateral authority to purchase machines. The fact that a person has the authority to decide not to do something is not proof of his having authority to decide to do that thing. Without additional proof of Weisman's authority, it is an assumption to say that he could purchase gaming machines on his own authority because he could decide not to purchase them. An equally possible scenario is that Weisman had authority to make initial decisions as to whether or not to purchase particular machines, but that any decision to purchase had to be approved by the Tribe.

Additionally, the JPW Contract allowed either JPW or the Tribe to purchase gaming equipment. Management Contract at 10. While the Chairman did provide evidence that Mr. Weisman may have some authority over the installation and operation of these Class III games at

HSG, he failed to provide sufficient evidence that it was JPW who made the final decision to acquire and install the machines in question. In examining the record, we do not find sufficient evidence to hold that it was more likely to be true than untrue the fact that JPW "offered" Class III gaming without an approved Tribal-State compact. We find that the Chairman did not meet his burden of proof and therefore, reverse his decision on this issue.

Civil Fine Assessment

Managing an Indian gaming operation prior to receiving approval of the management contract is a substantial violation where the assessment of a civil fine is appropriate. Congress intended that management contracts be subjected to an extensive review and approval process prior to becoming effective. See 25 U.S.C. §2712. They expressed their concern for the need and importance of this process to protect not only the tribes but also the public at large by establishing detailed requirements and not creating any exceptions to them. NIGC is compelled to follow accordingly and the regulations reflect the seriousness of the process and the requirements. The Commission views a violation of this provision a major breach of the requirements established by Congress.

The Chairman assessed the maximum fine of $25,000 per day. While we agree that the violation deserves a considerable fine, we find that the violation is not so egregious as to merit the maximum fine. Therefore, we lower the civil fine assessment to $10,000 per day.

In determining the period of violation we look to the date in the NOV that the Chairman alleges that JPW began to manage which was July 2, 1996, and the date of the letter from JPW indicating that it ceased its management activities which was June 6, 1997. The 1996/1997 audit report for HSG indicated that JPW assumed management of HSG sometime in May 1996 and continued to manage until the Tribe assumed management in May 1997. Smith Deposition Exhibit 2 at 9. Chairman Billie confirmed this fact in his deposition. Billie Deposition at 6. The monthly financial statements for HSG from May 1996 to November 1996 showed management fees being paid to JPW during those months. The record does not contain monthly financial statements for months after November 1996. The record suggests that the violation may have occurred before July 2, 1996, but we do not believe it necessary to change the period of violation. Mr. Weisman's letter of June 6, 1997, indicated that JPW would cease its management activities of that date. We find that the Chairman met his burden in establishing that JPW was managing during this period. Based on this evidence, we find that the period of violation to be 340 days. Therefore, we affirm the assessment of the civil fine but lower the fine from $8.5 million to $3.4 million.

CONCLUSION

For reasons stated above, we affirm the Chairman's decision relative to the management of HSG; we reverse the Chairman's decision relative to the Class III games; and we affirm the assessment of the civil fine but lower the fine to $3.4 million.

Montie R. Deer
Chairman

Philip N. Hogen by MRD

Philip N. Hogen
Vice-Chairman

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 98-7401-CIV-DIMITROULEAS

JPW CONSULTANTS, INC.,

Plaintiff,

vs.

NATIONAL INDIAN GAMING COMMISSION, et al.,

Defendants.

ORDER GRANTING NATIONAL INDIAN GAMING COMMISSION'S MOTION FOR SUMMARY JUDGEMENT AND DENYING JPW CONSULTANT'S MOTION FOR SUMMARY JUDGEMENT

THIS CAUSE having been heard upon both parties' Motions for Summary Judgement, and the Court having heard arguments of counsel on November 23, 1999, having reviewed proposed Orders, finds that National Indian Gaming Commissions' Motion is Granted and JPW Consultant's Motion is Denied.

