

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

SOUTH DAKOTA COMMISSION ON GAMING,	)	
	)	Appeal No. #28436
	)	
APPELLANT,	)	
	)	
vs.	)	
	)	
CHARLES JOHNSON,	)	
SDCG Support License #A8365-14-SP	)	
	)	
APPELLEE.	)	

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APPEAL FROM THE CIRCUIT COURT  
FOURTH JUDICIAL CIRCUIT  
LAWRENCE COUNTY, SOUTH DAKOTA

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THE HONORABLE MICHELLE K. PERCY  
CIRCUIT COURT JUDGE

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BRIEF OF APPELLANT

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## **JURISDICTIONAL STATEMENT**

This appeal arises from a Final Judgment of the Fourth Judicial Circuit Court, the Honorable Michelle K. Percy, dated October 12, 2017. The Circuit Court heard Mr. Charles Johnson's appeal from a Final Decision and Order of the South Dakota Commission on Gaming ("Commission"). Notice of entry of judgment was served October 13, 2017. Notice of appeal was filed on October 25, 2017. This Supreme Court has jurisdiction over this appeal pursuant to SDCL 1-26-37, 15-26A-3, and 15-26A-6.

## **PRELIMINARY STATEMENT**

Within this brief, citations to the settled record will be: to the Commission's Findings of Fact (denoted as "CG FOF"); to the Commission's Conclusions of Law (denoted as "CG COL"); to the circuit court's Findings of Fact (denoted as "CC FOF"); to the circuit court's Conclusions of Law (denoted as "CC COL"); and to the administrative record (denoted "AR." followed by the page number.)

## **STATEMENT OF THE ISSUES**

*I. Whether the Commission correctly concluded that Johnson acted dishonestly or fraudulently under ARSD 20:18:09:02.*

The circuit court did not decide this issue although it was presented.

*In re Jarman*, 2015 S.D. 8, 860 N.W.2d 1.

*Iversen v. Wall Bd. of Educ.*, 522 N.W.2d 188 (S.D. 1994).

ARSD 20:18:09:02.

*II. Whether the Commission correctly concluded that Johnson violated ARSD 20:18:33:11 by not seeking direction from his supervisor.*

The circuit court reversed the Commission and held that Johnson did not violate this regulation on irregularities.

*Citibank, N.A. v. S.D. Dep't of Revenue*, 2015 S.D. 67, 868 N.W.2d 381.

*Martinmaas v. Engelmann*, 2000 S.D. 85, 612 N.W.2d 600.

ARSD 20:18:33:11.

*III. Whether the Commission correctly concluded that Johnson violated a Tin Lizzie's in-house policy on treatment of found money.*

The circuit court reversed the Commission and held that Johnson did not violate a house policy.

*IV. Whether the Commission's decision was arbitrary, capricious, and an abuse of its discretion when it revoked Johnson's gaming license for dishonesty or fraudulent conduct and placed him on the exclusion list.*

The circuit court reversed the Commission's discipline, and held that the Commission acted arbitrary, capricious, and abused its discretion when it revoked his gaming license and placed him on the exclusion list.

*In re Jarman*, 2015 S.D. 8, 860 N.W.2d 1.

*Iversen v. Wall Bd. of Educ.*, 522 N.W.2d 188 (S.D. 1994).

ARSD 20:18:08.01:02.

SDCL 42-7B-24.

SDCL 42-7B-32.

SDCL 42-7B-61.

## **STATEMENT OF THE CASE**

This case comes from an appeal by the Commission of the Final Judgment entered by the Fourth Judicial Circuit Court, the Honorable Michelle K. Percy.

The Commission is a statutorily-created board empowered to regulate the licensing of individuals involved in the gaming industry, among other duties. Charles Johnson had a gaming support license granted to him by the Commission. On September 19, 2016, Johnson took a player's chips while dealing at the craps table at the Tin Lizzie's Casino as a "tip." Johnson was investigated for violations of two administrative rules and an in-house policy. After a contested hearing before the Commission, the Commission concluded that discipline was appropriate, and it revoked Johnson's gaming support license and placed him on the exclusion list.

Johnson appealed the decision to the circuit court, which reversed, holding that the decision was arbitrary, capricious, and an abuse of discretion. The Commission appeals and urges reversal of the circuit court's judgment.

## **STATEMENT OF THE FACTS**

Early in September 2016, Austin Burnham, the General Manager at Tin Lizzie's Casino in Deadwood, South Dakota, notified Gaming Commission Agent Brandon Snyder of a potential cheating incident at the craps table at Tin Lizzie's. CG FOF 2, AR. 78. After receiving the report, Agent Snyder reviewed video surveillance from Tin Lizzie's and observed what appeared to be cheating by dice sliding on the craps table and identified the suspect as Mark Haddad. CG FOF 4, AR. 78. Snyder communicated with Burnham and various employees regarding his investigation and that he had a good idea

of the identity of the individual, without disclosing the name because it was an ongoing investigation. CG FOF 4, 5; AR. 79, 99, 112-13. Johnson was one of the employees who saw surveillance footage and could recognize Haddad as the suspected cheater, knew Snyder could identify the cheater, was aware of the prior cheating incident, and that the Commission was investigating this individual. CG FOF 30-31; AR. 28, 152-55.

On the evening of September 19, 2016, Johnson recognized the suspected cheater in the casino and alerted Burnham. AR. 153. Burnham reported to the Commission office that the suspected cheater was again visiting Tin Lizzie's craps tables. CG FOF 6; AR. 79. Burnham directed Johnson, who was the pit supervisor on duty, to the craps table to act as dealer. AR. 141. When Burnham did not hear back from the Commission staff, Burnham undertook the process of escorting Haddad out of Tin Lizzie's. CG FOF 10; AR. 28, 141. With Johnson in the dealer position, Burnham approached Haddad, asked him for his ID, and when Haddad refused, Burnham asked him to leave and escorted him out. CG FOF 10; AR. 142-43. Haddad left \$20 in chips on the craps table, which Johnson took and eventually placed in his tip box. CG FOF 8; AR. 87.

On September 29, 2016, Snyder came to Tin Lizzie's to investigate Haddad and review the video surveillance of the craps table from September 19, 2016. CG FOF 7; AR. 79. While reviewing that video surveillance, Snyder observed that Johnson, while acting as craps dealer, placed chips belonging to Haddad but left on the craps table into the tip box after Haddad and another player left the table. CG FOF 8; AR. 87. Snyder believed this was improper and began investigating Johnson's conduct.

On September 30, 2016, Snyder interviewed Johnson about the September 19th incident with the chips being taken as a "tip." CG FOF 10; AR. 28-30, 89. Johnson



explained that Burnham and he recognized the suspected cheater, and Burnham reported it to the Commission. AR. 28-30. Johnson said, "Well we already knew this guy, so Austin [Burnham] went and called you guys [the Commission]." CG FOF 10; AR. 28, 154-55. Johnson explained that as Burnham was waiting for the Commission to respond, Burnham came to the craps table where Johnson was dealing and asked the player for his ID, but the player wouldn't provide it, so Burnham escorted the player out of the casino. CG FOF 10; AR. 28-30. Johnson told Snyder that the player had a \$15 bet on the table that Johnson picked up and set on the player's rail. CG FOF 11; AR. 28. Johnson further told Snyder that he didn't realize at the time that the player had also placed a separate \$4 bet with a dollar tip on the craps table. CG FOF 12; AR. 28-29. During the interview with Snyder, Johnson claimed that after Burnham confronted the player, Johnson told the player the money on the rail was his. CG FOF 13; AR. 28. At that point Johnson claimed the player did not respond but just grabbed his other chips and left. *Id.* Johnson also told Snyder that as the player was leaving, another player at the craps table pointed to the money and said something to the effect that the money was Haddad's. *Id.* Johnson said the cheating player still walked away. *Id.* Then, Johnson admitted to Snyder that he took the two bets (the \$15 bet and the separate \$4 bet with dealer tip), set them off to the side, and put a lammer on them. CG FOF 15; AR. 29. Johnson then said that after the other player (the one who pointed to the chips) left the craps table, Johnson picked up the \$20 in chips belonging to the suspected cheater and dropped them in the tip box. FOF 16; AR. 29.

