

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE CENTER, BLDG. 68-69
1511 PONTIAC AVENUE
CRANSTON, RHODE ISLAND 02920

IN THE MATTER OF: :
: :
PHILIP JOHN DRUKEN, : DBR No. 12RA082
: :
Respondent. : :
: :

DECISION

Hearing Officer: Ellen R. Balasco, Esq.
Hearing Held: February 27, 2013
Appearances: For the Respondent: Ashley K. Langmead, Esq.
For the Department: Neena Sinha Savage, Esq.

I. INTRODUCTION

In this matter, the Department of Business Regulation’s Racing & Athletics Division (the “Department”) seeks to revoke the Service Employee license (“License”) held by Philip Druken (“Respondent”).

On September 6, 2012, the Department issued an Order to Show Cause Why License Should Not Be Revoked or Suspended, Notice of Hearing and Appointment of Hearing Officer (“Order”) to Respondent. The issuance of this Order was precipitated by a complaint received from Newport Grand and the Rhode Island Lottery Commission. The Department avers in its Order that it has the requisite “good cause” to revoke Respondent’s license pursuant to R.I. Gen. Laws § 41-4-9.1(c) because he deliberately and wrongfully took possession of a paper voucher in the amount of \$124.75 from a Video Lottery Terminal (VLT”) which belonged to a patron,

printing the voucher by cashing out the VLT and hiding the voucher on his person. The Department also contends that the Respondent later lied to the patron, and to security personnel when they asked him to surrender the voucher. These actions are alleged to have created a security breach of Newport Grand's policies, and to have constituted a security risk to the facility. Though the Order states that the Respondent has been terminated from his employment at Newport Grand as a result of this conduct, he was subsequently allowed to return to his job.

Notably, the Respondent does not necessarily dispute the underlying facts of this case, but instead recasts them slightly and asks for leniency. He seeks to retain his license to allow for part-time (13 hours per week)¹ employment at Newport Grand, conditioned on his having no access to the VLT's.

A pre-hearing conference was held at the Department on January 17, 2013, at which time counsel for the Department submitted to the undersigned Hearing Officer a videotape which was relevant to the Department's case. The parties at that time jointly stipulated to the fact that this tape is an authentic video recording obtained from Newport Grand Slots security, and further stipulated that one of the images (identified by both during the playback of the video recording on a Department computer) is that of the Respondent.

Counsel for the Department submitted a disc containing the security video as Department's Exhibit No. 1, and the Hearing Officer marked and admitted the same as a full exhibit, with no objection by counsel for the Respondent. That video recording has been viewed in its entirety, several times, by the undersigned Hearing Officer.

¹ According to the testimony and evidence presented, the Respondent was terminated from Newport Grand at the time of the incident described in this complaint. He was allowed, in a joint decision of the Lottery Commission and Newport Grand management, to return to his job in September of 2012, pending the outcome of this hearing. At the time of hearing, Respondent remained employed 13 hours per week at Newport Grand.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen Laws §§ 41-1-1, 41-4-9.1, 41-9-1 *et seq.*, 42-14-1 *et seq.*, and 42-35-1, *et seq.*

III. ISSUE

The issue in this matter is whether or not the Department has good cause to revoke Respondent's license pursuant to the provisions of R.I. Gen Laws § 41-4-9.1(c).

IV. MATERIAL FACTS AND TESTIMONY

On the date of hearing, prior to the presentation of the Department's case-in-chief, the parties jointly presented two additional exhibits. Joint Exhibit No. 1 is a Stipulation of Fact and Law executed by counsel for both parties. Joint Exhibit No. 2 is a copy of §§ 3.83, 3.86 and 3.89 of the Rhode Island Lottery Video Lottery Terminal Procedures. The Department presented five witnesses, including the Respondent, at hearing. Additionally, it submitted three additional documents. Department's No. 2 contain records of Respondent's prior license approval notices from the Department. Department's No. 3 is a Newport Grand Security Department Incident Report from the incident in question. Department's No. 4 is a set of still photocopies taken from the security video previously referenced herein. All documents submitted were marked and admitted as full exhibits.