FINDINGS OF FACT

Because this action is one for review under the APA, there can be no facts that are appropriate to be tried de novo before the Court. Under the arbitrary and capricious standard, "all the agency must do is articulate a rational connection between the facts and its conclusion." Georgia Public Service Commission, 704 F.2d 538, 543 (11th Cir. 1983). The question before the Court is whether evidence in the agency record is rationally connected to the decision of the National Indian Gaming Commission in this case. Where the substantial evidence test is appropriate, the Court looks to the record for relevant evidence which supports the agency's conclusion and which "is something less than the weight of the evidence, and the possibility of

drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-620 (1966); McHenry v. Bond, 668 F.2d 1185, 1190 (11th Cir 1982)("It is something more than a scintilla of evidence, but something less than the weight of the evidence.") If there is substantial evidence in the record, it is beyond this court's function to "substitute its own conclusions for those which the Commission had fairly drawn from such findings." Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285 (1974) (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)). Under either "substantial evidence" or "arbitrary and capricious" standard, a reviewing court should substantially defer to the judgment of the Commission.

Under this framework, this Court has concluded that there is a substantial evidentiary basis presented in the agency record for the following facts:

1. The Seminole Tribe of Florida, a federally recognized tribe, has been operating a gaming facility in Hollywood, Florida, now called Hollywood Seminole Gaming (HSG), since 1979. Start-up capital and management for the gaming operation were provided by Seminole Management Associates (SMA) under a management contract approved by the local BIA office.

2. SMA was a limited partnership in which Butch Moriarity, a/k/a Eugene Weisman, brother of James P. (Skip) Weisman, as trustee for Weisman Enterprises, served as a general partner. One of the partners in Weisman Enterprises was Plaintiff JPW Consultants, Inc. (JPW). James P. Weisman was brought in by SMA from the beginning to manage the gaming facility.

3. Although initially on the payroll of the Tribe, in 1982, James P. Weisman formed JPW to receive payment from the Tribe for the management services performed by James P. Weisman. According to Mr. Weisman, the purpose for this arrangement was to provide Mr.

Weisman a tax-friendly vehicle for building a pension. The tax returns filed by JPW reflect that the corporation's business activity was "management service" and its product or service was "consulting". Mr. Weisman also testified that these representations in the tax returns were false.

4. In May, 1996, the Tribe bought out its contract with SMA and signed a management contract with JPW. That contract was submitted for approval to Defendant National Indian Gaming Commission (NIGC), but has never been approved.

5. On January 12 and 13, 1997, representatives of the NIGC visited HSG, to determine how and by whom the facility was being managed. During that visit NIGC representatives were advised by Kenneth Smith, the person who identified himself as the acting facility manager, that he was working for JPW.

6. On or about May 30, 1997, the Chair of the National Indian Gaming Commission issued a Notice of Violation to JPW for managing without an approved contract and for offering class III games in the absence of a tribal-state compact.

7. By letter dated June 6, 1997, James P. Weisman, as President of JPW Consultants, Inc. stated that "JPW Consultants, Inc. hereby agrees to cease, and has ceased, all management activities at the Seminole Indian Bingo of Hollywood." Agency Record, Item 15, Ex. 3. Also in the same letter, JPW Consultants, Inc. used the cessation of the management activities as support for an extension of time to submit written information. Id. Mr. Weisman secured advice of counsel before making these admissions. Agency Record, Item 15, at 95.[1]

8. On June 27, 1997, the Vice Chairman of NIGC (in the absence of a Chairman) issued a fine of $8.5 million to JPW for violations described in the Notice of Violation. Agency

[1] As it later turns out this was good advice because June 6, 1997 became the date on which violations ceased to be calculated..

Record. Item 34. The Vice Chairman's assessment reflects a consideration of each factor contained in C.F.R. § 575.4 (a - d) and articulates the method of calculating the proposed civil fine assessment.

9. JPW timely appealed both the Chairman's Notice of Violation and the fine assessed by the Vice Chairman (ratified by a subsequently appointed Chairman) to the NIGC as provided in 25 U.S.C. § 2713 and 25 C.F.R. Part 577. Pursuant to its appeal regulations, the Commission designated a presiding official to conduct a hearing and provide a recommended decision. The hearing occurred in two phases: (a) depositions taken in Florida on June 9 and 10, 1998, and (b) testimony in the presence of the Presiding Official in Arlington, Virginia, on July 15 and 16, 1998.

