IN THE COURT OF APPEALS OF IOWA

No. 8-147 / 07-0412
Filed May 14, 2008

NATIONAL CATTLE CONGRESS, INC.,
Petitioner-Appellant,

vs.

IOWA RACING AND GAMING COMMISSION,
Respondent-Appellee,

AREA INVESTORS LOCAL GROUP, L.L.C.,
Intervenor-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

National Cattle Congress appeals from the district court's ruling on judicial review of a declaratory order by the Iowa Racing and Gaming Commission. **AFFIRMED.**

Dave Nagle of Dave Nagle Law Office, Waterloo, for intervenor-appellant.

Kenneth Nelson of Randall & Nelson, P.L.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Jeffrey C. Peterzalek, Deputy Attorney General, and Mark Hunacek, Assistant Attorney General, for appellee.

Heard by Sackett, C.J., and Miller and Vaitheswaran, JJ.

VAITHESWARAN, J.

National Cattle Congress, Inc. (NCC) once held a license to conduct pari-mutuel racing at the Waterloo Greyhound Park. NCC wanted "the re-issuance of the license previously held" and a license to conduct "expanded gaming" at the racetrack. However, it did not wish to pay the fees associated with an initial application for a racing license. Therefore, it petitioned the Iowa Racing and Gaming Commission for a declaration that it was automatically entitled to both a pari-mutuel racing license and an "expanded gaming" license and that it could file a renewal application rather than an initial application for a racing license. NCC posed the following specific questions to the commission:

> Question #1: Does Iowa Code section 99F.4A(2) mandatorily require the issuance of a license to the Petitioner to operate pari-mutuel racing and/or gambling games?
> . . . .
>
> Question #2: Does Iowa Administrative Code section 491-1.5(2) allow Petitioner to only file a Renewal Application for a pari-mutuel racing license? If yes, is Petitioner relieved from any filing fee requirement?

After considering NCC's arguments and the arguments of several intervenors,[1] the agency answered no to both questions. On judicial review, the district court took judicial notice of additional information proffered by the parties and issued a decision affirming the agency order. NCC appealed.[2]

I. Question 1

Iowa Code section 99F.4A(2) (2005) provides:

[1] Intervenors at the hearing included Isle of Capri, Black Hawk Gaming Association, and Area Investors Local Group, L.L.C.
[2] Intervenor Area Investors Local Group, L.L.C. filed a brief in support of NCC's position.

> A license to operate gambling games shall be issued only to a licensee holding a valid license to conduct pari-mutuel dog or horse racing pursuant to chapter 99D on January 1, 1994.

It is undisputed that NCC held a valid pari-mutuel dog racing license in 1994. Based on this undisputed fact, NCC argues section 99F.4A(2) required the commission to reissue a pari-mutuel license and authorize expanded gaming.

The commission concluded this provision did not "mandate that a license be issued to the Petitioner or any other person or entity." The commission reasoned that NCC's reading effectively wrote out the word "only" in section 99F.4A(2) and led to the untenable conclusion that it could simply demand and receive a license.

As a preliminary matter, we must decide what standard to use in reviewing the agency's answer to question 1. In making that decision, we look to whether a provision of law vests the commission with discretion on this matter. *See* Iowa Code § 17A.19(11)(c) (requiring court to give "appropriate deference" to view of agency with respect to particular matters vested by provision of law in discretion of agency). Section 99F.4 affords the commission "full jurisdiction" to supervise gambling games governed by the chapter and gives the agency authority to promulgate rules implementing the chapter. Based on this authority, we conclude the commission is vested with discretion to interpret Iowa Code section 99F.4A(2). *City of Marion v. Iowa Dep't of Revenue & Fin.*, 643 N.W.2d 205, 207 (Iowa 2002) (concluding similar provision warranted deference to agency interpretation of statute). Where an agency has such discretion, the appropriate standard of review is set forth in Iowa Code section 17A.19(10)(l); the agency's

interpretation will be overturned only if it is "irrational, illogical, or wholly unjustifiable."

Returning to the commission's answer to question 1, we conclude that answer was not "irrational, illogical, or wholly unjustifiable." As the State points out on appeal,

> The relevant statute says that a license shall be issued "only to" certain people. It does not say that these people are automatically entitled to a license. In other words, the statute merely sets up the pool of people who are eligible to be licensed but does not confer on these people any automatic right to obtain a license.