Counsel for the Department first called the Respondent. In short, he testified that the hearing date marked his sixteenth (16th) anniversary since he was hired at Newport Grand, and that he currently works 13 hours per week as a janitor. He now has no contact with the VLT's

in the building, other than occasionally walking past a few on his way to clean certain parts of the building. For the majority of his working hours, the facility is closed, and the VLT's are locked and turned off.

Regarding the incident in question, he stated that, while wiping down the front of a VLT, he inadvertently hit the "Cash Out" button, which produced a paper cash voucher. He admitted on direct examination that he did not volunteer this information to the patron who had previously been playing the machine when he returned and asked after the credits left in that terminal. He further admitted that he initially denied to Newport Grand security personnel that he had cashed out the machine when he was asked, but later admitted that he had it hidden in his sock. He then surrendered the voucher to the security agent.

He admitted that he was aware that cashing out a VLT while on duty was a violation of the terms of his employment, and that the policy of Newport Grand was that employees must turn in to security any item of value which is found on the premises.

His testimony also revealed that he had never been disciplined for any reason during his 16 years as a Newport Grand employee. He detailed two incidents in his employment history where he had previously found cash on the premises during the performance of his duties, and turned it over to the security office. The first such incident occurred a number of years ago, and involved his discovery of several thousand dollars in a trash receptacle, which he promptly surrendered. The second occurred approximately two weeks before the hearing, when he found a fifty dollar (\$50) bill on the floor and turned it in.

Richard Vanderscoff, the Operations Manager at Newport Grand, testified that his duties in that position include overseeing all departments at the facility. On the date of the incident in question, he responded personally to the location of the incident, and spoke to Brian Perry, a security employee and to Michael Serbst, the Captain of Security at the facility. After being briefed on the incident He told the Respondent that he “should know better”, then he took possession of the cash voucher retrieved from the Respondent, and returned it to the patron to whom it belonged.

According to this witness, when an employee is hired they are given a copy of the general rules and regulations at Newport Grand, and the employee must sign an acknowledgement that they received them.

The witness stated that this Respondent had no disciplinary actions lodged against him in the past ten years (since the witness began working there). The Respondent was banned from the Newport Grand premises after the incident on May 22, 2012. Approximately two months later, Newport Grand management received a letter from the Lottery Commission indicating that the Respondent was to be allowed to return to his job. The Operations Manager corroborated the Respondent’s testimony that he had found and turned in approximately two thousand dollars (\$2000.00) sometime during the past ten years.

Michael Serbst testified the he received a call on the day in question from a security guard, responded to the area and met with the patron who had been playing the VLT which had produced the cash voucher. He notified the surveillance office to check the video tapes, and spoke with the Respondent, who at first denied taking the voucher. After speaking to the Respondent a second time shortly thereafter, he admitted having the voucher in his sock, and surrendered it to Serbst in the men’s rest room. He has had no reports of infractions or prior

security issues with the Respondent in the eight years he has been employed at the facility. Regarding the location of VLT's at this facility, he stated that they are in most areas of the building, except the Simulcast area.

The next witness presented was David Malkasian, Security Manager for the Rhode Island Division of Lotteries ("Division"). Although he was not present at the facility on the date of the incident, he is familiar with the facts as presented to him by Newport Grand. He does not believe that the Respondent's act of cashing out the VLT was "inadvertent". He believes it was a deliberate act. As part of his duties, he reviewed the surveillance tape, and the Security Department Incident Report (Department's Exhibit No. 3) and later communicated his own report to the Director of the Division of Lotteries, based on his belief that the Respondent had violated Lottery regulations. The Respondent was terminated from his job.