10. The Presiding Official's recommended decision was submitted to the Commission on October 16, 1998. She recommended that the notice of violation and proposed civil fine be withdrawn. Her recommendation is but a single factor that this Court considers in reviewing the reasonableness of the NIGC's decision. In its action the NIGC disapproved the recommendation in part. The Commission determined that JPW was managing HSG without an approved contract, but that it was not offering the class III games. The Commission also reduced the fine from the proposed $8.5 million to $3.4 million.

11. Corroborating the information in paragraph 5, Kenneth Smith, Program Director for the HSG, told the NIGC investigators on February 12, 1997, that JPW began managing the Hollywood Gaming operation on July 2, 1996. Declaration of Carl Olson, May 30, 1997. Item 64, Administrative Record, Tab 2; see also Agency Record, Hearing Transcript, Item 12 at page 20 (Stuckwisch Testimony) and at 71 (Olson Testimony). Mr. Smith also told the investigators that in July 1996, he was given the additional title of Program Manager. Id. James P. Weisman

continued to manage HSG, until June 6, 1997, when JPW advised the NIGC that they agreed to cease the management activities. Agency record. Item 15. Exh. 3.

12. Horkey and Associates, P.A., a Certified Public Accounting Firm from Ft. Lauderdale prepared an independent audit report in order to obtain reasonable assurance that the financial statements are free of material misstatements. In auditing the expenses they noted that "Management fees" were paid in 1996 in the amount of $423,426,354. And in 1997, in the amount of $9,290,347. Agency record, item 12. Ex 2 at 3. The Horkey report reflected that "[t]hrough May 1997, the Tribe had arranged for the day to day operations of HSG by the engagement of a management company, which was responsible for the regular operations of HSG." Id at 5. In May 1997, Tribal Council assumed management of the HSG. The Horkey Report identifies the management company for the relevant period at note G. "In May 1996, the Tribe purchased the remaining rights of SMA to the Management contract (see Note F) and simultaneously approved a new management contract with JPW Consultants, Inc., a company owned by the same general manager previously employed by the Tribe. This new contract required JPW to perform the same management functions as SMA..." Id at 9.

13. Since 1982, JPW Consultants, Inc. received all payments directly from the tribe for management services. Between July 2, 1996, when Mr. Smith related to NIGC investigators that JPW began managing the facility, until June 6, 1997 when JPW admits that it then ceased management activities, there is no record evidence of a written employment contract, the provision of any pension, health insurance, sick leave, vacation leave, or any other employment benefits provided by the Seminole Tribe to Mr. Weisman. There is no indication that payroll taxes were ever deducted by the Tribe for the compensation to Mr. Weisman, or that Mr. Weisman ever protested the failure to deduct payroll taxes.

14. The Tribe was in fact treating the management contract with JPW as though it were already operative. Seminole Chairman Billie, in explaining why JPW was receiving its (contractually required) multi-million dollar ten percent payments, described the situation in his deposition by noting that once the Tribal Council approves something, the Tribe is going to proceed with it (AGENCY RECORD Item 13: Billie depo. at. 5, L. 18-20).

15. No request for a mandatory background check was submitted to NIGC for Mr. Weisman as an employee, until well after the investigation focused on the violation in issue in the NIGC enforcement action. The testimony of Ms. Sumner established that Mr. Weisman was being treated as an asset of the management contractor rather than a tribal employee. Her testimony shows that it was not until April of 1997 (when the level of NIGC scrutiny was well known), that the submission of employee background materials on Mr. Weisman required under 25 C.F.R. Part 556 was made. Agency Record, Item 12, Hearing Transcript, July 15, 1998, at 99-103. As early as 1993, however, background material had been submitted for Mr. Weisman (as a person having an interest in a management contract) in connection with SMA's effort to get approval for its contract pursuant to 25 C.F.R. Part 537. In other words, by 1993, Weisman had complied with the background requirements for persons financially interested in management contracts but did not comply with the requirements for casino employees until 1997.