Also during this interview, Snyder asked Johnson if he knew the policy regarding found chips. CG FOF 17; AR. 29. Johnson responded yes, and that if an employee

knows who the chips belong to, the employee saves the chips for them. *Id.* When asked what should be done if the employee didn't know the player who left the chips, Johnson indicated that they had never had that problem. *Id.* After the interview, Snyder provided Johnson's supervisor with a written statement form and directed Johnson to fill it out. CG FOF 18; AR. 90.

In an interview with Burnham and Donica Schumacher, the Tin Lizzie's table games manager and Johnson's direct supervisor, both individuals reported to Snyder that Tin Lizzie's policy on found or unclaimed chips was to hold the chips if the dealer knew who the player was until the player returned. CG FOF 9; AR. 93-94. If the dealer did not know who the player was, the found chips should be taken to the cage. *Id.* This policy was unwritten at the time of the incident but was reduced to writing on October 21, 2016. AR. 32, 115. The written policy is substantially similar to the unwritten policy Burnham and Donica explained, that found chips are to be turned into the cage.

As a result of the investigation interview with Johnson, as well as Snyder's review of the surveillance tapes, which did not support Johnson's story, an Initial Complaint against Johnson was issued, dated November 4, 2016. CG FOF 21; AR. 33-35. The Complaint alleged that Johnson violated ARSD 20:18:09:02 (actions constituting dishonesty or fraudulent conduct) and ARSD 20:18:33:11 (failing to follow proper protocols when irregularities occur).

Johnson responded to the Complaint with a typewritten Answer on or about November 19, 2016 and a handwritten statement dated September 30, 2016. CG FOF 22; AR. 31, 38. The typewritten answer and the written statement both varied from Johnson's initial statements to Snyder. *Compare* AR. 31 *with* AR. 38. Johnson's

handwritten statement alleged that he told the player (Haddad) three times that he had left chips: once before he left the table; once as he turned from the table; and a third time after the player had taken a couple of steps. AR. 31. In his typewritten Answer to the Complaint, Johnson claimed that after he had picked up the \$15 in chips and put the chips on the rail before the player (Haddad) left, he told the player that those were his chips. AR. 38. Johnson indicated that the player started to turn away and “I told him again ‘he was leaving chips in the rail.’” *Id.* Johnson then claimed that as the player was about half way out of the room, he “yelled to him once more ‘that he left chips on the table.’” *Id.*<sup>1</sup> The surveillance video is not consistent with any of these versions of his story and shows that Johnson never said anything to the player. AR. 25.

As part of the Complaint process, Johnson met informally with Executive Secretary Larry Eliason at the Commission’s office in Deadwood. AR. 122-23. Eliason offered Johnson a 30-day suspension at the informal meeting, which Johnson turned down. AR. 123. Following the meeting, as Eliason was leaving the Commission’s office, Johnson approached Eliason in the hallway. *Id.* A surveillance video recorded much of the scene. AR. 45. Johnson came back in and approached Eliason and “palmed” him a \$20 bill stating, “If you think I was a thief and dishonest here’s his twenty dollars.” AR. 49, 123-26. Eliason described the incident as highly offensive to him and stunning, stating Johnson attempted to “palm” him a \$20 bill, which he described “like I was some maître d.” AR. 123-24.

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<sup>1</sup> Each statement improves Johnson’s position: in the first he told Haddad once. In the handwritten statement he claimed he told Haddad three times. In his typewritten answer he told Haddad three times, yelling to him the last time. During his testimony, Johnson said that he did not yell but spoke louder than a normal tone, and added that he could not turn to the player because he had to watch the table.

The Commission served Johnson with a Notice of Hearing that advised Johnson of the maximum punishment. The notice explained his gaming license could be revoked, and his name could be placed on the exclusion list, which would prevent Johnson from entering licensed gaming establishments in South Dakota. AR. 50-51.

At the March 22, 2017 hearing, Snyder, Eliason, and Johnson testified regarding the incident in question. The Commission reviewed the surveillance video from September 19, 2016. CG FOF 20, 44; AR. 84-87, 125-26. Snyder explained what he found significant while the surveillance played. AR. 84-87. Snyder explained that, counter to Johnson's statements, from the video, it did not appear that Johnson spoke at all to the player regarding leaving the chips on the table. CG FOF 20; AR. 88. Snyder confirmed that nothing in the video demonstrated that Johnson "yelled" after the player. AR. 92-93. Snyder then pointed out that once the only other player at the table left, Johnson took the suspected cheater's chips and put them in the tip box, smiling at the other dealer while he was doing so. AR. 87. Snyder testified that he filed the Complaint because Johnson's actions and subsequent inconsistent interviews and statements constituted theft and dishonesty. AR. 95.

Executive Secretary Eliason also testified at the hearing. He testified that Johnson had previously been disciplined in August 2015 and received a two-day suspension. AR. 128. Eliason recounted his informal consultation with Johnson involving the current Complaint and explained that he initially proposed a 30-day suspension. AR. 123. Then, Eliason explained Johnson's attempt to give him \$20, and the Commission watched the surveillance video footage of that event. CG FOF 44; AR. 125-26. Eliason explained that he was shocked as no one had ever attempted to "get their way out of a situation by

handing me money.” AR. 126. He testified it was the combination of Johnson’s actions of taking the chips for a tip, “palming” the \$20 bill into his hand, Johnson’s previous two-day suspension by the Commission, Johnson’s inconsistent statements, and the surveillance video from September 19th that led Eliason to recommend that Johnson’s license be revoked, and he be added to the exclusion list. AR. 127-28. Eliason stated “this is an individual who has little regard, if any, for the rules of the Commission and somehow thinks that he’s somehow a special person.” AR. 128.

Johnson testified to his version of the events. Once again, Johnson attempted to avoid responsibility. First, he testified that the player’s chips were abandoned but wrote in his September 30, 2016 statement that they were left as tips. AR. 31, 145. He testified that there was no policy on abandoned chips, yet told Agent Snyder that he was aware of Tin Lizzie’s policy on found chips. He admitted that if chips or slot tickets were found on the floor, he would take them to the cage, yet also he testified that he would only take a “significant” amount of money left on a table to the cage. AR. 145, 160-61. For instance, he differentiated a situation where a player left a dollar chip on a table and a hundred-dollar chip on a table. *Id.* Only in the latter would he take the chip to the cage. *Id.*

When examined regarding the September 19, 2016 surveillance video, Johnson gave a new twist explaining why it appeared neither his mouth nor head moved at all to alert Haddad that he was leaving his chips. Rather than saying that he yelled at the player as he left, Johnson now claimed he told the cheater in a tone slightly louder than his normal tone that he was leaving his chips. AR. 156-57. The Commission found that this testimony was not credible. CG FOF 35. Johnson also added for the first time that

because another player was at the table, he could not turn his head to the suspected cheater as he was leaving without his chips. AR. 157.

Johnson further testified that on the night of the incident he was acting as pit supervisor and claimed there was no one to report the incident to, despite the fact that General Manager Burnham was present. CG FOF 34; AR. 141, 158-59. The Commission found this testimony to lack credibility. CG FOF 34.

Johnson admitted that he knew Burnham was in communication with the Commission regarding the suspected cheater. CG FOF 30; AR. 153. Johnson never asked Burnham, anyone at Tin Lizzie's, Agent Snyder, or anyone else at the Commission if they could identify the player in order to comply with what Johnson had first believed was the policy to save chips for known players. CG FOF 31; AR. 155-56. Johnson admitted he made no effort to find out who the player was before taking the chips and putting them in the tip box. CG FOF 32; AR. 156. Finally, Johnson admitted to trying to give Eliason a \$20 bill. Johnson claimed that he was not trying to bribe him. AR. 149, 158.

After reviewing the September 19th and January 5th videos, Johnson's initial statements to Snyder, his statements in his Answer, and his testimony during the Commission's hearing, the Commission determined that Johnson's varying stories demonstrated dishonesty or fraudulent conduct. CG FOF 55. The Commission found that Johnson's actions in placing the chips in his tip box without any attempt to determine the player's identity constituted dishonesty or fraudulent conduct. CG FOF 54. The Commission found that Johnson's failure to take the chips to the cage or notify his supervisor regarding the chips constituted a violation of both Tin Lizzie's policies and

Commission regulations. CG FOF 56. The Commission ultimately decided to revoke Johnson's gaming license and place him on the exclusion list.

