PRACTICE TIPS:

Representing Gaming Employees Before the Gaming Control Board

By Terry Johnson & Chan Lengsavath

Attorneys who represent gaming employees in appealing denials of employment registrations (aka gaming "work cards") perform a crucial function and aid in the effective administration of Nevada's Gaming Control Act. They help ensure that these employees fully understand their rights and responsibilities under the law, which in turn promotes confidence in the decisions rendered. To further aid in these efforts, this article will cover the policy rationale underlying gaming employment registration, the registration and appeal process, and practical assistance for attorneys representing employees before the Board in these matters.

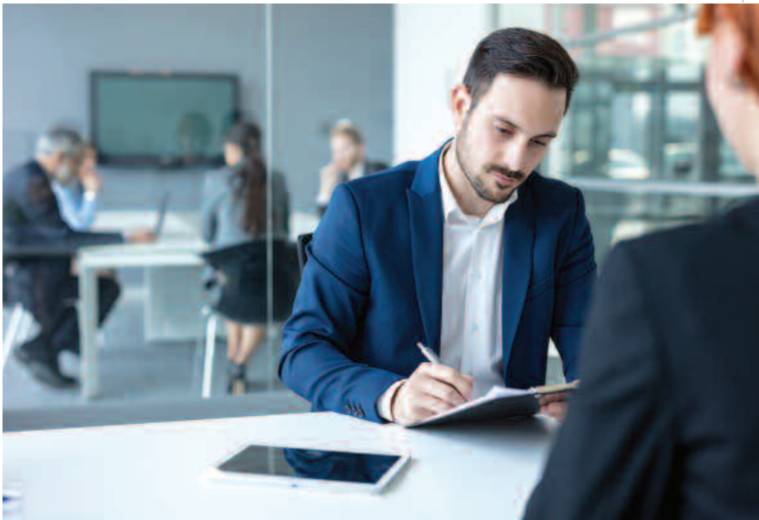
The policy rationale behind the gaming employee registration process is rooted in the state's overall gaming policy, which establishes that the "gaming industry is vitally important to the economy of the State and the general welfare of its inhabitants."[1] The essential public trust and confidence required to sustain this system requires the "strict regulation of all persons" involved in gaming operations.[2] In addition, the Legislature has declared that, as a matter of gaming policy, the state must "protect and promote the health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada." To do so, the Gaming Control Board is therefore required to "[a]scertain and keep itself informed of the identity, prior activities and present location of all gaming employees in the State of Nevada."[3]

Procedurally, no person may be employed as a "gaming employee" unless they are first registered with the Gaming Control Board.[4] The term "gaming employee" includes a broad array of positions.[5] Some examples include cashiers, change personnel, dealers, machine mechanics, security personnel, pit bosses, and certain gaming supervisors and managers.[6] Additionally, persons employed in club venues on the premises of nonrestricted gaming establishments must also be registered.[7] According to Gaming Control Board records, there are approximately 127,000 active gaming employee registrations in the state.

When a gaming licensee hires a "gaming employee," that employee is required to complete a Gaming Employee Registration application with the Board. The application, which includes a complete set of fingerprints, is then reviewed by the Board's Enforcement Division. Enforcement Division agents will investigate any relevant information pertaining to the suitability of an employee to

work in the gaming industry. Portions of the investigation may be conducted via telephonic interview between the agent and the employee. Generally, the investigations will center on the applicant's criminal history and a review of local, state and federal criminal records.