16. For every year in which JPW Consultants, Inc. filed a tax return, the representation to the Internal Revenue Service was that the corporation was providing consulting and managing services (Schedule B, Line 3), and that James P. Weisman was not an employee of the Tribe. This representation is consistent with the absence of IRS W-2 forms, evidence indicating that payments to JPW were subject to payroll taxes, or any other documents suggesting Mr. Weisman was an employee of the Tribe. The fact that Mr. Weisman says he was not telling the truth to the

IRS (AGENCY RECORD Item 11: Hearing at 186) for each of those years, does not give credence to his assertions that he was a tribal employee and JPW was a shell to provide for a pension. The repeated provision of claimed false information to another federal government agency also supports the NIGC finding that Mr. Weisman was not a credible witness.

17. The Commission could reasonably choose to give more weight to Mr. Smith's contemporaneous statements to Stuckwisch and Olson, than to deposition testimony given more than a year later. At the request of JPW, it is not unlikely that Smith provided his testimony to help JPW and Mr. Weisman avoid a multimillion dollar fine. The NIGC could rationally conclude that the attempted explanations, cited by plaintiff in the opposition brief, (JPW Opp., at 16), skirt around the unprepared candid observations made to the two investigators that plainly reflected ongoing management by JPW.

18. The Commission could reasonably chose to give more credibility to the pre-litigation representations to the IRS that JPW was engaging in management activities and Mr. Weisman was not an employee of the Seminole Tribe, rather than Mr. Weisman's characterization after the proposed fine assessment was made given the financial interest at stake in the outcome of the fine. This is particularly true of the admission by JPW that it was ceasing management activities, a representation made after securing the advice of counsel.

CONCLUSIONS OF LAW

The Court may grant summary judgement "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317,

323(1986). The Court should not grant summary judgement unless it is clear that a trial is unnecessary. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. Id. at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). According to the plain language of Fed.R.Civ.P. 56(e), the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(c); Matsushita, 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. Anderson, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, then summary judgement may be granted." Anderson, 477 U.S. 242, 249-50.

1. The principles of deference to agency decisions of Chevron "are applied to most agency actions, including administrative adjudications..." Kohler Co. v. Moen, Inc., 12 F.3d 632, 634, fn. 3. (7th Cir. 1993); TransUnion Corp. v. FTC, 81 F.3d 228 (DC Cir. 1996). As noted by the Ninth Circuit in Morrison-Knudsen Co., Inc. v. CHG International, 811 F.2d 1209 (9th Cir. 1987), the substantial evidence test applies only to hearings required by statute, otherwise the arbitrary and capricious standard applies.

2. While 25 U.S.C. § 2713 (a)(2) requiring a hearing, it does not specify a hearing "on the record" or otherwise explicitly require the court to apply the substantial evidence test:

> The Supreme Court in State Farm referred to the substantial evidence standard only after citing legislative history from the Motor Vehicle Safety Act that explicitly stated Congress' intent that that standard of review by used. Id. The Court has repeatedly held that unless an agency's organic statute contains a specific provision to the contrary, the substantial evidence standard is used only to review formal "on the record" agency actions, not those resulting from the informal rulemaking procedures of § 553 of the APA which are incorporated...

Florida Manufactured Housing Association, Inc. v. Cisneros, 53 F.3d 1565, 1573 (11th Cir. 1995).

3. The arbitrary and capricious standard applies to review of whether or not a violation occurred. "Along the standard of review continuum, the arbitrary and capricious standard gives an appellate court the least latitude in finding grounds for reversal." North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1538-39 (11th Cir. 1990). Under the arbitrary and capricious standard, "all the agency must do is articulate a rational connection between the facts and its conclusion." Georgia Public Service Commission, 704 F.2d at 543. See Bowman Transportation, Inc., 419 U.S. at 285, 95 S.Ct. At 441. Once a commission has drawn its conclusion, an appellate court must give deference to the expertise of the agency. Georgia Public

Service Commission, 704 F.2d 538, 543 (11th Cir. 1993).