Sometime after the Respondent had been terminated ², the Division allowed him to return to his employment at Newport Grand on a part-time basis, pending the outcome of this hearing. This was a joint decision of Newport Grand management and the Division of Lotteries Director. The series of events leading to the re-hire was that the Respondent made a request to do so to Newport Grand management, who reported that request to and the Division agreed to his re-hire, on the condition that he not have contact with any VLT during his working hours. This fact was stipulated to by counsel for Respondent and for the Department during the hearing.

Mr. Malkasian further testified that it is not possible to completely segregate an employee from being in the vicinity of VLT's during a work shift, as they are nearly everywhere in the facility.

² No evidence was presented by the Department as to the exact or even approximate date that the Respondent was re-hired at the Facility, though Respondent's testimony was that he returned to work there in September, 2012.

The Department's final witness was Christina Tobiasz, Chief Licensing Examiner for the Department's Division of Racing and Athletics. In the scope of her duties, she reviewed the complaint against the Respondent, including the surveillance video. She believes that the actions of the Respondent constitute a violation of Lottery regulations and that his license should be revoked, according to the provisions of R.I. Gen. Laws § 41-4-9.1. On cross examination, the witness testified that this is the first time she has handled or seen a case similar to this in the two years she has been in her current position.

V. DISCUSSION

After a review of the record developed at hearing, the undersigned finds that the Department may well have some established some cause to revoke Respondent's license in light of the statutory framework. Under R.I. Gen. laws § 41-4-9.1(c), the Division of Racing and Athletics "may suspend or revoke for good cause any license issued by it after a hearing held in accordance with chapter 35 of title 42 and subject to further appeal procedures provided by § 41-2-3." It is this section of the law upon which the Department bases their argument that the Respondent's license should be revoked in the instant case.

The Hearing Officer agrees with the testimony of Mr. Malkasian that Respondent's act was more likely deliberate, as opposed to accidental or inadvertent as the Respondent himself testified. A review of that portion of tape does include a pause just prior to the cash out button being hit when it appears that the Respondent is considering his next move. Considering the Respondent's remorseful demeanor at hearing, it appears likely that if he had reflected a bit longer to consider the consequences before touching that button, that he would not have done so.

It is somewhat troubling that the Respondent characterized his actions in the incident to be “inadvertent.” However, rather than this statement showing evidence of the Respondent’s dishonest character, it appears to be more a result of his embarrassment over his indiscretion, as he freely admits that he committed the act, and that it was wrong. This in no way justifies the making an untruthful statement while under oath, and the Respondent was wrong in doing so.

But whether the act was intentional or accidental is not greatly significant in this matter, nor entirely probative on the issue of whether the Respondent possesses a bad, dishonest character or poses a security threat to the public or this gaming facility. The fact is that he violated Lottery and Newport Grand regulations by producing and secreting the cash voucher, and he knew it was wrong – both then and now. Those facts are not in dispute.

What is disputed by the parties is whether the Respondent should be judged and punished for his act without considering the other factors and circumstances brought to light by the evidence adduced at hearing.

A number of prior administrative licensing decisions made in Department cases establish a standard for determining when to license felons. *In the Matter of William J. Stanton, DBR No. 98-L-0035 (1998); In the Matter of John A. Scungio, DBR No. 00-L-0003 (2001), In the Matter of Nathaniel Wetherbee, DBR No. 02-L-0053 (2003); In the Matter of Joseph G. Edwards, DBR No. 09-L-0165 (2009).* These decisions are based upon the premise that a licensee, or potential licensee, should not be judged solely on a criminal act, but rather on a totality of the circumstances surrounding the violation itself and on the characteristics of the licensee’s life since the act. These cases can provide guidance only as to whether to grant or deny a license where a Respondent has a history of criminal conviction. (It is, in fact,

worthy of note that no criminal complaint was pursued by Newport Grand or the Division of Lotteries against this Respondent.) While these cases are not specifically on point with the instant matter, they have established a standard for looking outside a particular act to determine someone's suitability for licensing, and are instructive in that light.