Johnson appealed the Commission's Decision and Order to the Fourth Judicial circuit court. The Honorable Michelle K. Percy heard oral argument on August 30, 2017 and issued Findings and Conclusions. The circuit court disregarded the Commission's findings on Johnson's credibility when Johnson testified about the inconsistent stories of whether he yelled at the player three times and whether there was anyone to whom he could report the incident. *See* CC FOF 15, 18 (overturning CG FOF 34, 35). The circuit court found that the video surveillance did not have audio to dispute or confirm Johnson's multiple inconsistent statements, despite the visual confirmation that Johnson said nothing. CC FOF 18, 25. The circuit court found that none of the other employees at Tin Lizzie's knew the player's identity, contrary to Johnson's testimony that he recognized the player and knew he was being investigated by the Commission, and that he and other employees watched surveillance of the cheater; other employees even participated in a photo line-up to identify the cheater. AR. 113, 140 (Johnson testified that he recognized the player when he walked in); CC FOF 15; CG FOF 29, 30. The circuit court found that Tin Lizzie's had no written policy on found money, yet also found that two other employees, Donica Schumacher and Burnham, told Agent Snyder the policy was to take found money to the cage when the player's identity was unknown. CC FOF 20, 29. Then the circuit court went a step further and found Tin Lizzie's did not have a policy at all. CC FOF 30. The circuit court then, in contravention of the entire record, found that there was no evidence produced that the money was not a "tip" or was "found money,"

disregarding Johnson's own testimony that he believed it was found or abandoned money. CC FOF 35; CC COL 2.

After reviewing video surveillance of January 5, 2017, Executive Secretary's testimony about the event, and Johnson's admission, each indicating that Johnson attempted to pay Eliason \$20 by palming him a bill like a maître d, the circuit court made no finding at all and never mentioned that this conduct occurred, which was important support for why Eliason increased his discipline recommendation from a 30-day suspension to a revocation and exclusion. By ignoring this incident, the circuit court found that there had been no change in facts to warrant the increase in discipline. CC FOF 42; CC COL 12.

Next, completely absent from the circuit court's findings and conclusions is any mention of ARSD 20:18:09:02, discipline for acts of dishonesty or fraudulent conduct. This regulation was the Commission's primary ground for the revocation and exclusion of Johnson. CG COL 6, 7.

The circuit court reversed the Commission's conclusion that Johnson violated ARSD 20:18:33:11, rule on irregularities, because Johnson was the pit supervisor and dealer. CC COL 8. The circuit court concluded that Tin Lizzie's had no policy on "found money." CC COL 9. Finally, the circuit court concluded that the Commission acted arbitrary, capricious, and abused its discretion when it revoked Johnson's gaming license and placed him on the exclusion list. CC COL 12. The Court entered its own Findings of Fact and Conclusions of Law on September 19, 2017, and its Judgment was issued October 12, 2017.



## STANDARD OF REVIEW

Administrative appeals are reviewed in accordance with SDCL 1-26-37 (Appeal to Supreme Court) and SDCL 1-26-36 (Standards of review). The Supreme Court's "review of agency decisions is the same as the review made by the circuit court." *Black v. Div. of Criminal Investigation*, 2016 S.D. 82, ¶ 13, 887 N.W.2d 731, 735-36 (quoting *In re Jarman*, 2015 S.D. 8, ¶ 8, 860 N.W.2d 1, 5). A reviewing court "must give great weight to the findings of the agency and reverse only when those findings are clearly erroneous in light of the entire record." *St. Pierre v. State ex rel. S.D. Real Estate Comm'n*, 2012 S.D. 25, ¶ 14, 813 N.W.2d 151, 156. The Supreme Court's review under the clearly erroneous standard is highly deferential, and it reverses only if review of the entire record has left the court "with a definite and firm conviction that a mistake has been committed." *Osman v. Karlen & Assocs.*, 2008 S.D. 16, ¶ 15, 746 N.W.2d 437, 443. Further, the Supreme Court performs that review of the agency's findings "unaided by any presumption that the circuit court's decision was correct." *Peterson v. Evangelical Lutheran Good Samaritan Soc'y*, 2012 S.D. 52, ¶ 13, 816 N.W.2d 843, 847 (quoting *Kermmoade v. Quality Inn*, 2000 S.D. 81, ¶ 10, 612 N.W.2d 583, 586).

"[F]indings based on documentary evidence, such as depositions, are reviewed de novo." *Terveen v. S.D. DOT*, 2015 S.D. 10, ¶ 6, 861 N.W.2d 775, 778 (citing *Vollmer v. Wal-Mart Store, Inc.*, 2007 S.D. 25, ¶ 12, 729 N.W.2d 377, 382). "When documentary or video evidence is offered, the trial court is in no better position to intelligently weigh the evidence than the appellate court. As such, we review this disputed evidence de novo." *Fowler v. Weber*, 2000 S.D. 22, ¶ 6, 607 N.W.2d 252, 254 (citing *Watertown v. Dakota*,

*Mn. & Eastern R. Co.*, 1996 S.D. 82, ¶ 11, 551 N.W.2d 571, 574) (internal citation omitted).

“Agencies are entitled to make witness credibility determinations and choose between conflicting testimony.” *In re Jarman*, 2015 S.D. 8, ¶ 18, 860 N.W.2d 1, 8-9 (citing *In re Prevention of Significant Deterioration (PSD) Air Quality Permit Application of Hyperion Energy Ctr.*, 2013 S.D. 10, ¶ 41, 826 N.W.2d 649, 661). The Court “defer(s) to the agency on the credibility of a witness who testified live because the agency is in a better position [than an appellate court] to evaluate the persuasiveness of witness testimony.” *Id.*

## **ARGUMENT**

When gaming was authorized in 1988 by the people of the South Dakota, the Legislature found and declared certain public policies to regulate this new industry. It was recognized that this industry’s success depended upon public confidence and trust that licensed gaming would be conducted honestly. SDCL 42-7B-2.1(1). Public confidence and trust can only be maintained by strict regulation of all persons related to the operation of licensed gaming. SDCL 42-7B-2.1(2). To enforce strict regulations, the Legislature granted the Commission authority to issue and revoke gaming licenses. SDCL 42-7B-2.1(4), 42-7B-11(6) and (9).

Licensure is a privilege and no holder has any vested right to their license. SDCL 42-7B-2.1(4), 42-7B-24; see *Discipline of Rokahr*, 2004 S.D. 66, ¶ 21, 691 N.W.2d 100, 108. The Commission is a licensing board mandated to uphold public confidence and trust in the credibility and integrity of licensed gaming in South Dakota. To honor its mandate, the Commission may consider many factors concerning a person’s conduct,

including character and prior conduct, to determine whether that person is fit for licensure. *See* SDCL 42-7B-32, -33.

After considering the evidence presented and having the benefit of hearing in-person testimony, the Commission made credibility determinations, and found that Johnson had engaged in conduct constituting dishonesty or fraudulent conduct, and violated an in-house policy. CG FOF 54, 55; CG COL 6-8. This conduct supported the Commission's decision to revoke Johnson's gaming license and place him on the exclusion list. That decision should be upheld, and the circuit court's decision should be reversed.

## I.

*Whether the Commission correctly concluded that Johnson acted dishonestly or fraudulently under ARSD 20:18:09:02.*

The circuit court's findings and conclusions lack any mention or consideration of the regulation, ARSD 20:18:09:02. This regulation was the main support for disciplining Johnson. By completely ignoring this regulation, the circuit court only reviewed half the Commission's reasons for its decision before reversing. It is incumbent upon the circuit court, when reviewing the agency's decision, to consider all of the reasons for the agency's decision before reversing it.

This regulation reads:

Any act, whether of the same or of a different character than specified in this article, that constitutes dishonesty or fraudulent conduct, whether arising within or without the pursuit of the license privilege, committed by a licensee is grounds for disciplinary action.