4. The agency articulated a rational connection between the facts in the record and in its conclusion that a violation occurred. The record reflects that JPW admitted to management activities at HSG that it agreed to cease on June 6, 1997. This admission alone is a substantial basis for finding support for a finding of a violation. The admission is consistent with pre litigation representations to the IRS. It is also consistent with Mr. Smith's representation that JPW took over management activities on July 2, 1996. It is certainly rationale for the Commission to conclude that payments made directly to JPW for management activities is an indicia, not of an employee-employer relationship to corroborate the admission of violation by JPW. The Commission could rationally view the disinterested Horkey audit report as substantial corroboration of the ongoing violations during this period. The failure of the Tribe to deduct payroll taxes or provide employee benefits, repeated representations to the IRS characterizing the activities of JPW, all substantiate the rational connection between the facts in the record and the conclusion of IGRA violations.

5. Under the arbitrary or capricious standard, or even under the substantial evidence test, the Commission's determination that violations occurred is sustained. Substantial evidence exists to support a conclusion that violations occurred during the relevant period. The evidence presented by plaintiffs in the record could reasonably be viewed as amounting to disavowals presented by plaintiff. When the entire agency record is considered and appropriate deference given to the agency, the decision of the National Indian Gaming Commission, that from July 2, 1996 to June 6, 1997, JPW managed HSG under a contract which was not approved by the Chairman of the National Indian Gaming Commission, in violation of 25 U.S.C. § 2711, cannot be viewed as arbitrary, capricious or lacking substantial evidence.

6. While the standard of review of the Commission's decision regarding the violation of the regulation by JPW's management activities is "arbitrary and capricious", or alternatively "substantial evidence," the standard of review in determining the appropriateness of the Commission's sanction of $3.4 million is the abuse of discretion standard. Shippers Committee, OT-5 v. ICC, 968 F.2d 75 (D.C. Cir. 1992). "Unless the Commission abused its discretion in fashioning its remedy, its action must be affirmed." Shippers Committee, OT-5, 968 F.2d at 79. Agency sanctions are generally treated as a discretionary act related to the fashioning of policies. Niagara Mohawk Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967). The fact that IGRA provides the Chairman with the authority to levy a per violation fine of $1 or $25,000, is a clear indication that Congress has given the Commission broad discretion in the application of agency sanctions.

7. The agency record in this case contains substantial evidence to support the decision of the National Indian Gaming Commission that a civil fine in the amount of $3.4 million is a lawful and appropriate penalty for JPW's violation of the law and that decision is not arbitrary, capricious or an abuse of discretion. It is clear that NIGC must have reduced the fine from $25,000 to $10,000 per day. It appears that the hearing officer's recommendation had some effect on NIGC's decision. The agency has an important mission in protecting the integrity of Indian gaming. Review and approval of management contracts is a device designed by Congress to limit corrupting influence, protect the public, and to assure that tribes remain the prime beneficiaries of the Indian Gaming Regulatory Act. The proposed fine assessment considered all the factors that are relevant. The Commission reasonably reduced the Chairman's fine, but continued to make it substantial, in light of the serious threat to the integrity of Indian gaming presented by the management of a gaming facility without a compact and the large sums received

by the JPW when it was operating illegally. A substantial fine for a serious violation to secure some deterrent effect is not an abuse of discretion in these circumstances. The NIGC reasonably found that while record evidence exists of violations pre-dating July 2, 1996, clearly by July 2, 1996 according to the testimony of the NIGC investigators and Mr. Olson's declaration, Mr. Smith, who represented himself as the Program Director, stated that JPW took over management activities on that day. It was also not an abuse of discretion for the Commission to set the end date of the violations as June 6, 1997, given JPW's letter to the Commission conceding that JPW Consultants, Inc. "hereby agrees to cease" the management activities.