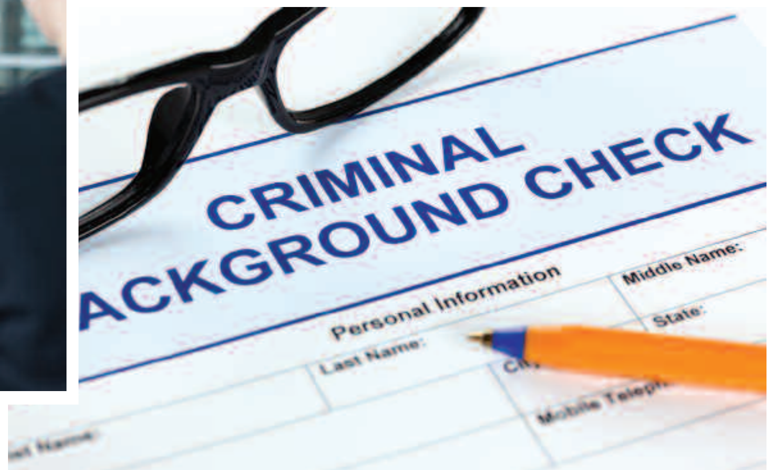
During the course of the initial investigation, the employee is considered temporarily registered.[8] Upon conclusion of the investigation, the employee will be deemed registered unless the Enforcement Division provides the employee and the licensee with notice of an objection within 120 days.[9] The Board's Enforcement Division can suspend or object to a gaming employee's registration for any of the specific infractions enumerated in NRS 463.335(12)(a)-(g) or "for any cause deemed reasonable by the Board."[10] If the Board does not outright object to or suspend a gaming employee's registration, it may alternatively "limit the period for which the registration is valid, limit the job classifications for which the gaming employee may be employed and establish such individual conditions" for the employee's registration "as the Board deems appropriate," including unscheduled tests for controlled substances.[11]



If the Board's Enforcement Division objects to the employee's registration, the employee may request a hearing within 60 days of the objection notice.[12] However, if a request for a hearing on the objection is not received within the 60-day time limit, or if the employee fails to appear at the hearing, the objection is "deemed well-founded."[13] If the objection is deemed well-founded or sustained by the Board after a hearing, the employee must wait one year before applying for another hearing to reconsider the objection.[14]

Upon an employee's request for a hearing on the Enforcement Division's objection, the initial hearing is typically conducted before a Hearing Examiner appointed by the Board.[15] After taking testimony and reviewing the evidence presented at the hearing, the Hearing Examiner will submit a recommendation to the Board as to whether to sustain or reverse the objection.[16] If the Board sustains the objection, the employee remains ineligible for gaming employment. The aggrieved employee then has 15 days in which to appeal to the Gaming Commission.[17] The Gaming Commission's review of the matter is "limited to the record of the proceedings before the Board."[18] The Commission can sustain, modify or reverse the Board's decision.[19] If an employee is still aggrieved by the outcome, he or she may seek judicial review of the Gaming Commission's decision in the courts.[20]

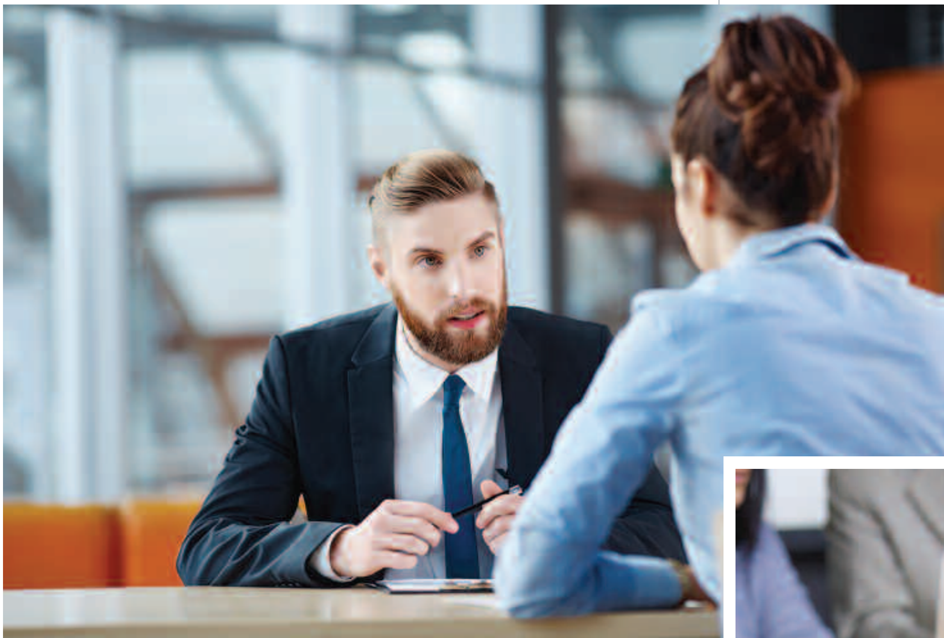
Now, for employees seeking registration or attorneys representing employees appealing objections to gaming employment registrations, there are ways to increase the likelihood of success. First, and foremost, perhaps the most common (and most consequential) mistake that employees make is failing to furnish all information requested, especially information concerning the employee's criminal background. In fact, the first of the statutorily enumerated reasons for objection is that the employee "[f]ailed to disclose or misstated information or otherwise attempted to mislead the Board with respect to any material fact contained in the application for registration as a gaming employee."[21] Aside from the minority of instances where an applicant may have inadvertently omitted information because they genuinely did not recall the matter, employees often intentionally exclude criminal history information such as arrests,



