

**State of California
Office of Administrative Law**

In re:

**California Gambling Control
Commission**

Regulatory Action:

**Title 4, California Code of
Regulations**

Adopt section: 12391(a)(2)

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2012-0731-02S

DECISION SUMMARY

On July 31, 2012, the California Gambling Control Commission (CGCC) submitted to the Office of Administrative Law (OAL) the proposed adoption of sections 12391 and 12392 and the amendment of section 12360 of Title 4 of the California Code of Regulations (CCR). These regulations establish requirements for the development and implementation of gambling floor operations and house rules by licensed gambling enterprises.

On September 12, 2012, OAL notified the CGCC that OAL disapproved subdivision (a)(2) of proposed section 12391 for failure to comply with the clarity standard of Government Code section 11349.1(a)(3) and Title 1 CCR section 16(a).

BACKGROUND

Gambling is the quintessential cash business, and internal controls are the primary procedures used to protect the integrity of cardroom games and funds and are a vitally important part of properly regulating gambling. This rulemaking action was proposed in an effort to establish uniform procedures, standards, and requirements for gambling floor operations and gambling enterprise house rules which would assist the CGCC and the Bureau of Gambling Control in meeting their oversight responsibilities under the Gambling Control Act, taking into account variations in the size of gambling operations, and, thereby, provide minimum standards for the protection of public health, safety, and general welfare. Among other things, but specific to this Decision of Disapproval, the rulemaking action sought to protect gambling enterprise employees, who were directed

by their employers to play in controlled games but who refused to do so, from coercion and from adverse actions by the employer which would affect the terms and conditions of their employment.

DISCUSSION

Any regulation amended or adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA review. (Gov. Code, secs. 11340.5 and 11346.) OAL reviews regulatory actions for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that required procedures are followed in order to provide meaningful public opportunity to comment on rules and regulations before they become effective.

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. Government Code section 11340(b). Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the clarity standard. Section 11349(c) of the Government Code defines “clarity” to mean “...written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them.” Title 1 CCR section 16 states in pertinent part that:

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exist:

(1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning, or

(2) the language of the regulation conflicts with the agency’s description of the effect of the regulation....

CGCC’s Proposed Section 12391(a)(2) fails to meet the Clarity standard of the APA.

Proposed new subdivision (a)(2) of section 12391 provides as follows:

No licensee or employee of a gambling enterprise shall, as a consequence of an employee's refusal to play a controlled game, coerce, take or threaten to take any action adversely affecting the terms and conditions of employment for that employee. This paragraph does not create any new civil liability.

This subdivision fails to satisfy the APA clarity standard in two respects.

First, the use of the verb "coerce" in the first sentence of subdivision (a)(2) is grammatically incorrect and results in the possibility of the regulation being interpreted to have more than one meaning pursuant to Title 1 CCR section 16(a)(1). As written, the provision prohibits a licensee or employee from coercing an action. An action cannot be coerced; however, a person can be coerced into taking an action. In correspondence with OAL, CGCC indicated that the word "coerce" was intended to refer to coercion of the employee who refuses to gamble. If a reader assumes, however, that the regulation does not contain this grammatical error, he/she could read the regulation as prohibiting the coercion of another (implied) employee to take or threaten to take adverse employment action against the employee who refused to play in a controlled game.

Prior to resubmitting this subdivision to OAL for review and filing with the Secretary of State, CGCC must revise it to make clear who is prohibited from engaging in coercion and who is protected from being coerced.

Second, as written, proposed subdivision (a)(2) prohibits an employer from taking or threatening to take adverse employment action against "an employee" and does not qualify the phrase "an employee." This phrase could reasonably be interpreted as meaning that an employer was prohibited from taking adverse employment action against "any employee" without regard to whether an employee's job duties included playing in controlled games. The text of this subdivision, prior to the CGCC's amendment of it on May 30, 2012, contained a sentence which qualified the prohibition by stating: "This paragraph does not apply to 'house proposition players' whose duties include the play of poker games." A commenter in this action asked that this sentence be restored prior to adoption of the final regulation. In its Final Statement of Reasons, at page 49, CGCC declined to adopt the commenter's suggested change and responded to the commenter as follows:

...House proposition players are employed specifically to play in controlled games, or at least playing in those games is one of the duties within the scope of their employment. This provision is neither intended, nor should it be interpreted to hinder an employer from taking appropriate action against an employee who refuses to perform some or all of the duties which he or she was specifically hired to perform.

Notwithstanding CGCC's explanation and qualification of the prohibition in its Final Statement of Reasons, the actual text of the regulation can reasonably be interpreted as prohibiting adverse action against any employee who refuses to play in a controlled

game, including against those for whom playing in controlled games is one of the duties of their employment. The language of the regulation, therefore, conflicts with the agency's description of the effect of the regulation pursuant to Title 1 CCR section 16(a)(2). Moreover, the regulation could be interpreted as a regulatory modification of the duties of employment of house proposition players.

Prior to resubmitting this subdivision to OAL for review and filing with the Secretary of State, CGCC must revise it to make it consistent with CGCC's intent and interpretation of the regulation as described in CGCC's response to the public commenter.

CONCLUSION

For the foregoing reasons, OAL disapproves proposed subdivision (a)(2) of section 12391 in the above-referenced rulemaking action. Pursuant to Government Code section 11349.4(a), the CGCC may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval. If the CGCC makes other than non-substantial or solely grammatical changes in revising the regulations, it shall make all changes which are sufficiently related to the original text available for at least 15 days for public comment pursuant to Government Code section 11346.8(c).

Date: September 19, 2012



Dale Mentink
Senior Staff Counsel

For: Debra M. Cornez
Director

Original: Tina Littleton
Copy: James Allen