ARSD 20:18:09:02. Whether actions constitute “dishonesty or fraudulent conduct” are factual questions. *See Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 14, 817 N.W.2d 395, 400 (stating fraud and deceit are questions of fact). As such, “[a] Court should not substitute its judgment when it has not had the opportunity to hear or see the evidence and determine credibility or the weight to be given to different evidence.” *Iversen v. Wall Bd. of Educ.*, 522 N.W.2d 188, 193 (S.D. 1994); *see In re Jarman*, 2015 S.D. 8, ¶ 18, 860 N.W.2d at 8-9.

The Commission reviewed the entire record, heard testimony from witnesses, including Johnson, and properly concluded that Johnson’s actions constituted dishonesty and fraudulent conduct. The entire record supports this factual determination. The circuit court committed clear error by failing to review or consider the Commission’s conclusion that Johnson acted dishonestly or fraudulently under ARSD 20:18:09:02.

The Commission correctly determined that Johnson committed dishonesty or fraudulent acts when (A) he took chips of a player, placed the chips in his tip box, and made no attempt to identify the player, and (B) he made several inconsistent statements about attempting to alert the player that he was leaving chips. CG FOF 54, 55.

*A. Taking the chips of a player and placing them in the tip box.*

Johnson engaged in conduct constituting grounds for disciplinary action by placing a player’s chips into the tip box. Johnson admitted to taking the chips but tried avoiding responsibility by explaining why this conduct was not dishonest. Johnson attempted to claim that the chips were a “tip.” The circuit court erroneously agreed and found that there was no evidence that the chips were not a tip. CC FOF 35, CC COL 2. This circuit court finding is error. When the circuit court made its finding as the nature of

the chips, it failed to give great weight to the agency's determination that the chips were "found money." Only if the circuit court was definitely and firmly convinced that the chips were a tip could it make such a finding, and such support does not exist in the record.

Instead, the weight of the evidence indicates that \$19 was a bet that was then abandoned, and not a tip. First, three \$5 chips were being bet on the "9" and \$4 was being bet "hardway." Only \$1 was a tip at the time Burnham approached Haddad. Johnson never stated or testified that Haddad indicated to him that his intention was to tip Johnson \$19. At most, Haddad showed his intention to tip \$1. Johnson was the one who removed three chips from the "9" and placed those on the rail for Haddad to take with him. At that time, Johnson's conduct indicated that he believed those chips were the property of Haddad, and not a tip. Once Haddad left the table and his chips, Johnson admitted and testified that "[he] considered those chips abandoned" and not tips. AR. 145. This testimony was the only sworn testimony Johnson gave. Johnson cannot claim a better version of these facts than his own testimony. *St. Pierre*, 2012 S.D. 25, ¶ 23, 813 N.W.2d at 158 ("A party cannot . . . assert a better version of the facts than [his] prior testimony . . .").

Johnson's testimony that he believed the tips were abandoned is also consistent with Agent Snyder's testimony that these chips were considered found money and the surveillance video. AR. 94. The video reveals that while the other player was still at the table Johnson had kept the chips to the side and placed a lammer over them, demonstrating the appearance that he was saving the chips. *Id.* It was only after the

other player left that Johnson dropped the chips into his tip box. *Id.*<sup>2</sup> This creates an inference that Johnson knew what he was doing was wrong and knew those chips were not a tip. The Commission should be given great weight as to this inference. SDCL 1-26-36. The Commission correctly labeled the chips as found, unclaimed, and abandoned chips, as is supported by the greater weight of the evidence in the entire record.

Johnson further testified that on that night, he was acting as pit supervisor and claimed there was no one to whom he could report the incident to despite the fact that General Manager Burnham was present. CG FOF 34, AR. 141, 158-59. The Commission specifically found this testimony to lack credibility. CG FOF 34. It is well-settled law that “[a]gencies are entitled to make witness credibility determinations and choose between conflicting testimony.” *In re Jarman*, 2015 S.D. 8, ¶ 18, 860 N.W.2d at 8-9 (citing *In re Prevention of Significant Deterioration (PSD) Air Quality Permit Application of Hyperion Energy Ctr.*, 2013 S.D. 10, ¶ 41, 826 N.W.2d at 661). This Court “defer(s) to the agency on the credibility of a witness who testified live . . .” *Id.* The circuit court erred by setting this creditability determination aside. The entire record supports that Johnson had someone to report to that night. Johnson knew that Burnham was the general manager on duty, that Burnham knew the suspected cheater, that Burnham was aware of the entire situation, and that Burnham was at the craps table when the player left his chips. What better person to ask what to do with the found chips?

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<sup>2</sup> Yet another inconsistency exists in Johnson’s statements. In his Answer, he assumed the player “was leaving chips for the dealers since he was trying to tip anyways.” AR. 38. But if that were true, Johnson would not have to put the chips aside with a lammer on them and save the chips in case the player returned. He would have just put the chips in the tip box when Haddad left.

The Commission also found Johnson lacked credibility when he testified about the September 19, 2016 surveillance video. Johnson's story differed from his first statement to Snyder and from his written statements and Answer. The Commission watched Johnson testify and found his testimony not persuasive in light of the video evidence. CG FOF 35. Agent Snyder testified that in the video, it did not appear Johnson spoke to Haddad at all. CG FOF 20. The video stands on its own, but the Commission submits that neither Johnson's mouth nor body indicate that he spoke at all. The Commission's finding on Johnson's credibility is supported by the record and any finding to the contrary is clearly erroneous.

Johnson also testified about the in-house policy. Johnson asserted that not knowing a player's name had never happened to him before. If that were the case, common sense and basic diligence expected of a licensee would dictate that Johnson should have asked when he did not know what to do with the chips. Instead, as the dealer, Johnson took it upon himself to decide to take the chips. Even if Johnson was the dealer and the pit supervisor, under the regulation on irregularities, Johnson was required to direct the dealer to do what is "fair and equitable." Taking the chips was neither fair nor equitable. In the end, the player's name could have been easily ascertained by alerting Burnham. Instead, he took the easy way out and dropped the chips in the tip box.

Another instance of dishonesty was Johnson's testimony that how he would apply the in-house policy on found chips depended on the significance of the amount left. AR. 160-61. Evidentially, \$20 was not significant to him. This attitude is not what is fair and equitable and is not expected of a licensee.

*B. Making multiple inconsistent statements during investigation.*

Not only did Johnson's actions constitute a violation of the administrative regulation, but Johnson's story about this incident arises to dishonesty or fraudulent conduct because his story is wholly inconsistent with each version and inconsistent with the video evidence of the occurrence. *See* CG FOF 13, 24, 26; AR. 28-31, 38, 140-45. In his initial interview with Agent Snyder, Johnson stated he told Haddad once that the chips were Haddad's and that the other player also told him "a couple of times." AR. 28-30. Next, in his September 30, 2016 written statement, Johnson claimed that he told the cheater twice and then repeated for a third time that he had chips left on the table. AR. 31. Johnson's Answer to the Commission's complaint added yet another story: that Johnson "yelled" at the player regarding his chips. AR. 38. He also added that he believed it was his decision to make to take the chips because he was the pit supervisor. *Id.* Johnson also stated, after the video was played, that rather than "yelling," he may have told Haddad in a tone slightly louder than his normal tone that he had left chips on the table, and explained his lack of attention to Haddad was because he was attending to the other player at the table. AR. 143, 156-57. Johnson stated that he felt the chips were "abandoned chips" and that he was unaware of any policy involving the circumstances regarding found money at the craps table. AR. 145. Yet he had previously told Agent Snyder that he knew the policy for "found chips." AR. 89.