including instances where the charges were dismissed or were reduced or pled down to a misdemeanor or gross misdemeanor from a felony. However, the gaming employee application asks applicants for their *complete* criminal history for a specified time period. Further, the application itself goes to great lengths to expressly state that even arrests that resulted in dismissals, acquittals or the like must be disclosed. Thus, when applicants still fail to include their entire criminal history, the presumption is that such omissions were willful. As a result, an objection will nearly always follow. Attorneys should therefore counsel their employee clients to be fully forthcoming at the outset when submitting the application or to otherwise affirmatively correct any omissions at the earliest opportunity.

Some employees fail to include their complete criminal history under the belief that the related criminal records have been sealed and no such disclosures are required. While some applicants may in fact avail themselves of the ability to seal their criminal records in Nevada under chapter 179 of the Nevada Revised Statutes and respond in the negative to certain questions concerning their criminal history, careful attention should be given to whether any such sealed records pertain to gaming. If so, the Gaming Control Board can "inquire into and inspect any record sealed" pursuant to these provisions.[22] As well, because criminal records may have been sealed in other jurisdictions does not mean that they are inaccessible to Board agents here. Thus, attorneys should carefully counsel their applicant clients as to when complete criminal history disclosures to the Board may still be required, notwithstanding the sealing of the records – in Nevada or elsewhere.

Finally, attorneys representing employees before the Gaming Control Board should be aware of some of the nuances of the applicable gaming statutes and regulations that may vary from their regular practice of law. First, once the Board's Enforcement Division has concluded its investigation and issued an objection to an individual's gaming employment, there is no stay of that decision pending a hearing. When the objection is issued, "the licensee *shall immediately terminate* the applicant from employment or reassign the applicant to a position that does not require registration as a gaming employee."[24] (While reassignment is legally permitted, gaming licensees generally terminate the employee, as opposed to placing them into another position for which they were not originally hired.) The fact that there is no stay of the objection, coupled with the fact that termination usually follows, merits reiterating the importance of applicants fully and accurately completing their initial application that will be investigated and then cooperating fully and truthfully with the agent conducting the investigation.



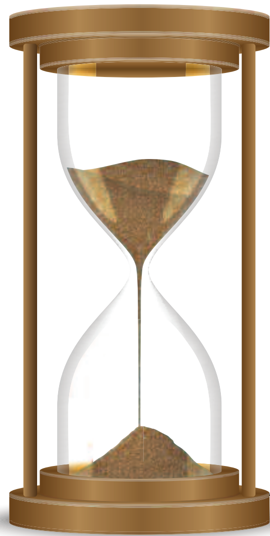
Second, it is important to observe that the proceedings before the Board are administrative in nature, as opposed to criminal. Periodically, attorneys err in attempting to apply criminal procedures and standards, particularly evidentiary standards, to the Board's administrative proceedings.

Next, attorneys should counsel gaming employee applicants they represent to interact professionally and honestly with the investigating agents and to show candor to the hearing tribunal. A frequent cause of objection is when the agents attempt to make initial contact with the employee telephonically and the employee fails to answer or return calls to the agent. Worse yet, when they do speak with the agents they fail to answer truthfully the questions presented. The applicant's credibility erodes at that point. Should the matter proceed to a hearing, credibility becomes even more critical. Given that determinations of credibility by the trier of fact are entitled to deference in any subsequent review or appeal,[23] should the Board's Hearing Examiner find that the applicant lacked credibility in his or her hearing testimony, the applicant's likelihood of overturning the objection is significantly lessened. Thus, it behooves applicants to demonstrate the appropriate forthrightness and candor to the tribunal, as well as to the entire investigative process.

Next, attorneys should be strategic in determining whether and when to recommend their clients pursue a review of an objection. For example, the Board may object to a gaming employee's registration if the applicant has "been or remains in the constructive custody of any federal, state or municipal law enforcement authority."[25] More often than not, both the Gaming Control Board and the Gaming Commission have interpreted "constructive custody" to include

instances where an applicant is on parole or probation. If an applicant has been objected to because of their probationary status and unsuccessfully pursued a review of that objection, they generally may not petition for reconsideration for one year.[26] If, for example, the probation ends in less than one year, the applicant will likely have forgone the opportunity to return to work sooner.