We concur with this statement and affirm the agency's answer to question 1.

II. Question 2

The Commission has promulgated the following rule:

> *Renewal application for racing license.* This form shall contain, at a minimum, the full name of the applicant, racing dates, simulcast proposal, feasibility of racing facility, distribution to qualified sponsoring organizations, table of organization, management agreement, articles of incorporation and bylaws, lease agreements, financial statements, information on the gambling treatment program, and description of racetrack operations. The form may include other information the commission deems necessary to make a decision on the license application.

Iowa Admin. Code r. 491-1.5(2). NCC contends this rule allows it to file "only a renewal application, rather than an initial application, for a pari-mutuel racing license." As the State points out, the rule says nothing about when an initial application must be filed and when a renewal application must be filed. It simply prescribes the contents of a renewal application form. The commission could have answered no to question 2 on this basis. The commission did not do so. Instead, it answered the question posed by NCC. The commission stated NCC had "no existing license to renew," and concluded NCC would have to file an

initial rather than a renewal application. Implicit in this ruling was a conclusion that rule 491-1.5(2) did not apply.

Again, we must preliminarily decide the appropriate standard of review. NCC argues the commission made a fact finding that it had no existing license. It further argues this fact finding must be reviewed under the substantial evidence standard. *See* Iowa Code § 17A.19(10)(f).

Section 17A.19(10)(f) applies to "determination[s] of fact." A petition for declaratory order is not a vehicle to adjudicate contested facts. *See* Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act (1998) Chapter 17A, Code of Iowa (House File 667 as Adopted) Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 38 (1998) ("Note that there are no contested issues of fact in declaratory order proceedings because their function is to declare the applicability of the law in question to unproven facts furnished by petitioners."). It is a means to obtain an order "declaring the applicability of the statute, rule, or order in question to the specified circumstances." Iowa Code § 17A.9(5)(a).

In its order, the commission was obligated to summarize "the particular facts upon which" its ruling was based. Iowa Code section 17A.9(7); Iowa Admin. Code r. 491-2.29. NCC pled that it "previously held" a pari-mutuel racing license and it "once held a pari-mutuel license that was either suspended or revoked." The commission's statement that NCC had no existing license was a reiteration of this undisputed fact rather than an adjudication of a disputed fact, as NCC contends.

We recognize the agency did not limit its factual summary to the allegations in NCC's petition but also referenced "the past agency action of this Commission." NCC maintains this past agency action reflected "confusion and disagreement" about the status of its license and, by referring to it, the commission generated a disputed fact. We disagree. In its declaratory order, the commission observed that it did not renew NCC's license in 1996. This observation was undisputed, as NCC stipulated to the evidence supporting the observation at a subsequent hearing on NCC's petition for judicial review.[3] As noted, NCC also conceded it had no license at the time it petitioned for a declaratory order. Based on this record, we conclude the agency did not adjudicate any disputed issues of fact.

Because the commission could not and did not decide a contested issue of fact, the substantial evidence standard of review set forth in Iowa Code section 17A.19(10)(f) is inapplicable.

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[3] At oral arguments on NCC's petition for judicial review, NCC and the commission stipulated that the court could

> "take judicial notice of other materials and documents in the court file, including but not limited to select portions of various Iowa Racing and Gaming Commission meeting minutes as well as some other documentation that was produced by the commission over the course of the past few years actually dating back probably to 1996."

Our highest court has permitted judicial notice of public documents of state agencies. *Salsbury Labs. v. Iowa Dept. of Envntl. Quality*, 276 N.W.2d 830, 835-36 (Iowa 1979). Those public documents unequivocally establish that the commission denied NCC's request for renewal of its pari-mutuel wagering license in 1996 and NCC did not seek judicial review of that action.

To the extent the district court considered past agency action in its review of the commission's declaratory order, it was fully empowered to do so. *See* Iowa Code section 17A.19(7) (stating in proceedings for judicial review of agency action other than contested cases, a court "may hear and consider such evidence as it deems appropriate").

This leaves us with the commission's implicit conclusion that the cited rule did not apply to NCC. We review the conclusion under the "irrational, illogical and wholly unjustifiable" standard of section 17A.19(10)(*l*). As noted, the rule, by its terms, did not apply. Therefore, the agency's implicit conclusion was not irrational, illogical, or wholly unjustifiable.

AFFIRMED.