CONCLUSION

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Defendants' Motion for Summary Judgement is hereby **GRANTED**. Judgment is entered for the counter-claimant on the counterclaim in the amount of $3.4 million, in the name of the United States together with interest. Plaintiff shall pay the costs of this action.

2. Plaintiff's Motion for Summary Judgement is hereby **DENIED**.

3. The Clerk shall deny all pending motions as moot.

4. The Clerk shall close this case.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 30 day of November, 1999.

WILLIAM P. DIMITROULEAS
United States District Judge

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-10017

D.C. Docket No. 98-07401-CV-WPD

JPW CONSULTANTS, INC.,

Plaintiff-Appellant,

versus

NATIONAL INDIAN GAMING COMMISSION,
established within the United States Department
of the Interior,
UNITED STATES,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(April 12, 2001)

Before EDMONDSON, BLACK and McKAY*, Circuit Judges.

* Honorable Monroe G. McKay, U.S. Circuit Judge for the Tenth Circuit, sitting by designation.

PER CURIAM:

This case is a challenge to an order of the National Indian Gaming Commission ("Commission"), which concluded that Plaintiff JPW Consultants, Inc. ("JPW") -- in violation of the Indian Gaming Regulatory Act ("IGRA") -- managed an Indian gaming facility without a management contract approved by the Chairman of the Commission. See generally 25 U.S.C. §2711(a)(1); 25 C.F.R. §533.1. We affirm the district court's decision upholding the Commission.

JPW does not dispute that its owner, James P. Weisman ("Weisman"), managed the gaming facility or that the Chairman of the Commission never approved the contract. But JPW contends that Weisman was merely an employee of the Seminole Tribe of Florida ("Tribe"), who owned the gaming facility.

Weisman was first hired to work at the facility by Seminole Management Associates ("SMA"), who managed the facility from 1979 until 1996. When first hired, Weisman was paid directly by the Tribe. In 1982, however, Weisman formed JPW Consultants, in which Weisman was the only principal. The Tribe began paying JPW for Weisman's services, and Weisman drew a salary from JPW. In May 1996, the Tribe adopted a resolution approving a new management agreement between JPW and the Tribe. The agreement provided that JPW would manage the gaming facility in exchange for ten percent of the gaming revenues from the facility.

The agreement was submitted to the Chairman for approval, but the Chairman neither approved nor rejected the agreement.

In May 1997, the Commission issued a Notice of Violation to JPW for managing the facility without an approved contract and for offering class III games in the absence of a tribal-state contract. Under the advice of counsel, Weisman sent a letter, dated 6 June 1997, to the Chairman. This letter said that "JPW Consultants, Inc. hereby agrees to cease, and has ceased, all management activities at the Seminole Indian Bingo of Hollywood."

In June 1997, the Vice Chairman of the Commission issued a Proposed Civil Fine Assessment of $8.5 million to JPW for the violations. The amount was based on factors set out in the guide to civil fine assessments. JPW appealed both the notice of violation and proposed fine to the Commission. The Commission designated a presiding official to conduct a hearing and to provide a recommended decision. The presiding official recommended that the notice of violation and civil fine be withdrawn.

The Commission, in a twelve page and extensively reasoned order, upheld the notice of violation on the unapproved management contract but reversed it on the Class III games. The Commission reduced the fine from the maximum limit of $25,000 per day to $10,000 per day; the result was a fine of $3.4 million. In doing

so, the Commission noted that JPW's conduct was a substantial violation but was "not so egregious as to merit the maximum fine."

JPW filed a complaint in the district court for review of the Commission's decision. The Commission filed a counterclaim against JPW for the $3.4 million fine. The district court granted summary judgment for the Commission. The court concluded that the evidence supported the Commission's decision that JPW had violated 25 U.S.C. § 2711 and that the fine assessed by the Commission was within its discretion. JPW now appeals the district court's order. JPW challenges both the Commission's 13 November 1998 decision and the accompanying civil fine.[1]

DISCUSSION

JPW first attacks the Commission's decision that JPW was managing the gaming facility without approval from the Chairman in violation of the IGRA.

