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17106-9060

FILED

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1408-2010
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August 18, 2010

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Linda S. Lloyd, Esquire
Director of Hearings and Appeals
Office of Hearings and Appeals
One Penn Center
2601 N. 3rd Street/5th Floor Suite 502
Harrisburg, Pennsylvania 17110

RE: PEDP Petition 1558-2010, consolidated to 1408-2010 (See Caption below)

Petition Pursuant to 1 Pa. Code § 35.20 in the nature of an appeal of the Orders dated July 15, 2010 issued by the Director of Hearings and Appeals which, Inter Alia, denied Respondent's Motion to Overrule Objections and Compel Responses to First Set of Interrogatories and First Set of Requests for Production Directed to Complainant and Respondent's Motion for the Issuance of a Subpoena to Produce Documents or Things For Discovery Directed to the Pennsylvania Gaming Control Board.

Director Lloyd,

Respondent Philadelphia Entertainment and Development Partners, L.P. (PEDP) filed the above Petition on July 19, 2010. Complainant Bureau of Investigations and Enforcement (BIE), through the Office of Enforcement Counsel (OEC) files this letter response in lieu of a formal Answer for the reasons set forth below.

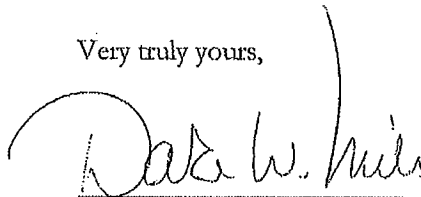
The Petition above is an appeal of the Orders dated July 15, 2010 issued by the Director of the Office of Hearings and Appeals denying a motion regarding discovery matters in the matter of the Complaint for Revocation of Slot Machine License filed by BIE against PEDP.

By Order of August 11, 2010, the Pennsylvania Gaming Control Board ruled that while a matter is before the Office of Hearings and Appeals, rulings of the Presiding Officer may not be appealed to the Board absent extraordinary circumstances when a prompt decision by the Board is necessary and the matter is referred to the Board by the Presiding Officer. (See Exhibit "A" Board Order and Adjudication of August 11, 2010.)

No extraordinary circumstances exist in Respondent's request requiring a prompt decision by the Board, and this matter has not been referred to the Board by the Presiding Officer. Therefore, the rulings of the Presiding Officer which are the subject of this Petition may not be appealed, and Respondent's Petition is premature, improperly filed, and no formal response is required.

Complainant requests that Respondent's Petition be stricken from the docket of the Office of Hearings and Appeals, and returned to Respondent. While Complainant neither admits nor denies the averments in Respondent's Petition, it reserves the right to file a formal response in which it may exercise all of its procedural rights under the law when, and if, Respondent chooses to file its Petition at the appropriate time.

Very truly yours,

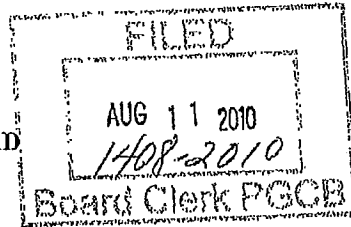
A handwritten signature in cursive script that reads "Dale W. Miller". The signature is written in black ink and is positioned above a horizontal line.

Dale W. Miller, Esquire
Deputy Chief Enforcement Counsel
Office of Enforcement Counsel

cc: F. Warren Jacoby, Esquire
Robert A. Graci, Esquire
Cyrus R. Pitre, Esquire
James J. Armstrong, Esquire

EXHIBIT "A"

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD



IN RE: :
PHILADELPHIA ENTERTAINMENT AND : PGCB Docket No. 1367
DEVELOPMENT PARTNERS, L.P., d/b/a : OHA Docket No. 1408-2010
FOXWOODS CASINO PHILADELPHIA :.

ORDER


AND NOW, this 11th day of August 2010, for the reasons outlined in the Adjudication issued herewith, the Pennsylvania Gaming Control Board ("Board") hereby DENIES Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia's ("Foxwoods") July 7, 2010 "Petition Pursuant to 1 Pa. Code § 35.20 in the Nature of Motion for Reconsideration of the Order dated June 30, 2010 Issued by the Director of Hearings and Appeals which, *inter alia*, Denied Respondent's Emergency Petition, dated June 22, 2010, Requesting that all Discovery in the Within Proceedings be Completed by October 31, 2010; and Scheduling the Commencement of Hearings in the Within Proceedings for November 2010."

Notwithstanding this denial, based upon the argument of counsel at the July 29, 2010 hearing in this matter, the Board directs the Director of the Office of Hearings and Appeals, as the Presiding Officer in this matter, to reconsider the discovery deadline imposed upon the parties in this matter as indicated in Paragraph One of her Discovery Order dated June 18, 2010.