In this case, the factors which cry out for consideration are those which lead to conclusions about whether this Respondent poses a threat to the public security while he is performing janitorial services in a gaming facility – one which is closed to the public for the majority of his working hours.

It is clear that this Respondent violated § 3.83 of the *Rhode Island Lottery Video Lottery Terminal Procedures* (“VLT Procedures”), and that Newport Grand Management (“the Regulator”) acted within the scope of their authority granted by §§ 3.86 and 3.89(B) of the Procedures in removing him from the Facility after the violation occurred. In fact, it is clearly within the scope of the Regulator's discretion to terminate an employee.

Newport Grand Regulations and Rules provide that “any employee in violation of the rule against cashing out VLT credits “will be subject to accelerated progressive discipline or possible reassignment by the state.” (*page 12*) In fact, the “progressive discipline” framework provides for termination either after the fifth infraction, or, if the infraction is determined to be severe, termination could be meted out upon the first infraction. Underlying the Newport Grand regulations as well as the Lottery's VLT procedures is the right to terminate any employee for serious infractions. Further, it is stated in the Preamble of the VLT Procedures manual that “The Regulator reserves the right to remove any employee from the VLT operation, if the Regulator determines that the employee represents a security risk to VLT operations or is not in compliance with these Procedures.”

A review of the VLT Procedures also makes it clear that there are options other than termination of an employee available to the Regulator in cases such as this. § 3.87 provides that “(t)he Regulator and the Director may, when considering the status of any employee, set specific conditions for reinstatement of authority to work in VLT areas.” Further, § 3.89(A) establishes the discretion of the Regulator to reassign an employee to other areas of the facility:

“Nothing in this section shall require the employer to discharge or suspend an employee whose authority to work in VLT areas has been interrupted. Such employee may be reassigned to other responsibilities not involving VLT operations at the sole discretion of the employer.”

Not only does the Regulator have the discretion under these sections to reassign an employee, but it found it to be an appropriate measure in this case to exercise that very discretion and to reassign this Respondent and alter his job specifications. It appears that Newport Grand Management and the Division of Lotteries felt justified in their discretion to immediately terminate this Respondent, as is established in their rules, regulations and procedures. Yet, they later chose to reassign him to different shifts and different job duties as was also their right under the same regulations.

An inference must be drawn by this reassignment of the Respondent that both Management and the Agency were confident that they were *(a)* acting within the scope of their discretion as established by their rules and regulations, and *(b)* were able to effectuate this reassignment without putting the public safety or the security of the Facility at risk. As was stated in direct testimony and written into the rules and regulations that control the operation of this facility, public safety and a secure gaming environment are the paramount objectives of Newport Grand. If the reassignment of this Respondent was contrary to those objectives, it is impossible to believe that the reassignment or re-hire would have taken place.

This Hearing Officer finds that the testimony and argument that there is “no meaningful way to segregate employees from VLT machines at Newport Grand,” is unrealistic, and gives it little weight. The current conditions placed on the Respondent’s work shifts are that he is not to have contact with any VLT. He testified that he cleans the restrooms, and buffs the floors in the mutuels area, which has no VLT machines. Both his testimony and that of the witnesses from Newport Grand indicated that the only contact he currently has with any VLT is to walk by them in the hallways. There was further testimony that anywhere there is a VLT machine in the facility, it is under video surveillance. Of the thirteen hours per week that the Respondent works, the facility is closed (and the VLT’s shut down) for all but three hours. Newport Grand management has, in fact, meaningfully segregated the Respondent from the VLT machines in their facility. The Department’s argument is contradicted by this evidence.

In accordance with Newport Grand Regulations and Rules and Rhode Island Lottery Video Lottery Procedures, management had within its discretion an outright and permanent termination of the Respondent, but chose instead to exercise its discretion to reassign this Respondent to limited job duties and hours which were determined to pose no risk to public safety or the security of the gaming operation.

