

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF PARI-MUTUEL)
WAGERING,)
)
Petitioner,)
)
vs.) Case No. 04-3039PL
)
JERRY M. BONETT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On November 4, 2004, an administrative hearing in this case was held in St. Petersburg, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Stefan Thomas Peavey Hoffer
Qualified Representative
Ralf E. Michels, Esquire
Division of Pari-Mutuel Wagering
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Jerry M. Bonett, pro se
7801 Willowbrook Court
Hudson, Florida 34667

STATEMENT OF THE ISSUES

The issues in the case are whether the allegations of the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated July 1, 2004, the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Petitioner) alleged that Jerry M. Bonett (Respondent) failed to disclose a complete history of criminal convictions when he applied for licensure as a dealer in a card room.

Respondent disputed the allegations and requested an administrative hearing. Petitioner forwarded the matter to the Division of Administrative Hearings, which scheduled and conducted the hearing.

At the hearing, Petitioner presented no witnesses and had Exhibits 1 through 6 admitted into evidence. Respondent testified on his own behalf.

The Transcript of the hearing was filed on December 2, 2004. Both parties filed proposed recommended orders.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulation of pari-mutuel wagering pursuant to Chapter 550, Florida

Statutes (2003), and is responsible for licensing employees of pari-mutuel facilities.

2. Respondent is a card dealer holding Florida occupational license number 6927724-1012 for employment as a card dealer at the Tampa Bay Downs racetrack.

3. By application filed at the racetrack on December 3, 2003, Respondent applied for the referenced license. Persons unknown apparently conducted the application process for all employees of the facility. Employees completed the applications and submitted them at the racetrack, again to persons unknown.

4. The application includes a section titled "Background Information." Question 1 asks in relevant part the following question:

Have you ever been convicted of a crime, found guilty, or entered a plea of guilty or nolo contendere (no contest) to, even if you received a withhold of adjudication?

5. Question 1 further provides as follows:

YOUR ANSWER TO THIS QUESTION WILL BE CHECKED AGAINST LOCAL, STATE AND FEDERAL RECORDS. FAILURE TO ANSWER THIS QUESTION ACCURATELY MAY RESULT IN DENIAL OR REVOCATION OF YOUR LICENSE. IF YOU DO NOT FULLY UNDERSTAND THIS QUESTION, CONSULT WITH AN ATTORNEY OR CONTACT THE DEPARTMENT.

6. Respondent answered the question in the affirmative. The question provides that if the applicant responds in the

affirmative to the question, "form 0050-1" should be completed to disclose additional information about the convictions.

7. Form 0050-1 includes space to list three criminal convictions. The application instructions related to the form state: "[i]f you have more than seven offenses to document on form 0050-1, attach additional copies . . . as necessary."

8. Respondent completed a form 0050-1. On the form, he stated that he had been convicted of a misdemeanor in 1987. The Respondent identified the offenses as "trespassing," "suspended license," and "cashed check." Respondent stated that the penalty had been probation, which was violated, and that he was required to finish the sentence. Respondent initially identified the location of the conviction as Pasco County, but crossed through the writing and changed it to Hillsborough County.

9. Above Respondent's signature on the application is a statement that in material part provides as follows:

I hereby certify that every statement contained herein is true and correct and that I understand that any misstatement or omission in this application may result in denial or revocation of my pari-mutuel license.

10. Other than the information on the application, there was no evidence offered at the hearing that Petitioner was convicted of a misdemeanor in 1987 in Hillsborough County.

11. Petitioner asserts that at the time he filed the application, he completed a second form 0050-1 on which he disclosed additional information related to felony convictions. At the hearing, he testified that an unidentified person allegedly involved in the application process instructed him to make the felony disclosures on a second form. Although there is no evidence contradicting Respondent's account of the events, the application submitted through the racetrack to Petitioner did not include a second form 0050-1.

12. In 1983, Respondent was adjudicated guilty of felony charges, including Forgery and Uttering a Forged Check in Pasco County, Florida (Circuit Court, Sixth Judicial Circuit, Case No. 8101927CFAWS).

13. In 1990, Respondent was adjudicated guilty of a felony charge of Grand Theft, Third Degree in Hillsborough County, Florida (Circuit Court, Thirteenth Judicial Circuit, Case No. 90-279).

14. In 1991, Respondent was adjudicated guilty of a felony charge of Grand Theft in Pasco County, Florida (Circuit Court, Sixth Judicial Circuit, Case No. 8701762CFAWS).

15. A few days after the application was completed, Respondent met with an employee of Petitioner (identified as "Nick") to discuss the felony convictions. "Nick" did not testify at the hearing.

16. As filed with Petitioner, Respondent's application failed to include a second form 0050-1 and did not disclose the felony convictions identified herein.