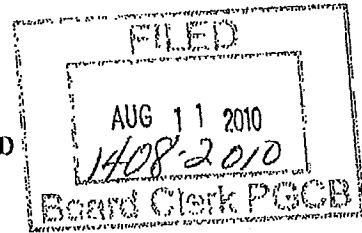
Additionally, the Board reminds the parties that it believes Sections 491a.7(b)(1)(7) and (f) of the Board's duly promulgated regulations are directly on point in this matter and that, pursuant thereto, so long as a proceeding is before the Board's

Office of Hearings and Appeals, the Presiding Officer in that Office has the authority to regulate the course of hearings, including the scheduling of proceedings and disposition of procedural matters. Moreover, while the matter is before the Office of Hearings and Appeals, rulings of the Presiding Officer may not be appealed to the Board absent extraordinary circumstances when a prompt decision by the Board is necessary and the matter is referred to the Board by the Presiding Officer

Dated: 8/11/10

By: 
Gregory C. Fajt, Chairman
Pennsylvania Gaming Control Board

BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD



IN RE: :
PHILADELPHIA ENTERTAINMENT AND : PGCB Docket No. 1367
DEVELOPMENT PARTNERS, L.P., d/b/a : OHA Docket No. 1408-2010
FOXWOODS CASINO PHILADELPHIA :

ADJUDICATION

The matter before the Pennsylvania Gaming Control Board ("PGCB" or "Board") for disposition is Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia's ("Foxwoods") July 7, 2010 petition entitled:

Petition Pursuant to 1 Pa. Code § 35.20 in the Nature of Motion for Reconsideration of the Order dated June 30, 2010 Issued by the Director of Hearings and Appeals which, *inter alia*, Denied Respondent's Emergency Petition, dated June 22, 2010, Requesting that all Discovery in the Within Proceedings be Completed by October 31, 2010; and Scheduling the Commencement of Hearings in the Within Proceedings for November 2010 ("Motion for Reconsideration").

In the Motion for Reconsideration, Foxwoods primarily contends that, pursuant to 1 Pa. Code § 35.20, the Board should overrule the Director of Hearings and Appeals' June 30, 2010 Order denying its Emergency Petition. In doing so, Foxwoods asks the Board to modify the Director of Hearings and Appeals' June 18, 2010 Discovery Order and set a new discovery deadline of October 31, 2010 and a hearing date sometime in November 2010; or, in the alternative, Foxwoods asks the Board to certify the matter for appeal to the Commonwealth Court.

After a review of the relevant filings and consideration of the argument provided at the Board's July 29, 2010 Public Hearing on this matter, as well as applicable law in this area, the Board makes the following findings:

Findings of Fact

1. Foxwoods was one of five applicants for two Category 2 Slot Machine Licenses in the City of Philadelphia, the others being HSP Gaming, L.P.; Keystone Redevelopment Partners, L.P.; Pinnacle Entertainment, Inc.; and Riverwalk Casino, L.P.
2. The Board awarded Foxwoods one of the two licenses on December 20, 2006. The Board issued its Adjudication and Order memorializing this decision on February 1, 2007.
3. In its February 1, 2007 Adjudication and Order, the Board noted that, during the application process, Foxwoods projected that it would realize \$338 million in annual revenue and provide 955 jobs once its facility was fully operational.
4. Because of the delay in Foxwoods commencing operations, it has not contributed to property tax relief, wage tax relief, job creation and other economic benefits as have the nine facilities currently in operation.
5. Although the Board did not require Foxwoods to submit the \$50 million licensing fee prior to obtaining the necessary permits it needed to begin construction of its facility, Foxwoods submitted the fee on October 17, 2007.
6. The Board subjects the awarding of all slot machine licenses to the licensees signing a Statement of Conditions that provides, *inter alia*, that licensure is a privilege; requiring the licensee to at all times comply with any and all provisions of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §1101, et. seq. ("Gaming Act") and any rules, regulations, technical standards or Board orders in

effect at the date of signing or later amended or promulgated by the Board; and to maintain the suitability required to hold a license under the Gaming Act.

7. Foxwoods executed its Statement of Conditions on July 11, 2007.
8. The Board issued Foxwoods' slot machine license ("License") on May 29, 2008. Pursuant to Section 1210(a) of the Gaming Act, 4 Pa.C.S. § 1210(a), Foxwoods had one year from that date by which to make 1,500 slot machines available for play at its facility, unless granted an extension of time, by the Board, upon application and for good cause shown.
9. On May 22, 2009, seven days prior to the Section 1210(a) deadline, Foxwoods, which had not (and has not) yet broken ground to commence construction on the project approved by the Board, filed a Petition to Extend Time to Make Slot Machines Available in which it contended that it had expended considerable efforts and faced numerous obstacles beyond its control in developing its facility (i.e. litigation; community opposition; and obstacles from Philadelphia City Council); and that these facts established good cause for the Board to grant it additional time to develop its facility.
10. After an August 28, 2009 Public Hearing, the Board announced its decision to conditionally grant Foxwoods' Petition for Extension of Time, giving it until May 29, 2011 to begin operations with at least 1,500 slot machines. The Board memorialized this decision in an Adjudication and Order dated September 1, 2009.
11. The Board conditioned its grant of Foxwoods' Petition to Extend Time on nine conditions outlined in the September 1, 2009 Order including benchmark reporting and documentary submission deadlines that would indicate that the project was on

track and moving forward in a manner consistent with the intent of the Gaming Act, as well as the representations of Foxwoods to the Board.