Finally, it is worth noting that Respondent does not dispute the underlying facts of this case. Indeed, rather than challenge them, he only attempts to recast them slightly and then asks for leniency. The Respondent’s statement at hearing was apologetic and remorseful about the incident and his repentance was credible.

It is significant that this Respondent has never before in his sixteen year history of employment at Newport Grand committed any infraction or been subject to any disciplinary action by his employers. In fact, there is uncontradicted evidence that he found money on the

premises on two occasions (in one instance amounting to several thousand dollars) and strictly adhered to regulations by turning the money over to security personnel.

VII. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws §§ 41-1-1, 41-4-9.1, 41-9-1, *et seq.*, 42-14-1, *et seq.*, and § 42-35-1, *et seq.*
2. The Department has presented evidence which substantiates little cause for revoking Respondent's License pursuant to R. I. Gen. Laws § 41-4-9.1(C), however an application to the employer's regulations to the circumstances in this case allow for the Respondent to maintain his license on a conditional basis.
3. The Newport Grand Regulations and Rules and the Rhode Island Lottery Video Lottery Terminal Procedures contain provisions which allow for the reassignment of employees who have committed infractions of those Rules and Procedures, and management has the discretion to do so.
4. The Department has failed to establish that there is no way to meaningfully segregate the Respondent from Video Display Terminals during his work shifts, as the re-hiring of the Respondent by Newport Grand and the Division of Lotteries invalidates the Department's argument.
5. Certain mitigating circumstances exist in this case which, when balanced against the singular wrongful act of the Respondent, dictate that the Respondent may maintain his license with conditions, without jeopardizing public safety or the security of the gaming facility.

V. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the Director of the Department Order that:

1. The Respondent shall be allowed to maintain his Service Employee License which qualifies him for employment at Newport Grand, on the express conditions that he has no physical contact with any Video Lottery Terminal during his working hours, unless those VLT's are shut down during the facility's closed hours.
2. That the Respondent is subject to all other rules, regulations and policies dictated by Newport Grand and the Rhode Island Division of Lotteries.

DATED: 17 April 2013

Ellen R. Balasco
Ellen R. Balasco, Esq.
Hearing Officer

ORDER

I have read the Hearing Officer's Recommendation in this matter, and I hereby take the following action with regard to the Recommendation:

ADOPT

REJECT

MODIFY

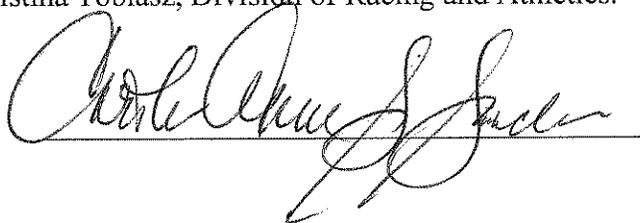
Dated: 18 April 2013

Paul McGreevy
Paul McGreevy
Director

THIS ORDER CONSTITUTES A FINAL DECISION OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-1 ET SEQ. AS SUCH, THIS DECISION MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MAY BE COMPLETED BY FILING A PETITION FOR REVIEW IN SAID COURT.

CERTIFICATION

I hereby certify on this 18th day of April, 2013, that a true copy of the within Decision was sent by first class mail, postage prepaid to counsel of record for the Respondent: Ashley K. Langmead, Esq. at 420 Scrabbletown Road, Ste. C, North Kingstown, RI 02852 and and by electronic mail to the following parties at the Department of Business Regulation: Neena Sinha Savage, Esq., Maria D'Alessandro, Esq., Deputy Director, Commercial Licensing, Racing and Athletics, and Christina Tobiasz, Division of Racing and Athletics.

A handwritten signature in cursive script, appearing to read "Charles A. Langmead", is written over a horizontal line.