"[T]he trial court is in no better position to intelligently weigh [video] evidence than the appellate court" and reviews video evidence de novo. *Fowler*, 2000 S.D. 22, ¶ 6, 607 N.W.2d at 254 (citing *Watertown*, 1996 S.D. 82, ¶ 11, 551 N.W.2d at 574) (internal citation omitted). The Court is free to review the video, and the Commission is confident



that the Court will find that there is no indication that Johnson notified the player three times about the chips. CG FOF 27. The Commission's FOF 55 found that Johnson's explanations constituted dishonesty or fraudulent conduct, especially when viewed in light of the video evidence as well as Johnson's testimony. The Commission found that the video clearly demonstrated that Johnson did not yell after the suspected cheater as he was walking away. CG FOF 27, 55. Further, the video does not support Johnson's allegation that he tried to inform the suspected cheater that he had chips on the table, and Snyder testified that from the video, it did not appear that Johnson spoke to Haddad at all. AR. 25, 88. In fact, the video shows that Johnson was looking away from the cheater at the time the cheater was leaving, and his mouth does not move. AR 25. The video shows that the other player at the table seemed more concerned about the cheater's chips than Johnson was. *Id.*

Even considering the video *de novo*, the Commission is still entitled to great weight when it chose between conflicting testimony of Agent Synder and Johnson, and the reviewing court cannot substitute its own judgment for the agency's judgment as to the weight given to this factual dispute. SDCL 1-26-36; *In re Jarman*, 2015 S.D. 8, ¶ 18, 860 N.W.2d at 8-9 (citation omitted). The Commission found no evidence on the video suggesting that Johnson "yelled" at the suspected cheater as he was walking away or ever said anything to the player at all. CG FOF 27. The Commission's findings are supported in the record. Johnson's ever-changing versions of the events project an image of fraud and deceit and a negative shadow on Deadwood's gaming industry. As a result of the discrepancies in Johnson's statements and his testimony, the Commission found

Johnson's actions constituted dishonesty or fraudulent conduct, a finding that must be given great weight. CG FOF 55.

Reviewing the totality of the evidence and testimony presented, the Commission determined that Johnson was not credible, and his actions and statements constituted dishonesty and fraudulent conduct. Such are fact questions best determined by the Commission sitting as the finder of fact, and under the clearly erroneous standard, it is not for the appeal court to reverse those findings. *St. Luke's Midland Reg'l Med. Ctr. v. Kennedy*, 2002 S.D. 137, ¶ 17, 653 N.W.2d 880, 885 (appeal court "will not second-guess the factual findings of [an agency] unless they are clearly erroneous"). The Commission should be given great weight as to its finding that Johnson committed dishonesty or fraudulent conduct in violation of ARSD 20:18:09:02.

## II.

*Whether the Commission correctly concluded that Johnson violated ARSD 20:18:33:11 by not seeking direction from his supervisor.*

Finding a violation of ARSD 20:18:09:02, the dishonest conduct regulation, alone warrants the Commission's decision to revoke and exclude Johnson. Therefore, if this Court finds in favor of the Commission on Issue I above, no consideration of Issue II is required because a favorable conclusion on Issue I is sufficient independent support for the Commission's decision.

That said, there is support in the record for this Court to find that Johnson also violated ARSD 20:18:33:11, which states:

*If any irregularity occurs, the dealer shall notify the box person or pit supervisor, who shall direct the dealer to take the most appropriate action which the box person or supervisor believes to be fair and equitable, and shall observe such action being taken. The box person or pit supervisor,*

*and not the dealer*, must make all decisions concerning disputed play or the payment or collection of wagers.

ARSD 20:18:33:11 (emphasis added).

“Administrative regulations are subject to the same rules of construction as are statutes.” *Citibank, N.A. v. S.D. Dep’t of Revenue*, 2015 S.D. 67, ¶ 12, 868 N.W.2d 381, 387 (quoting *WestMed Rehab, Inc. v. Dep’t of Soc. Servs*, 2004 S.D. 104, ¶ 8, 687 N.W.2d 516, 518). “Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is *clear, certain and unambiguous*, there is no reason for construction, and the Court’s only function is to declare the meaning of the statute as clearly expressed.” *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611 (quoting *Moss v. Guttormson*, 1996 S.D. 76, ¶ 10, 551 N.W.2d 14, 17) (emphasis added). Additionally, “[s]ince statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result.” *Id.*

The plain meaning of this rule prohibits a dealer from making any decisions regarding an irregularity, including the collection of a wager. When two provisions in the same regulation are as intertwined as the two sentences in ARSD 20:18:33:11, an absurd result would arise if the two sentences were interpreted separately. To read out the second sentence as inapplicable, as suggested by Johnson and as done by the circuit court in its COL 7, creates an ambiguity where none exists. Essential to this statute is the concept that two people must be involved when deciding the most appropriate action to take in the event of any irregularity.

At the time of the incident in question, Johnson was the dealer, despite his claims otherwise. While it is accurate that Johnson had been acting pit supervisor on that date, at the time of the incident in question he had assumed the position of dealer and was acting as such. Johnson testified and admitted the same: “So after Austin said he was going to call Gaming, we went to the – I went to the table as the stick person to start **dealing** to him.” AR. 141 (emphasis added). Johnson admitted he was acting as the dealer. Again, he cannot claim a better version of the facts than that to which he has previously testified. *St. Pierre, supra* (“party cannot . . . assert a better version of the facts than his prior testimony”); *see also* CG FOF 8.

ARSD 20:18:33:11 expressly prohibits a dealer from making decisions regarding irregularities. The essence of the rule is that a dealer must notified his superior in the event of an irregularity. The spirit of this regulation prohibits the dealer from determining what is fair and equitable in the situation. Regardless of whether a dealer is also a pit supervisor, a decision regarding an irregularity is not the dealer’s decision to make. While there may not have been a pit supervisor other than himself on the floor at the time, Johnson had a supervisor, General Manager Burnham, who was in the building. AR. 158-59. Johnson never notified his supervisor when an irregularity occurred; thus, he violated ARSD 20:18:33:11.

### III.

*Whether the Commission correctly concluded that Johnson violated a Tin Lizzie’s in-house policy on treatment of found money.*

The Commission correctly found that Johnson violated Tin Lizzie’s policy on “found money” contrary to the circuit court’s finding. *Compare* CG FOF 56 *with* CC

FOF 30-31. After reviewing the entire record, this Court will be firmly convinced no mistake was made by the agency with regard to the house policy.

Tin Lizzie's had a written and a verbal policy for this situation. Tin Lizzie's Table Game Manual, November 2014 edition, was introduced into evidence by Johnson during the Commission hearing. It proposes a hypothetical situation and solution:

What if a player places a bet, gets cards, and leaves? No extra cards will be given to the hand. The hand will be played out. If the hand loses, the chips go to the tray, if the hand wins, the chips will be placed off to the side of the tray and will be taken to the cage by the Pit Boss as "found property."

AR. 21. In addition to this written policy, Tin Lizzie's had a verbal policy on found money in effect on the date of the incident and later memorialized in writing after the incident. CG FOF 9; AR. 94. This verbal policy also requires delivery of found chips to the cage. AR. 32. When General Manager Burnham and Johnson's direct supervisor, Donica Schumacher, were asked about the policy, both confirmed that when a person is not known but leaves chips behind, the chips must be taken to the cage for appropriate disposition. *See* CG FOF 9; AR. 93-94.

Johnson accurately recalled the first part of this policy that if chips are left at a table and the dealer knows to whom the chips belong, the dealer holds the chips for that person. When asked to articulate the policy if he did not know to whom the chips belong, Johnson was non-responsive and only said that that has never happened. AR. 30. When asked what he would do if he found chips on the floor of the casino, Johnson said he would bring the found chips to the cage. AR. 145. When asked what he would do if someone left money on a card table and he didn't know the person, then Johnson would use diligence if he thought the amount of money was significant enough to "try to find

out who he – if we could recognize the person, if I knew him or not. If not, then I probably would have turned it in to the cage. . .” AR. 161.

Even if one believed Johnson that he didn’t know the policy, contrary to his testimony, not knowing the policy is not a defense to violating it. *In re Laprath*, 2003 S.D. 114, ¶ 87, 670 N.W.2d 41, 66 (“ignorance of the law and professional rules or the lack of professional competence is no excuse for her conduct.”). This is even more true when a similar policy was in writing in the table game manual and could have been applied to this analogous situation. Even if Johnson did not know what Tin Lizzie’s policy was, a prudent licensee should have asked if he did not know instead of taking the chips.

Johnson has argued that he could not have violated Tin Lizzie’s policy because it was not reduced to writing until after the incident. Johnson’s lack of *written* policy argument is a red herring. The verbal policy was in place according to both his supervisors, Burnham and Schumacher.