12. Condition 5 of the Board's September 1, 2009 Order reads as follows:

Within 3 months of the date of this Order, Foxwoods shall submit to BIE all architectural renderings, artist renderings, conceptual proposals, engineering opinions, any and all other documents relating to construction of a facility, substantially similar to that approved by the Board on December 20, 2006. The submissions must provide for a minimum of 1,500 slot machines available for play, on or before May 29, 2011, at the Columbus Boulevard site.
13. Condition 6 of the Board's September 1, 2009 Order reads as follows:

Within 3 months of the date of this Order, Foxwoods shall submit to BIE a timeline for commencement and completion of all phases of development regarding its facility with a minimum of 1,500 slot machines available for play, on or before May 29, 2011.
14. The documents due pursuant to Conditions 5 and 6 of the Board's Order of September 1, 2009 were to be submitted to BIE on or before December 1, 2009.
15. On November 30, 2009, Foxwoods filed a Motion for Extension of Time to Comply with Conditions 5 and 6 of the Board's September 1, 2009 Order.
16. After a January 27, 2010 Public Hearing, the Board announced its decision to deny Foxwoods' Motion for Extension of Time to Comply with Conditions 5 and 6 of the Board's September 1, 2009 Order; imposed a daily sanction until Foxwoods complied with the Board's September 1, 2009 Order; and issued a Rule to Show Cause upon Foxwoods as to why the Board should not revoke its slot machine license. The Board memorialized this decision in Adjudication and Order dated February 10, 2010.
17. The Board subsequently held a hearing regarding the Rule to Show Cause on March 3, 2010 after which the Board, dissatisfied with Foxwoods' progress, entered an order continuing the daily sanction and imposing a new deadline (April 26, 2010) by which

Foxwoods was to come into compliance with the Board's Order of September 1, 2009.

18. At the Board's April 29, 2010 Public Meeting, Foxwoods and the Office of Enforcement Counsel ("OEC") presented a Consent Agreement that would have settled the proceedings related to Foxwoods' alleged noncompliance with the Board's September 1, 2010 Order and further extended the deadlines by which Foxwoods had to come into compliance with the Board's Order of September 1, 2009.
19. After a Board vote, the Board announced its decision to reject the proposed Consent Agreement. The Board also continued the daily sanctions earlier imposed upon Foxwoods.
20. After the proposed Consent Agreement was rejected, OEC filed a Complaint for Revocation of Foxwoods' Slot Machine License ("Complaint for Revocation") in which it alleges, generally, that Foxwoods:
 - a. Failed to comply with Board Orders;
 - b. Failed to comply with its Statement of Conditions;
 - c. Is unable to be operational by the Board imposed deadline of May 29, 2011; and
 - d. Failed to maintain its suitability for licensure.
21. On May 15, 2010, Foxwoods filed a Motion for Extension of Time to Answer OEC's Complaint for Revocation. The Director of the Office of Hearings and Appeals ("OHA"), acting as the Presiding Officer in this matter, denied this Motion on May 17, 2010. On May 19, 2010, Foxwoods appealed this decision, later withdrawing said appeal on June 2, 2010 after timely filing an Answer to the Complaint for Revocation.

22. In addition to its Answer to the Complaint for Revocation, on June 1, 2010, Foxwoods filed the following documents:
- a. A Motion for a Discovery Conference;
 - b. A Motion for Extension of Time to Comply with the Board's Order of September 1, 2009¹; and
 - c. A Petition to Toll or Otherwise Extend Date by which to File a Petition to Conduct Table Games².
23. As requested by Foxwoods, on June 11, 2010, the Director of OHA issued an order scheduling a June 17, 2010 Discovery Conference.
24. During the June 17, 2010 Discovery Conference, the Director of OHA indicated to the parties that the discovery deadline in the matter of OEC's Complaint for Revocation would be July 30, 2010.
25. The Director of OHA memorialized her decision regarding the discovery deadline in an Order dated June 18, 2010.
26. On June 22, 2010, Foxwoods attempted to appeal, to the Board, the Director of OHA's Discovery Order of June 18, 2010 pursuant to a filing Foxwoods entitled:
- Emergency Petition in the Nature of an Appeal of the Order Dated June 18, 2010 Issued By the Director of Hearings and Appeals Directing that All Discovery in the Within Proceedings Be Completed by the Close of Business on Friday, July 30, 2010; for an Extension of the Time Within Which All Discovery Must Be Completed in the Within Proceedings to October 31, 2010; Scheduling the Commencement of Hearings in the Within Proceedings for November, 2010; and Seeking Certification of Orders and a Stay of Proceedings. ("Appeal")
27. In the Appeal, Foxwoods argued that the Board should review the Director of OHA's June 18, 2010 Discovery Order pursuant to 1 Pa. Code § 35.20 because it was

¹ This Motion was consolidated with OEC's Complaint for Revocation, docketed at 1408-2010, by an Order issued by the Director of Hearings and Appeals dated July 1, 2010.

² See Footnote 1, *supra*.

improper, arbitrary and capricious and violated its due process rights. Specifically, Foxwoods contended that the Director of OHA had no justification to establish a deadline so near in time to the date of the conference and that because the underlying matter was one of first impression for the Board (i.e. revocation of a slot machine license) and involved an expensive item (i.e. Foxwoods' License), the parties needed more time to conduct discovery.