Courts review the Commission's decision and its findings under the "arbitrary

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[1] In a footnote to the facts portion of its brief, JPW states "Montie Deer's appointment as Chairman of the NIGC is highly questionable in that it does not appear that he was appointed by the President with the advice and consent of the Senate." JPW points to no record facts to support this contention nor does he develop a legal argument beyond this speculative statement. Furthermore, the district court's order did not mention this issue nor did JPW raise this issue in its motion for summary judgment. We, therefore, decline to address this issue today.

and capricious" standard. See 5 U.S.C. §706(2)(A). When reviewing a decision under the "arbitrary and capricious" standard, "we must defer to the wisdom of the agency provided [its] decision is reasoned and rational." McHenry v. Bond, 668 F.2d 1185, 1190 (11th Cir. 1982).

The district court concluded that the 6 June 1997 letter sent from JPW to Acting Chair Ada Deer was substantial enough to uphold the Commission's decision. Weisman argues with the Commission's interpretation of this letter. He claims that he signed the letter, upon advice of counsel, only to avoid closure of the gaming facility and that counsel had not contemplated the implications of the letter. The Commission rejected this explanation because 1) Weisman had counsel which made it more likely than not that the letter's implications were understood and 2) Weisman could have easily disassociated himself from the facility without admitting JPW managed the facility. We cannot say that the Commission's reasons for rejecting Weisman's explanations for the 6 June letter were unreasonable or irrational.

Also, the Commission did not rely solely on the 6 June letter to conclude that JPW had been managing the gaming facility. The Commission also conducted a three-part inquiry to resolve the issue further: (1) did Weisman manage the gaming facility; (2) did he do so as a contractor or as a tribal employee; and (3) should his

acts be imputed to JPW? Because Weisman does not dispute that he managed the gaming facility, we focus our review on the Commission's last two inquiries.

The Commission looked to common law principles to determine whether Weisman managed the gaming facility as a tribal employee or as a contractor. See Nationwide Mutual Ins. Co. v. Darden, 112 S.Ct. 1344, 1348 (1992)(adopting common law test to determine whether person is employee under ERISA); Restatement (Second) of Agency §220(2) (1958)(listing non-exhaustive criteria for identifying master-servant relationship); 51A.L.R. Fed. 59 §§3-19 (same). Several things indicated that Weisman's relationship to the Tribe was that of a contractor-contractee: (1) JPW had the opportunity to make a profit if the gaming facility performed well; (2) JPW's tax return included deductions for "consulting expenses," and JPW had no other major source of income other than Weisman's compensation; (3) Weisman possessed a particularized skill required of managing a gaming facility; (4) Weisman's pay for his services was not a salary, but in the form of a percentage of the gaming facility's net revenue; (5) the general manager of a gaming facility is a recognized trade or calling; (6) Weisman's payroll taxes were not deducted from the Tribe's payments to JPW; and (7) JPW -- instead of the Tribe -- made payments to Weisman's pension plan.

The Commission noted that the record did not contain sufficient evidence to

make findings on some of the common law factors. But no requirement exists that evidence of every listed factor must be present before a court may examine the totality of the employment relationship. The common law is clear that no one factor is determinative; instead, the circumstances must be examined as a whole. See Patterson & Wilder Constr. Co., Inc. v. United States, 226 F.3d 1269,1276 (11th Cir. 2000) (common law test of agency requires examination of entire relationship); Birchem v. Knights of Columbus, 116 F.3d 310, 312 (8th Cir. 1997)("In applying the common law of agency test, the Supreme Court looks at the large number of factors that define the parties' total contractual relationship."); ARA Leisure Servs., Inc. v. NLRB, 782 F.2d 456, 460 (4th Cir. 1986)("we must examine the relationship in its entirety, considering all the circumstances that suggest either employee or independent contractor status.").