Further, at the time of the incident, craps had just begun in Deadwood in 2015. Tin Lizzie’s November 2014 written policy requiring that “found” chips be “placed off to the side of the tray and will be taken to the cage by the Pit Boss as ‘found property’” was in full effect. The November 2014 written policy regarding a player leaving with chips on the table applied to Johnson’s situation, or at least should have provided guidance to the new game of craps until policies could be drafted. At the very least, Johnson should have recognized the general policy that when a player leaves chips on the table, those chips go to the cage. His ignorance of this policy is not an excuse for his deliberate and dishonest conduct of taking the chips.

It could be argued that Johnson violated this regulation in alternative ways. On one hand, Johnson admits that he knew the guy, recognized him when he came in, that the guy was a suspected cheater, and that he had seen him on the surveillance provided by an enforcement agent during the investigation of the suspected cheater. Although he did not know his name, asking Burnham or an enforcement agent would have led Johnson to learning Haddad's identity. Had the amount been more significant in the eyes of Johnson, maybe he would have applied the same diligence to this situation as he described he would have on a card table. AR. 161. Instead of being thorough in his duty to comply with the policy of returning chips to known players or even being "fair and equitable," Johnson decided to take the chips. On the other hand, even if the Court determines that the in-house policy does not impose a duty on Johnson to be reasonably diligent in ascertaining a player's identity, then Johnson failed to take the chips to the cage when he didn't know the player's name as dictated by the November 2014 manual and verbal policy in force at the time.

Instead of taking the chips to the cage in accordance with Tin Lizzie's written and verbal policies, Johnson acted completely outside of both and deposited the chips in question into the tip box. Johnson did so only after the other player left the table. AR. 87. Johnson's conduct is a violation of Tin Lizzie's oral and written policies; as such, the Commission appropriately found that Johnson violated Tin Lizzie's in-house policy. This finding was not clear error but supported by the entire record.

#### IV.

*Whether the Commission's decision was arbitrary, capricious, and an abuse of its discretion when it revoked Johnson's gaming license for dishonesty or fraudulent conduct and placed him on the exclusion list.*

The Commission concluded that the appropriate discipline for Johnson's violations should be "that the gaming support license of Charles Johnson be revoked and that Charles Johnson's name be placed on the list of persons to be included on the Exclusion List." AR 65. The circuit court reversed concluding that the Commission acted arbitrarily, capriciously, and abused its discretion when it revoked and excluded Johnson. CC COL 3, 8, 12. This reversal is clearly erroneous and the Commission's Decision and Order should be upheld.

*A. No abuse of discretion because revocation and exclusion are inside the range of permissible choices, and the decision was in full consideration of all relevant and competent evidence in the record.*

The Commission did not abuse its discretion or act arbitrary when it revoked Johnson's license and placed him on the exclusion list. An abuse of discretion "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *In re Jarman*, 2015 S.D. 8, ¶ 19, 860 N.W.2d 1, (citing *Thurman v. CUNA Mut. Ins. Soc 'y*, 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 616). "An arbitrary or capricious decision is one that is: based on personal, selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action taken." *Id.* (quoting *Huth v. Beresford Sch. Dist. # 61-2*, 2013 S.D. 39, ¶ 14, 832 N.W.2d 62, 65.)



In order to review the Commission’s decision for abuse of discretion, this Court may consider, “(1) whether there is authority for making the decision; and (2) whether the decision is justified under the facts as determined, i.e. is not arbitrary or capricious.” *Iversen*, 522 N.W.2d at 192. “An abuse of discretion refers to a discretion ‘exercised to an end or purpose not justified by, and clearly against reason and evidence,’ which is part two of the abuse standard.” *Id.* (quoting *Dacy v. Gors*, 471 N.W.2d 576, 580 (S.D. 1991)). Also included in part two, the Court may consider “whether [it] believe[s] a judicial mind, in view of the law and the circumstances, could reasonably have reached that conclusion.” *Id.* “In review, each decision should be presumed to have been made within that broad range of discretion which cannot be better determined by the reviewing court. This is true whether the decision maker is a circuit court, administrative agency, or school board.” *Id.* at 193.

*i. Revocation of License*

As a starting point, SDCL 42-7B-24 provides that “Any license that is issued under this chapter is revocable, is not transferable, and no person holding a license acquires any vested interest or property right in the license.” To revoke a license, SDCL 42-7B-32 provides, “Any license granted pursuant to this chapter may be suspended or revoked for any cause which may have prevented its issuance, or for violation by the licensee, . . . of this chapter or any rule adopted by the commission, . . . after notice to the licensee and a hearing, upon grounds determined adequate by the commission.” To be issued a support license, the individual shall be “of good moral character.” SDCL 42-7B-27.

The Commission found that Johnson violated ARSD 20:18:09:02 by engaging in activities that constituted dishonesty or fraudulent conduct. The Commission further found that he violated ARSD 20:18:33:11 by failing to notify his superior and failing to take the chips to the cage. The notice of hearing received by Johnson provided clear notice of the possible consequences as a result of the hearing pursuant to SDCL 42-7B-32. Johnson was told that the Commission could “[r]evoke or suspend [his] gaming license, impose a monetary penalty not to exceed two thousand five hundred dollars and place [his] name on the list of persons who are to be excluded or ejected from licensed gaming establishments.” AR. 50. These are permissible choices for discipline authorized by statute. As such, the Commission has satisfied the first prong of the abuse of discretion standard because it had authority to revoke Johnson’s license.

The analysis then moves to the second prong, whether the Commission’s decision was justified under the facts. Without restating the evidence as discussed above, the record supports the Commission’s findings that Johnson’s actions amounted to dishonesty or fraudulent conduct and that he violated administrative rules and house policies. Further, it should be reiterated that the Commission reviewed the record including the video of the incident involving the suspected cheater, the video of the incident where Eliason described Johnson “palming” him a \$20, and Johnson’s various and differing accounts of what occurred. After such consideration reflecting on Johnson’s character, the Commission was justified under the facts to determine that it was appropriate to revoke Johnson’s gaming support license.

*ii. Exclusion List*

Turning to the exclusion of Johnson from gaming establishments, the Commission has statutory and regulatory authority for such discipline. SDCL 42-7B-60 created an exclusion list “to maintain effectively the strict regulation of licensed gaming.” SDCL 42-7B-61 authorizes the Commission to place persons on the list by determining, for example, whether a person’s conduct has “adversely affect[ed] public confidence that gaming is conducted honestly.” SDCL 42-7B-61(4).

In addition to statutes, gaming regulations also provide the Commission with authority to exclude Johnson. ARSD 20:18:08.01:02 states in pertinent part:

The criteria to be applied by the commission to prepare a list of persons to be included on the exclusion list are the criteria set forth in SDCL 42-7B-61, any one of which is sufficient for placement on the list. . . . The commission, in its discretion may establish evidence of conduct that would adversely affect public confidence that gaming is conducted honestly, as that term is used in SDCL subdivision 42-7B-61(4), by anyone of the following criteria: (1) the person’s character, background, [or] past activity is incompatible with the maintenance of public confidence and trust in the credibility, integrity, and stability of licensed gaming; . . . (3) the person’s character, background, or past activity could create or enhance a risk of the fact or appearance of unsuitable, unfair, or illegal practices, methods or activities in the conduct of gaming or in the business or financial arrangements incidental thereto; or (4) any other factor reasonably related to the maintenance of public confidence in the efficacy of the regulatory process and the integrity of gaming operations and the gaming industry and its employees . . . .

Moreover, ARSD 20:18:08.01:01 authorizes the Executive Secretary to recommend changes to the exclusion list which Eliason did in this case. Based upon this legal framework, the Commission acted within its authority, and the first prong of the abuse of discretion standard is once again met.