28. On June 30, 2010, the Director, still acting as Presiding Officer in this matter, issued an Order denying the Appeal, finding that 1 Pa. Code § 35.20 was superseded by Section 491a.7(f) of the Board's regulations, 58 Pa. Code § 491a.7(f), and that that Section prohibited appeals of rulings by a presiding officer during the course of a hearing or conference unless the question was certified to the Board by the presiding officer.
29. On July 7, 2010, Foxwoods filed the current Motion for Reconsideration of the Director of OHA's aforementioned Orders of June 18, 2010 and June 30, 2010.
30. The Board listed this matter for consideration at a July 29, 2010 Public Hearing and Public Meeting.
31. On July 29, 2010, immediately prior to its Public Meeting, at a Public Hearing, the Board heard argument on the matter from both Foxwoods and OEC.
32. At the time of its July 29, 2010 Public Meeting, the Board announced its decision to deny Foxwoods' Motion for Reconsideration but directed that the Director of OHA, as Presiding Officer, review the discovery deadline set in her June 18, 2010 Order in light of the arguments and statements made by counsel during the Public Hearing.

Conclusions of Law

1. The Board, pursuant to Section 1202(a)(1) of the Gaming Act, 4 Pa.C.S. § 1202(a)(1), has jurisdiction over Foxwoods and the subject matter of the instant proceeding.
2. Unless the Board hears a matter directly, all matters . . . will be assigned to the Office of Hearings and Appeals to be heard by a presiding officer. 58 Pa. Code § 491a.8(a).
3. A presiding officer can be a member of the Board or another person designated by the Board. 58 Pa. Code §491a.2.
4. The presiding officer has the authority to regulate the course of hearings . . . and dispose of procedural matters. 58 Pa. Code § 491a.7(b)(1).³
5. Setting discovery deadlines is a procedural matter within the discretion of the presiding officer. 58 Pa. Code §493.11(a)(1).⁴
6. Discovery in administrative proceedings is not automatic. *St. Joe's Minerals v. PHRC*, 465 A.2d 1313 (Pa. Cmwlth. Ct. 1983).
7. Under the Board's regulations, the only discovery a party is absolutely entitled to are the names of any witnesses who may be called to testify and all documents or other material which the responding party reasonably expects to put into evidence. 58 Pa. Code § 493a.11(b).
8. Rulings of a presiding officer may not be appealed during the course of a hearing or conference except in extraordinary circumstances when a prompt decision by the

³ This is consistent with general administrative law practice in the Commonwealth. *See, for example*, 1 Pa. Code § 35.187 and § 35.114.

⁴ *See, also*, 1 Pa. Code §§ 35.113 and 35.117 (under the Administrative Code, a presiding officer can even limit the number of witnesses).

Board is necessary and the presiding officer refers the matter to the Board. 58 Pa. Code § 491a.7(f).⁵

9. An appeal of an order memorializing a ruling of a presiding officer made during the course of a discovery conference is subject to 58 Pa. Code § 491a.7(f).
10. An order setting a discovery deadline is not an extraordinary circumstance necessitating a prompt decision by the Board which a presiding officer should refer to the Board.
11. Regulations are to be construed in accordance with the Pennsylvania Statutory Construction Act, 1 Pa.C.S. § 1501, *et seq.* 1 Pa. Code § 1.7.
12. A final order, appealable to an appellate court as a matter of right, must (a) dispose of all claims and of all parties; (b) be expressly defined as a final order by statute; or (c) have the trial court or government unit make an express determination that an immediate appeal would facilitate resolution of the entire case. Pa.R.A.P. No. 341.
13. Neither an order setting a discovery deadline, nor an order by a presiding officer denying an immediate appeal of an order setting a discovery deadline, are final orders under the test established by Pa.R.A.P. No. 341 and are, therefore, interlocutory orders.
14. An interlocutory order is only appealable to an appellate court if it involves a controlling question of law as to which there is substantial ground for difference of opinion and for which an immediate appeal may materially advance the ultimate termination of the matter. Pa.R.A.P. No. 1312.
15. Neither an order setting a discovery deadline, nor an order by a presiding officer denying an immediate appeal of an order setting a discovery deadline are orders

⁵ This is consistent with general administrative law in the Commonwealth. See 1 Pa. Code §§ 35.190 and 35.180(a).

involving controlling questions of law as to which there is substantial ground for difference of opinion, the resolution of which would materially advance the ultimate termination of the underlying matter.

Discussion

In the Motion for Reconsideration presently before the Board, Foxwoods essentially asks for relief on two levels:

First, Foxwoods requests that the Board consider the matter pursuant to 1 Pa. Code §35.20, a provision of the Pennsylvania Administrative Code which provides that a decision of a subordinate officer of a state agency can be appealed to an agency head. As a result of that provision, Foxwoods argues that the June 30, 2010 Order of the Director of OHA, denying its Appeal (to the Board seeking an extension of the discovery deadline established by the Director of OHA's June 18, 2010 Discovery Order) was improperly decided by the Presiding Officer and should have been decided by the Board.⁶ In short, Foxwoods feels that it is entitled to immediately appeal to the Board, an order of a Presiding Officer setting a discovery deadline and, related thereto, it seeks a determination that it was inappropriate for the Presiding Officer to deny such an appeal of the Presiding Officer's decision on a procedural matter (i.e. discovery deadlines).