Next, the Commission concluded that Weisman's acts could be imputed to JPW. This conclusion was based on the following evidence: (1) the Tribe paid JPW for Weisman's work; (2) in an audit report conducted by independent auditors, the auditors inferred from the circumstances that JPW assumed management responsibilities under an unapproved management contract; (3) the Tribe's monthly financial statements indicated a management fee paid to JPW, which was listed separately from salaries paid to employees; (4) JPW was being paid roughly ten

percent of the net revenues, which is what JPW would have received under the original unapproved contract; and (5) the 6 June 1997 letter indicates JPW was managing the gaming facility.

JPW disputes the Commission's interpretation of this evidence and offers alternative characterizations and explanations. After reviewing the Commission's reasons for rejecting the alternatives, we do not deem the Commission's reasons to be either unreasonable or irrational.

JPW also contends that the Commission's decision was arbitrary and capricious because the Commission did not follow the presiding official's recommendations. JPW cites Universal Camera Corp. v. NLRB, 71 S.Ct. 456 (1951), for this contention. But in Universal the Court explained that, under the APA, the findings of a hearing examiner are to be considered as part of the record by the agency when making its decision. See id. at 467. An agency is not required to give such findings a particular level of deference; but instead, a reviewing court must "determine the substantiality of evidence on the record including the examiner's report." Id. at 467.

JPW argues that the examiner was in a better position to evaluate the testimony of Weisman. An agency that rejects an examiner's assessment of the credibility of a live witness should offer a reasonable explanation for doing so. See

Parker v. Bowen, 788 F.2d 1512, 1520 (11th Cir. 1986). Here, the Commission, as well as the district court, questioned Weisman's credibility as a witness. The Commission noted that Weisman consistently argued that JPW was not managing the gaming facility (but instead was established simply to provide Weisman a pension plan). But JPW's tax returns stated that its business was "management services" and that its product was "consulting." The Commission also notes that JPW incurred a substantial "consulting expense" in 1996, which indicated to the Commission that JPW had some activity or purpose beyond providing Weisman a pension. And in an attempt to explain the apparent conflict between these tax returns and his testimony, Weisman admitted he filed "false information" to the IRS and stated that he would "have to file amended returns for all those years and correct it." For these reasons, we cannot say that the Commission's decision to doubt Weisman's testimony was unreasonable.

JPW also attacks the $3.4 million civil penalty assessed by the Commission. JPW first challenges the fine by claiming that Weisman had not exerted a corrupt influence on the Tribe and that, therefore, the goals of the IGRA were not served by penalizing JPW. But JPW's operation of the facility, without the Commission's approval, threatened the Commission's ability to achieve its goals of shielding the Tribe from organized crime, of ensuring that the Tribe is the chief beneficiary of the

gaming operation, and of ensuring that gaming is conducted fairly and honestly by both the operator and players. See 25 U.S.C. §2702(2).

Second, JPW challenges the fine on the grounds that the Commission set it arbitrarily; he focuses on how the Commission reduced the fine from $8.5 to $3.4 million. The Vice Chairman of the Commission considered the pertinent factors and proposed a fine of $25,000 per day. See 25 C.F.R. §575.4 (setting forth economic benefit of noncompliance, seriousness of violation, history of violations, negligence or willfulness and good faith as factors to consider). The Vice Chairman noted that (1) JPW had received an economic benefit in over $9 million paid under the unapproved contract; (2) JPW willfully violated the IGRA in that it knew that the Commission must first approve the management contract if the contract is to be proper; and (3) JPW's operation of an Indian gaming facility under an unapproved contract was a serious violation in that it circumvented one of the Commission's main means of protecting Indian gaming from improper influences. The whole Commission then considered the proposed assessment but concluded that the violation was not serious enough to assess the maximum penalty and reduced the fine to $10,000 per day. JPW has shown no error in the Commission's assessment

of a $3.4 million civil penalty for JPW's violation.[2]

AFFIRMED.

[2]JPW also argues in his brief that the Commission selectively enforced the IGRA against JPW. The district court order, however, does not mention this issue nor did JPW develop this legal argument in its motion for summary judgment. We, therefore, decline to address this issue.