As to the second prong of the analysis, the Commission’s decision to place Johnson on the exclusion list is supported by relevant and competent evidence in the

record. Again, the citations to the record above are replete. But importantly, Eliason's testimony about Johnson sliding \$20 to him is telling of Johnson's character and a contributing factor to support Eliason's recommendation to revoke his license. While the Commission did not specifically find that the action constituted dishonesty or fraudulent conduct, Eliason's testimony was persuasive that Johnson's actions and attitude were incompatible with the maintenance of public confidence in the gaming industry, and the Commission found accordingly. CG COL 12 *in accordance with* SDCL 42-7B-2.1 and ARSD 20:18:08.01:02. The Commission found that Johnson's actions constituted "past activity which could create or enhance a risk of the fact or appearance of unsuitable, unfair, or illegal practices and activities in the conduct of gaming." CG COL 13. The Commission found that Johnson's conduct "could reasonably adversely affect the public confidence as to the integrity of gaming operations and the gaming industry and its employees, and therefore conclude[d] that [Johnson] engage[d] in conduct that would adversely affect the public confidence that gaming be conducted honestly" in making the determination for both revocation and placement on the exclusion list. CG COL 14. Based upon these findings and this review, the Commission's decision is justified under the facts and is not arbitrary or capricious.

The Commission did not abuse its discretion in disciplining Johnson. In its judgment, the Commission made a reasonable choice inside the range of permissible choices. Additionally, the discipline was not arbitrary or capricious because it was based on clear and convincing evidence that Johnson acted in a dishonest or fraudulent manner when he took the chips as a tip without believing the chips were a tip, without seeking direction from a supervisor, and without attempting to comply with the policy.

Furthermore, evidence was produced that Johnson gave inconsistent versions of his attempts to alert the suspected cheater of his chips. Even more support in the record for the discipline was Johnson's attempt to pay Eliason \$20 in a manner that was stunning to Eliason and unprecedented. The Commission did not act arbitrary or capricious in any way. The Commission's findings of fact must be given great weight and its credibility determination of Johnson should be given deferential treatment.

*B. Circumstances changed after the offer voluntary compliance to warrant an increase in penalty.*

The circuit court erroneously found that "[t]here had been no change in facts to warrant this increased penalty." CC COL 12. Sliding the Executive Secretary a folded up \$20 bill was captured on video. Eliason testified to it. Johnson admitted that it occurred. This incident specifically supported Eliason's increased recommendation. AR. 128. Eliason reasoned that "an individual who has little regard, if any, for the rules of the Commission and somehow thinks that he's somehow a special person. And I just think that to protect the integrity of gaming in Deadwood, people with that attitude should not be licensed and should not participate in gaming." *Id.* While the Commission did not make a specific finding that this incident arose to dishonest conduct to independently support a violation of ARSD 20:18:09:02, the Commission recognized that the incident happened, and it supported Eliason's total recommendation. CG FOF 46-49. This is a flaw in the circuit court's findings.

The Commission had the option to take a lesser action in the matter. As recited in the Notice of Hearing, the Commission could have suspended Johnson's gaming license or imposed a monetary penalty not to exceed \$2,500. AR 50. However, after hearing

and reviewing the evidence presented, the Commission decided to revoke and place Johnson on the exclusion list as the most appropriate sanction for his dishonesty or fraudulent conduct. The Commission took such action that it felt was appropriate to preserve the integrity of gaming operations and to maintain the public trust that gaming be conducted honestly and free from improper influence. SDCL 42-7B-2.1.

### **CONCLUSION**

Our Legislature has codified compelling public policy statements which the Commission is mandated to uphold. “The success of gaming is dependent upon public confidence and trust that licensed gaming is conducted honestly and competitively, that the rights of the creditors of licensees are protected and that gaming is free from criminal and corruptive elements[.]” “Public confidence and trust can only be maintained by strict regulation of all persons . . . related to the operation of licensed gaming establishments . . . [.]” SDCL 42-7B-2.1(1) and (2). The Commission’s swift action in this matter furthers the State’s public policy to maintain the public confidence in the efficacy of the regulatory process and the integrity of gaming operations.

Johnson took chips that did not belong to him and placed them in his tip box. He failed to follow Tin Lizzie’s internal policy on found money. He failed to notify his superior as required by administrative rule. When interviewed regarding his actions, Johnson provided explanations which were counter to the video surveillance, and inconsistent with each other. He attempted to give the Commission’s Executive Secretary a \$20 bill in a fashion that, at best, can be described as questionable. His actions, attitudes, statements, testimony, and disregard for the rules and integrity of the gaming process, all were factors which led the Commission to discipline Johnson.

The words and direction of Governor George Mickelson who was in the office when gaming in Deadwood began ring as loud and true to the Commission today as they did then: “Keep gaming squeaky clean!”

WHEREFORE, the Commission urges this Court to reverse the circuit court’s reversal of the Commission’s decision.

The Commission requests oral argument.

DATED this 4th day of January, 2018.

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## **CERTIFICATE OF SERVICE**

Katie J. Hruska of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 4th day of January, 2018, served by first class mail two (2) true and correct hard copies pursuant to SDCL 15-26A-79, and an electronic copy pursuant to SDCL 15-26C-3, of the foregoing Appellant's Brief in the above-captioned action to the Appellee's counsel, to-wit:

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## **CERTIFICATE OF COMPLIANCE**

Katie J. Hruska, counsel for Appellant, hereby certifies that the foregoing Brief of Appellant complies with the type volume limitation provided for in the South Dakota Codified Laws and pursuant to SDCL 15-26A-66(b)(4). This brief contains 9,763 words and 48,937 characters, no spaces, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix, and Certificates of Counsel. Counsel relied on the word and character count of Microsoft Word, word processing software, used to prepare this Brief at font size 12, Times New Roman, and left justified.

DATED this 4th day of January, 2018.

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## **CERTIFICATE OF PROOF OF FILING**

The undersigned hereby certifies that pursuant to SDCL 15-26C-3 she served an electronic copy in Word format, and the original and two (2) hard-copies of the above and foregoing Appellant's Brief on the Clerk of the Supreme Court by hand-delivering the same this date to the following address:

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DATED this 4th day of January, 2018.

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STATE OF SOUTH DAKOTA  
DEPARTMENT OF REVENUE  
SOUTH DAKOTA COMMISSION ON GAMING

South Dakota Commission  
on Gaming,

Plaintiff,

-vs-

Charles Johnson  
SDCG Support License # A8365-14-SP,

Defendant.

No. 16-09-050-BS

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

WHEREAS this matter having come on as a contested case hearing before the South Dakota Commission on Gaming on Wednesday, March 22, 2017, at City Hall, 102 Sherman Street, Deadwood, South Dakota, 57732, pursuant to a Notice of Hearing dated January 18, 2017, and

WHEREAS Defendant having personally appeared and also being represented through his attorney, Roger Tellinghuisen of Rapid City, South Dakota; the Plaintiff having appeared through its attorney, Michael F. Shaw of Pierre, South Dakota; Commission members present were Dennis McFarland, Karen Wagner and Karl Fischer; also present were Executive Secretary Larry B. Eliason and Gaming Commission Enforcement Agent Brandon Snyder; the Commission further noting that Defendant having held a gaming support license and an initial Complaint having been issued against the Defendant dated November 4, 2016, alleging that the Defendant had engaged in conduct constituting grounds for disciplinary action relating to an incident which occurred on or about September 19, 2016, at a craps table at Tin Lizzie's Casino where he was employed; the Commission having heard the arguments and evidence presented and being fully advised in the premises, hereby makes the following Findings of Fact:

FINDINGS OF FACT

1. That Defendant Charles Johnson holds a gaming support license and is employed as a dealer and pit supervisor at the Tin Lizzie's Casino in Deadwood.

2. That following a recent meeting of the South Dakota Commission on Gaming, Austin Burnham, General Manager at Tin Lizzie's, notified Gaming Commission Special Agent Brandon Snyder of a potential cheating incident at the craps table at Tin Lizzie's.

3. After receiving the report, Agent Snyder viewed video surveillance from Tin Lizzie's and observed what appeared to be a dice sliding incident on the craps table. Dice sliding is a method of cheating in the game of craps.

4. Agent Snyder continued to investigate the incident and was able to identify the individual observed to be cheating on the video as Mark Haddad. Agent Snyder communicated with General Manager Burnham regarding his investigation and Burnham was aware that Snyder knew the identity of the individual. Snyder did not disclose Haddad's identity to Burnham as there was an ongoing investigation.

5. During his investigation Agent Snyder did a photo line-up of Mr. Haddad with various employees at Tin Lizzie's. Snyder talked with Burnham and several of the dealers and told them he had a good idea of who the person was. Snyder did not disclose Haddad's identity at this time, also due to the ongoing investigation. Charles Johnson was not present during the line-up.