Second, Foxwoods requests that the Board rescind the Presiding Officer's June 18, 2010 Discovery Order and enter an order extending the discovery deadline.⁷

⁶ In the alternative, Foxwoods requested that the Board issue an order certifying the Director of OHA's June 30, 2010 Order denying Foxwoods' June 22, 2010 Appeal and the Director of OHA's June 18, 2010 Discovery Order as ripe for appeal as they both involve "controlling questions of law for which an immediate appeal would materially advance the ultimate termination of the matter," Pa.R.A.P. No. 1312.

⁷ Here too, in the alternative, Foxwoods requests that the Board issue an Order certifying "(1) the Director's (of OHA) denial of [Foxwoods] Emergency Petition dated June 30, 2010 and (2) the [Director of OHA's] June 18, 2010 [Discovery] Order as Orders involving controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from these Orders will materially advance the ultimate

For the reasons outlined below, The Board denies all of Foxwoods' requests.⁸

The Presiding Officer has the Authority to Regulate Hearings; Dispose of Procedural Matters, including Discovery Matters; and Dispose of Improper Appeals

The Director of OHA, acting as the Presiding Office in this matter, properly denied Foxwoods' June 22, 2010 Appeal of her June 18, 2010 Discovery Order as an improper appeal. Specifically, the Presiding Officer correctly concluded that Section 491a.7(f) of the Board's regulations, 58 Pa. Code § 491a.7(f), not 1 Pa. Code § 35.20, controlled her consideration of Foxwoods' Appeal; that her June 18, 2010 Discovery Order was made during the course of a hearing or conference; and that the matter was not extraordinary so as to warrant Board consideration thereof.

Foxwoods' Appeal of the Presiding Officer's June 18, 2010 Discovery Order was appropriately before the Presiding Officer and the Presiding Officer properly denied said Appeal. Here, Foxwoods does not challenge the Presiding Officer's authority to rule on discovery matters⁹. Instead, Foxwoods argues that 1 Pa. Code § 35.20, not 58 Pa. Code § 491a.7(f), controls consideration of its challenge of the Director of OHA's June 18, 2010 Discovery Order and that, under that provision, the Board, not the Presiding Officer herself, should have ruled on the Appeal.¹⁰

termination of the matter.¹¹ Foxwoods also requests that the Board enter a stay of all proceedings pending such an appeal.

⁸ Notwithstanding this denial, the Board will direct the Presiding Officer to review the arguments of counsel made at the July 29, 2010 hearing on this matter and determine whether an extension of the discovery deadline established in the June 18, 2010 Order is warranted.

⁹ Unless the Board hears a matter directly, Section 491a.8 of the Board's regulations, 58 Pa. Code § 491a.8, directs that the matter will be assigned to OHA to be heard by a presiding officer.

¹⁰ During the July 29, 2010 Public Hearing on the instant matter, counsel for Foxwoods stated, "the hearing today which would decide whether she [Director of OHA] really had the authority to decide whether we should have had more time in the first place." In other words, counsel argued that the purpose of the hearing was for the Board to rule on whether the Director of OHA has the authority to rule on Foxwoods' June 22, 2010 Appeal in which they request an extension of the July 30, 2010 discovery deadline set by the Director of OHA in her June 18, 2010 Order.

Section 491a.7(b) of the Board's regulations, 58 Pa. Code § 491a.7(b), directs that a presiding officer has the authority to "regulate the course of hearings . . . and dispose of procedural matters" including discovery matters. Rulings made by the presiding officer pursuant to this authority "may not be appealed during the course of a hearing or conference except in extraordinary circumstances when a prompt decision by the Board is necessary," 58 Pa. Code § 491a.7(f). If the presiding officer finds that "extraordinary circumstances whe[re] a prompt decision by the Board is necessary" exists, he/she must then refer the matter to the Board for its consideration. 58 Pa. Code § 491a.7(f).

Comparatively, 1 Pa. Code § 35.20 provides, more generally, that "[a]ctions taken by a subordinate officer (of any state agency) under authority delegated by the agency head may be appealed to the agency head," 58 Pa. Code § 35.20.

Directly on point is authority found in Foxwoods' Motion for Reconsideration. Specifically, Foxwoods correctly states that regulations are to be construed in accordance with the Pennsylvania Statutory Construction Act, 1 Pa.C.S. § 1501, *et seq.*; 1 Pa. Code § 1.7. Indeed, Section 1933 of the Statutory Construction Act provides:

Whenever a general provision in a [regulation] shall be in conflict with a special provision in the same or another [regulation], the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision . . .

1 Pa.C.S. § 1933.

1 Pa. Code § 35.20 is clearly more general than Section 491a.7(f) of the Board's regulations. Specifically, Section 491a.7(f) provides "[r]ulings of presiding officers may not be appealed during the course of a hearing or conference except in extraordinary circumstances when a prompt decision by the Board is necessary [and the presiding officer] immediately refers

the matter to the Board for determination,” 58 Pa. Code § 491a.7(f), whereas 1 Pa. Code § 35.20 seemingly permits appeals of agency staff actions irrespective of timing, substance or position within the agency. Because, in the context of this matter, the general 1 Pa. Code § 35.20 conflicts with the more specific 58 Pa. Code § 491a.7(f), pursuant to Section 1933 of the Statutory Construction Act, 1 Pa.C.S. § 1933, the more specific provision must prevail. Accordingly, the instant matter is controlled by Section 491a.7(f) of the Board’s regulations, 58 Pa. Code § 491a.7(f), and not 1 Pa. Code § 35.20.

Here, the Presiding Officer, during a June 17, 2010 Discovery Conference, decided the deadline for discovery in the matter of OEC’s Complaint for Revocation of Foxwoods’ License. The Presiding Officer memorialized this decision in her Discovery Order of the very next day, June 18, 2010. Unhappy with the deadline, Foxwoods, citing 1 Pa. Code § 35.20, appealed this Discovery Order. Finding that the more specific 58 Pa. Code § 491a.7(f) applied over the general 1 Pa. Code § 35.20, the Presiding Officer concluded that Foxwoods’ Appeal was an improper appeal and denied same. Because she did not refer Foxwoods’ Appeal to the Board for consideration, the Presiding Officer impliedly also concluded that the matter did not involve “extraordinary circumstances whe[re] a prompt decision by the Board was necessary,” 58 Pa. Code § 491a.7(f).

Because Section 491a.7(b) of the Board’s regulations, 58 Pa. Code § 491a.7(b), permits a presiding officer to regulate the course of hearings and, because Section 491a.7(f) of the Board’s regulations, 58 Pa. Code § 491a.7(f), prohibits appeals of such a ruling made by a presiding officer, the Director of OHIA’s June 30, 2010 denial of Foxwoods’ Appeal was appropriate.

Foxwoods' Interpretation of 58 Pa. Code § 491a.7(f) is Flawed

The Presiding Officer properly denied Foxwoods' June 22, 2010 Appeal based on the prohibition of appeals under Section 491a.7(f) of the Board's regulations', 58 Pa. Code § 491a.7(f). Here, Foxwoods argues that the Presiding Officer misapplied Section 491a.7(f) of the Board's regulations, 58 Pa. Code § 491a.7(f). Specifically, Foxwoods contends that the Presiding Officer's June 18, 2010 Discovery Order was not issued "during the course of a hearing or conference" but instead, after the conclusion of a hearing or conference and, therefore, Section 491a.7(f) of the Board's regulations, 58 Pa. Code § 491a.7(f), providing that rulings by presiding officers during hearings or conferences are not appealable, is inapplicable to these proceedings (emphasis added).

First, Foxwoods' contention that application of the phrase "during the course of a hearing or conference" does not apply to a discovery conferences is without merit. To exclude discovery conferences, absent the language in the Board's regulations, would make application of the provision arbitrary (i.e. uncertain as to what type of conferences to which the provision applies). Section 1922(2) of the Statutory Construction Act, 1 Pa.C.S. § 1922(2)¹¹, directs that "in ascertaining the intent of the [Board] in the enactment of the [regulations] it is presumed that the [Board] intends the entire [compliment of regulations] to be effective and certain." In other words, "a statute (or regulation) should, when possible, be construed to give effect to all of its provisions, and a particular section of a piece of [regulation] should (absent [agency] direction to the contrary) be construed as an integral part of the whole, and not as a separate portion with an independent meaning." *Crary Home v. Defrees*, 329 A.2d 874, 876 - 7 (Pa.Cmwlt. Ct. 1974) (internal citations omitted).

¹¹ As explained earlier, the Statutory Construction Act, 1 Pa.C.S. § 1501, *et seq.* applies to the construction of regulations. 1 Pa. Code § 1.7.

Section 491a.7 of the Board's regulations, 58 Pa. Code § 491a.7, in its entirety, provides:

- (a) When evidence is to be taken in a hearing, the Board or a presiding officer may conduct the hearing.
- (b) The Board and presiding officers shall have the power and authority to:
 - (1) Regulate the course of hearings, **including the scheduling thereof**, and the recessing, reconvening and the adjournment thereof, unless otherwise provided by the Board, as provided in § 494a.1 (a) (relating to generally).
 - (2) Administer oaths and affirmations.
 - (3) **Issue subpoenas.**
 - (4) Rule upon offers of proof and receive evidence.
 - (5) **Preside over or cause depositions to be taken.**
 - (6) **Hold conferences before or during hearings.**
 - (7) **Dispose of procedural matters**, but not before a proposed report, if any, to dispose of motions made during hearings to dismiss proceedings or other motions which involve final determination of proceedings has been submitted to the Board.
 - (8) Certify any question to the Board for consideration and disposition, within the presiding officer's discretion, or upon direction of the Board.
 - (9) Submit proposed reports or reports and recommendations in accordance with this subpart.
 - (10) Take other action appropriate to the discharge of their duties as may be designated by the Board and authorized by the act.
- (c) Except as authorized by law and by this subpart, a presiding officer may not, in a proceeding, consult with a party on a fact in issue or issue of law unless notice and opportunity for parties to participate has been given.
- (d) Presiding officers will conduct fair and impartial hearings and maintain order. Disregard by parties or counsel of rulings of the presiding officer on matters of order and procedure will be noted on the record, and if the presiding officer deems necessary, it will be made the subject of a special written report to the Board.
- (e) If parties or counsel engage in disrespectful, disorderly or contumacious language or conduct in connection with any hearing, the presiding officer may immediately submit to the Board a report thereon, together with recommendations, and, in the presiding officer's discretion, suspend the hearing.
- (f) Rulings of presiding officers may not be appealed during the course of a hearing or conference except in extraordinary circumstances when a prompt decision by the Board is necessary. In this instance, the matter will be immediately referred by the presiding officer to the Board for determination.