17. There is no evidence that Respondent has had any involvement in criminal activity since 1991.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.57, Fla. Stat. (2003).

19. Subsection 550.105(10), Florida Statutes (2003), in relevant part provides as follows:

Upon application for an occupational license, the division may require the applicant's full legal name; any nickname, alias, or maiden name for the applicant; name of the applicant's spouse; the applicant's date of birth, residence address, mailing address, residence address and business phone number, and social security number; disclosure of any felony

20. Subsection 550.105(5)(b), Florida Statutes (2003), provides as follows:

The division may deny, suspend, revoke, or declare ineligible any occupational license if the applicant for or holder thereof has violated the provisions of this chapter or the rules of the division governing the conduct of persons connected with racetracks and frontons. In addition, the division may deny, suspend, revoke, or declare ineligible any occupational license if the applicant for such license has been convicted in this

state, in any other state, or under the laws of the United States of a capital felony, a felony, or an offense in any other state which would be a felony under the laws of this state involving arson; trafficking in, conspiracy to traffic in, smuggling, importing, conspiracy to smuggle or import, or delivery, sale, or distribution of a controlled substance; or a crime involving a lack of good moral character, or has had a pari-mutuel license revoked by this state or any other jurisdiction for an offense related to pari-mutuel wagering.

21. Section 559.791, Florida Statutes (2003), provides as follows:

False swearing on application; penalties.-- Any license issued by the Department of Business and Professional Regulation which is issued or renewed in response to an application upon which the person signing under oath or affirmation has falsely sworn to a material statement, including, but not limited to, the names and addresses of the owners or managers of the licensee or applicant, shall be subject to denial of the application or suspension or revocation of the license, and the person falsely swearing shall be subject to any other penalties provided by law.

22. Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint filed against Respondent. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Clearly, Petitioner did not receive a form 0050-1 upon which the information related to Respondent's felony convictions was disclosed. Because the application submitted to Petitioner failed to include

information related to Respondent's felony convictions, the burden has been met.

23. Respondent asserts that he included information related to the felony convictions on a second form 0050-1 that he completed at the time of the application. In support of the assertion, Respondent testified that within a few days of making the application, he was required to meet with a state employee (identified as "Nick") allegedly assigned to review the applications and obtain information related to felony disclosures, thereby suggesting that the felonies were disclosed on the application. "Nick" did not testify at the hearing.

24. In response to a question from the administrative law judge, counsel for Petitioner indicated that in cases where an applicant has a felony conviction, an investigator reviews the matter and signs off on an application before further processing occurs.

25. As to Respondent's meeting with "Nick," Petitioner offered its Exhibit 6 into evidence (purportedly a form completed by "Nick" after his meeting with Respondent) to suggest that the meeting was related to felony convictions that were allegedly undisclosed on the application. The exhibit is one page of apparently seven from a form used by Petitioner. The page is undated and unsigned. Counsel for Petitioner offered the only information identifying the exhibit. No

evidence supporting admissibility under the business records exception to the rule against hearsay was offered. See Subsection 90.803(6)(a), Florida Statutes (2003), as to admissibility of the document. The exhibit is uncorroborated hearsay, is insufficient to form the basis for a finding of fact, and has not been considered in the preparation of this Recommended Order.

26. The evidence is insufficient to support any finding of fact as to the purpose of Respondent's meeting with "Nick," and fails to establish whether the meeting was triggered by information included on a now-missing disclosure form or by information obtained by Petitioner after the application was submitted.

27. A review of Petitioner's rules as set forth in Florida Administrative Code Chapter 61 did not establish that persons disclosing felony convictions on an application are required to meet with a state official prior to the application being processed.

28. It appears that Florida Administrative Code Rule 61D-5.006 provides a process by which Respondent may seek a waiver of disqualification related to criminal convictions from the director of the Division of Pari-Mutuel Wagering, but the issues in this case are framed by the Administrative Complaint

and the issue of a waiver is outside the scope of this proceeding.

29. In the Proposed Recommended Order, Petitioner seeks revocation of Respondent's licensure and disqualification from re-licensure for a period of five years. The suggested penalty seems inappropriately harsh under the circumstances. The evidence fails to establish that Respondent attempted to deceive Petitioner by making an incomplete disclosure of a criminal record. Based on Respondent's testimony at the hearing, it appears that time and circumstances have confused the details of inappropriate activities that ceased approximately 13 years ago. It also appears that Respondent provided information during the application process sufficient to put Petitioner on notice of the past activities.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Business and Professional Regulation enter a final order suspending Respondent's occupational license for a period of three months.

DONE AND ENTERED this 17th day of December, 2004, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of December, 2004.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.