In terms of the timing of seeking a review of objections, attorneys and their clients should also carefully consider the amount of time that has elapsed since the occurrence of any problematic incidents. The less time that has passed and the more severe the incident, the less likely an applicant will be successful in reversing an objection. Also, when the passage of time has not created in the applicant an appropriate sense of responsibility for their prior acts and a genuine demonstration of remorsefulness, such applicants would be well advised to wait an additional period of time before attempting to reverse an objection. Overall, attorneys can do their clients a valuable service in advising them to carefully consider whether and when to seek review of an objection. If the appeal is ultimately unsuccessful, the employee may be prohibited from gaming employment longer than anticipated.



One final point on timing as it relates to applicants with potentially borderline backgrounds and where attorneys can be helpful in representing them before the Board. In lieu of an outright objection to an applicant upon conclusion of its investigation, the Board's Enforcement Division "may specially limit" the time period for which an employee can be a registered gaming employee.[27] Thus, an attorney can propose to the Board's Enforcement Division that the applicant be allowed to register for a limited time period, along with any other conditions the division deems appropriate, in order to give the applicant an opportunity to more convincingly demonstrate their suitability for gaming employment. If the applicant "fails to comply with any limitation or condition" of the time-limited registration, an objection may be entered.[28]

In sum, attorneys representing gaming employee clients before the Gaming Control Board perform a useful function. Counseling these clients especially as to matters of strategic timing and of their duties of candor to the investigators and the hearing tribunal are conducive to the effective regulation of gaming in this state. The Gaming Control Board will continue to apply to gaming employees the high standards and strict regulation contemplated under the law, and will continue to do so in a fair, timely and professional manner. The ultimate beneficiaries of ensuring gaming employees are of the highest caliber and character are the gaming industry that employs them, the patrons they serve and their fellow citizens of the State of Nevada.

Terry Johnson currently serves on the Nevada Gaming Control Board. He previously held multiple State level cabinet positions in Nevada regulating various financial and other industries and as Assistant Director in the Clark County District Attorney's Office. He also served for 5 years as Nevada's Labor Commissioner.

Chan Lengsavath, a licensed attorney and an accountant, currently serves as a Hearing Examiner with the Nevada Gaming Control Board. He has over fifteen years of regulatory experience with the Board. Mr. Lengsavath is also a partner and founding member of Vegas Valley Law LLC. He holds Bachelor's and Master's of Science degrees in accounting from UNLV, along with a Juris Doctorate degree from UNLV's Boyd School of Law.

1 Nev. Rev. Stat. § 463.0129(1)
2 *Id.*
3 Nev. Rev. Stat. § 463.335(1)(a)
4 *Id.*
5 *See* Nev. Rev. Stat. § 463.0157
6 *Id.*
7 Nev. Rev. Stat. § 463.15999; Nev. Gaming Comm'n. Regulation 5.320
8 Nev. Rev. Stat. § 463.335(7)
9 Nev. Rev. Stat. § 463.335(8)
10 Nev. Rev. Stat. § 463.335(12)
11 *Id.* (*see* flush language)
12 Nev. Rev. Stat. § 463.335(11)
13 *Id.*
14 Nev. Gaming Comm'n. Regulation 5.109(2)
15 Nev. Rev. Stat. § 463.335(14)
16 *Id.*
17 Nev. Rev. Stat. § 463.335(13)
18 *Id.*
19 *Id.*
20 Nev. Rev. Stat. § 463.315
21 Nev. Rev. Stat. § 463.335(12)(a)
22 Nev. Rev. Stat. §179.301(1)
23 *See*, e.g., Krause Inc. v. Little, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001) (the court "will not weigh the credibility of witnesses because that duty rests with the trier of fact").
24 Nev. Rev. Stat. § 463.335(10) (emphasis added)
25 Nev. Rev. Stat. § 463.335(12)(g)
26 Nev. Gaming Comm'n. Regulation 5.109(1)
27 Nev. Rev. Stat. § 463.335(12) (see flush language)
28 *Id.*

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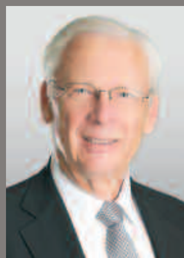

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