(1) An offer of proof made in connection with an objection to a ruling of the presiding officer rejecting or excluding oral testimony must be a statement of the substance of the evidence which counsel contends would be adduced by the testimony. If the rejected or excluded evidence is in documentary or written form, a copy of the evidence shall be marked for identification and shall constitute the offer of proof.

(2) Unless the Board acts upon a question referred by a presiding officer for determination within 30 days, the referral will be deemed to have been denied.

(g) This section supersedes 1 Pa. Code §§ 35.185--35.190 (relating to presiding officers).

58 Pa. Code § 491a.7 (emphasis added). Reading this regulatory provision, in its entirety, it is clear that the Board, in enacting this provision, intended the provisions therein to apply to pre-hearing matters and specifically, pre-hearing discovery matters (*see*, emphasized provisions *supra*). Because Section 491a.7 of the Board's regulations, 58 Pa. Code § 491a.7, applies to pre-hearing discovery conferences, subsection (f) of that provision, 58 Pa. Code § 491a.7(f), must also apply to pre-hearing discovery conferences "absent [Board] direction to the contrary," *Crary Home v. Defrees, Id.*

Second, Foxwoods contends that 58 Pa. Code § 491a.7(f) is inapplicable in these proceedings because it seeks to appeal the Presiding Officer's Discovery Order issued the day after the Discovery Conference (although simply memorializing statements made at that conference) as it was not issued during the conference. This argument is absurd.

Section 1922(1) of the Statutory Construction Act, 1 Pa.C.S. § 1922(1)¹², directs that when reviewing regulatory language, "the [Board] does not intend a result that is absurd, impossible of execution or unreasonable." Moreover, as noted earlier, Section 1922(2) of the Statutory Construction Act, 1 Pa.C.S. § 1922(2), provides that "in ascertaining the intent of the

¹² As explained earlier, the Statutory Construction Act, 1 Pa.C.S. § 1501, *et seq.*, applies to the construction of regulations. 1 Pa. Code § 1.7.

[Board] in the enactment of the [regulations] it is presumed that the [Board] intends the entire [compliment of regulations] to be effective and certain.” In other words, “the [Board] cannot . . . be deemed to intend that language used in a [regulation] shall be superfluous and without import.” *Com. v. Mack Bros. Motor Car Co.*, 59 A.2d 923, 925 (Pa. 1948).

Here, Foxwoods’ suggestion that the prohibition against appeals of a presiding officer’s rulings made during a conference or hearing (*see*, 58 Pa. Code § 491a.7(f)) does not apply so long as the appeal is taken after the conclusion of said conference or hearing is an absurd interpretation as it renders the provision meaningless. If, as Foxwoods argues, a party can appeal, without limitation, a ruling of a presiding officer so long as that appeal is filed after the conference or hearing at which said ruling was made, Section 491.7(f) of the Board’s regulations, 58 Pa. Code § 491a.7(f), can be bypassed without limitation. This result is not only absurd but would render the entire subsection impermissibly “superfluous and without import,” 1 Pa.C.S. § 1922 and *Com. v. Mack Bros. Motor Car Co., Id.*

**The Presiding Officer’s Orders of June 18, 2010 and June 30, 2010
are Not Appropriate for Appeal to an Appellate Court**

The Presiding Officer’s June 18, 2010 and June 30, 2010 Orders, in turn, setting a discovery deadline and denying Foxwoods’ appeal thereof, are neither final, appealable orders pursuant to Pa.R.A.P. No. 341; nor are they orders involving controlling questions of law to which there is substantial ground for difference of opinion, the immediate appeal of which would advance the ultimate termination of the matter. Pa.R.A.P. No. 1312.¹³

Pursuant to Pa.R.A.P. No. 341, absent certification of an order for appeal by the issuing authority, only “final orders” are subject to appeals. A “final order” is defined as an order that (a) disposes of all claims and of all parties; (b) is expressly defined as a final order by statute; or

¹³ For virtually identical reasons, the Order of the Board being issued herewith is similarly unappealable.

(c) is an order about which the trial court or government unit has made an express determination that an immediate appeal of which would facilitate resolution of the entire case. Pa.R.A.P. No. 341.

The Presiding Officer's Orders of June 18, 2010 and June 30, 2010 are not Final Orders

Here, the first two tests under RPa.R.A.P. No. 341 clearly do not apply to Foxwoods' challenge of either the Director of OHA's June 18, 2010 Discovery Order nor her June 30, 2010 Order denying Foxwoods' appeal of that Discovery Order.

It is well established that discovery orders are generally interlocutory and not appealable until there is a disposition of the final judgment. *Smith v. Philadelphia Gas Works*, 740 A.2d 1200, 1203 (Pa. Cmwlth. Ct. 1999).¹⁴ Clearly, only under the most unique set of circumstance – which do not exist here – could appellate review of a discovery order setting a deadline (like the June 18, 2010 Discovery Order in this matter) “facilitate resolution of the entire case,” Pa.R.A.P. No. 341. Accordingly, Foxwoods' challenge of the Director of OHA's June 18, 2010 Discovery Order must be denied as it fails to meet the requirements for an appealable final order under Pa.R.A.P. No. 341.

Additionally, Foxwoods not only contends that its right to discovery was somehow infringed by the Director of OHA's June 18, 2010 Order setting a discovery deadline, it also contends that the June 30, 2010 Order denying its appeal of that earlier Order is final and appealable. As noted above, the first two “finality” tests under Pa.R.A.P. No. 341 clearly do not apply to this situation. The question then becomes whether the Presiding Officer's denial of Foxwoods' Appeal of her June 18, 2010 Discovery Order is a matter, under Pa.R.A.P. No.

¹⁴ Although Pa.R.A.P. No. 313 permits appeals of discovery orders involving privilege, *Cmwlth. V. Makara*, 980 A.2d 138 (Pa. Super. 2009), that is not the situation currently before the Board. Here, Foxwoods is challenging the Presiding Officer's denial of its appeal of her establishment of a discovery deadline. These Orders are entirely procedural in nature and are not subject to a permissible interlocutory appeal of a collateral discovery order.

341(3), the immediate appeal of which would facilitate resolution of the entire case. Again, clearly the answer is in the negative. Challenges to a presiding officer's rulings on procedural discovery matters (like the Director of OHA's June 18, 2010 Discovery Order) only serve to delay the relevant proceedings as opposed to "facilitating resolution of the entire case," Pa.R.A.P. No. 341.

The Presiding Officer's Orders of June 18, 2010 and June 30, 2010 are not appealable interlocutory orders

In the alternative, Foxwoods seeks certification, under Pa.R.A.P. 1312, of the Director of OHA's June 18, 2010 and June 30, 2010 Orders as appealable interlocutory orders. Such orders must involve a controlling question of law for which there is substantial ground for difference of opinion and the immediate appeal of which would advance the ultimate termination of the matter. Pa.R.A.P. No. 1312. It cannot legitimately be found that the June 18, 2010 Discovery Order and the June 30, 2010 Order denying Foxwoods' appeal thereof, warrant certification for appeal.

First, it cannot be understated that discovery in administrative proceedings is not automatic, *St. Joe's Minerals v. PHRC*, 465 A.2d 1313 (Pa. Cmwlth. Ct. 1983). Indeed, Board regulations provide that it is within the presiding officer's discretion whether or not to allow discovery; further outlining that discovery may be allowed upon a finding by the presiding officer that it will "facilitate an efficient and expeditious hearing process (which does) not unduly prejudice the responding party and. . . may be required in the interest of justice," 58 Pa. Code § 493a.11(a)(1).

Indeed, notwithstanding the authority granted to a Board presiding officer regarding the extent of available discovery, the Board's regulations also provide that the only discovery to which a party is *absolutely entitled* is the name and address of any witness who may be called to

testify and all documents or other material which the responding party reasonably expects to put into evidence, 58 Pa. Code § 493a.11(b). As a result, the appropriateness of a discovery deadline, where full discovery is not even a matter of right, cannot be said to be a “controlling question of law which there is substantial ground for difference of opinion the immediate appeal of which would advance the ultimate termination of the matter,” Pa.R.A.P. No. 1312.

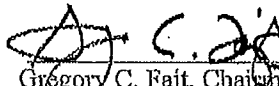
With respect to the Director of OHA’s June 30, 2010 Order denying Foxwoods’ improvident appeal of an order imposing a discovery deadline, again, there is clearly not a “question of law to which there is substantial ground for difference of opinion,” Pa.R.A.P. No. 1312. Indeed, under Pennsylvania law, such an order, regarding procedural matters, is clearly within the presiding officer’s discretion to decide. *See, in part,* 1 Pa. Code §§ 35.114, 35.117, 35.180, 35.187 and 35.190. To find otherwise would subject every decision of a presiding officer to an immediate appeal.

Finally, Foxwoods offers no support, and the Board can conceive of none, for Foxwoods’ contention that appellate review of either of the aforementioned orders would “advance the ultimate termination” of the matter (a requisite finding for certification of an interlocutory order for appeal). On the contrary, such appeals would do nothing more than unnecessarily delay resolution of the underlying matter.

Conclusion

For the forgoing reasons, Foxwoods’ Motion for Reconsideration is denied.

Dated: 8/11/10

By: 
Gregory C. Fajt, Chairman
Pennsylvania Gaming Control Board