6. On or about September 19, 2016, the Commission office received another report from Tin Lizzie's Casino, specifically from General Manager Austin Bernham, who indicated that the suspected dice sliding cheater had again visited Tin Lizzie's Casino's craps tables.

7. On September 29, 2016, Agent Snyder reviewed the video surveillance of Tin Lizzie's craps table from September 19, 2016, the date that Austin Bernham had contacted the Commission regarding the suspected incident.

8. While reviewing the video surveillance from September 19, 2016, Agent Snyder observed Charles Johnson, while acting as the craps dealer, place chips belonging to the suspected cheater, Mark Haddad, into the tip box.

9. Agent Snyder interviewed General Manager Austin Burnham and Donica Schumacher, Tin Lizzie's table games manager and supervisor of Charles Johnson. Both Burnham and Schumacher advised Agent Snyder that Tin Lizzie's policy on found or unclaimed chips was to hold the chips if they knew who the player was until the player returned. If they did not know who the player was, the found chips should be taken to the cage.

10. On or about September 30, 2016, Agent Snyder interviewed Charles Johnson regarding the incident. A transcript of the interview was introduced at the hearing on March 22 as part of Exhibit 1. Johnson explained that Austin Burnham had identified the suspected cheater (who was Haddad) and had called the Commission. Johnson told Agent Snyder, "Well we already knew this guy, so Austin went and called you guys." (Interview transcript, Exhibit 1). As he was waiting for the Commission to respond, Burnham came to the craps table where Johnson was dealing and asked the player for his ID but the player didn't want to give it to Burnham and, therefore, Burnham escorted the player out of the casino.

11. Johnson told Snyder that the player had a \$15 bet on the table that Johnson had picked up and set in the tray.

12. Johnson told Snyder that he didn't realize at the time that the player (Haddad) had also placed a separate \$4 bet with a dollar tip on the craps table.

13. During the interview with Agent Snyder, Johnson claimed that after Burnham had confronted the player (Haddad), Johnson told the player that the money in the tray was his. At this point Johnson claimed the player (Haddad) did not respond, but just grabbed the other chips and left.

14. Johnson also told Agent Snyder that as the player (Haddad) was leaving, another player at the craps table pointed to the money and said something to the effect that the money was the other player's. Johnson said the player (Haddad) still walked away.

15. At this point Johnson admitted to Agent Snyder that he took the two bets, set them off to the side and put a lammer on them.

16. Johnson then said that after the other player (the one who pointed to the chips) left the craps table, Johnson picked up the chips that belonged to the suspected cheater (Haddad) and dropped them in the tip box.

17. Johnson then told Agent Snyder that if the Tin Lizzie's employees know whose money has been left at a table, it is saved for the player. When asked what should be done if the employee didn't know the player who left the money, Johnson indicated that they never had that problem.

18. Agent Snyder left a written statement form for Johnson and asked that he complete it.

19. Agent Snyder returned several days after interviewing Johnson saw one of the statement forms that he had left at Tin Lizzie's blank and assumed that Johnson had not completed it.

20. At the hearing, the video surveillance of the September 19, 2016, incident at the craps tables at Tin Lizzie's was played. During the viewing of the video Agent Snyder explained what had occurred very similarly to what Johnson had advised in his interview, with one exception: from the video, Agent Snyder testified that it did not appear that Johnson had spoken to the player (Haddad) regarding leaving chips on the table.

21. Based upon his investigation, Agent Snyder brought an Initial Complaint against Johnson alleging that Johnson engaged in conduct constituting grounds for disciplinary action by taking property of another and not notifying the box person or pit supervisor of an irregularity. The Initial Complaint was dated November 4, 2016.

22. Charles Johnson completed an answer denying the allegations set forth in the Initial Complaint. The answer was introduced at the hearing as part of Exhibit 1.

23. In his answer, Johnson stated that on the night in question he was the pit supervisor and that he had been asked to stand in as the dealer when the suspected cheater (Haddad) was at the table.

24. In his answer, Johnson claimed that after he had picked up the \$15 in chips and put the chips in the tray before the player (Haddad) left, he told the player "they were his chips." Johnson indicated that the player started to turn away and "I told him again 'he was leaving chips in the rail'." As the player was about half way out of the room, Johnson stated "I yelled to him once more 'that he left chips on the table'." (Answer, Exhibit 1.)

25. Accompanying the answer to the Initial Complaint, Johnson also submitted a written statement he completed which was dated September 30, 2016, and which he completed at some point following his interview by Agent Snyder. The written statement was also introduced as part of Exhibit 1.

26. In his written statement, Johnson claimed that he told the player three times that he had left his chips, once before he left the table, once as he turned from the table, and a third time after the player had taken a couple of steps.

27. The Commission has reviewed the video incident of the matter and finds there is no evidence on the video to suggest that Johnson notified the

player three times that he had left chips on the table. The Commission specifically finds there is no evidence on the video tape to suggest that Johnson ever yelled to the player.

28. Any monies placed in the tip box at the craps table at Tin Lizzie's are divided among the employees. Johnson received a share of the tip proceeds from the night of September 19, 2016.

29. Johnson testified at the hearing regarding the incident. Johnson indicated that he did not know the identity of the player who was suspected of cheating. Johnson admitted that he was aware that the player was suspected of being a cheater and knew that South Dakota Gaming Commission agents were investigating the individual.

30. Johnson was cognizant of the fact that General Manager Burnham was in communication with the Commission regarding the suspected cheater.

31. Johnson never asked Burnham or anyone else at Tin Lizzie's if they knew the player's name so he could give the player his money back.

32. Johnson never asked Agent Snyder or anyone else at the Commission if they could identify the player.

33. Johnson admitted he made no effort to find out who the player was before taking the chips and putting them in the tip jar.

34. Johnson testified that on the night of the incident he was acting as the pit supervisor and claimed there was no one to whom he could report the incident to despite the fact that General Manager Austin Burnham was present. The Commission specifically finds that Johnson's testimony in this regard was not credible.

35. Johnson further testified that although in his formal answer to the Commission complaint he said that he had yelled to the player on the third time, it was a little louder than he usually talks. He then denied that he yelled to the player on the third attempt, but rather spoke up a little louder than his normal voice. The Commission finds that Johnson's testimony in this regard is not credible, particularly in view of the video of the incident, Johnson's answer to the Commission complaint where he claimed that he yelled to the player, and in view of his statement to Snyder during the interview where he made no mention of a second or third attempt to notify the player.



36. Johnson testified that on the evening of September 19, 2016, he had no direct supervisor at Tin Lizzie's despite the fact that General Manager Austin Burnham was present.

37. Johnson admitted that he did not report to Burnham that he took the player's chips and put them in the tip jar that evening.

38. Johnson knew on the night of September 19, 2016, that if he found a chip on the floor he would pick it up and give to the cage.

39. Johnson admitted that he took the chips and put them in the chip jar and knew he would ultimately receive a part of the tips.

40. Executive Secretary Larry Eliason also testified at the hearing.

41. Executive Secretary Eliason indicated that he had offered Johnson an opportunity to resolve the disciplinary matter through an informal consultation and Stipulation and Assurance of Voluntary Compliance. Executive Secretary Eliason indicated that the informal consultation took place at the Commission office in Deadwood on January 5, 2017, and that he had offered Johnson a 30-day suspension rather than taking the case to hearing. Johnson did not accept resolution of the matter through informal consultation.

42. Executive Secretary Eliason testified that there had been a prior incident involving Johnson that resulted in an Initial Complaint and a Stipulation and Assurance of Voluntary Compliance in August of 2015. At that time the allegation in the Complaint was Johnson had engaged in conduct constituting grounds for disciplinary action by not signing a statement requested by an enforcement agent. The result of this informal consultation was the entering into of a Stipulation and Assurance of Voluntary Compliance whereby Johnson surrendered his gaming support license for a period of 48 hours.

43. Following the informal consultation on January 5, 2017, at the Commission Office in Deadwood, Executive Secretary Eliason was approached by Johnson as Eliason was in a hallway at the front of the Commission office.

44. A surveillance video of this event from the Commission office was played at the hearing.

45. Also presented to the Commission was a transcript of the video of the January 5, 2017, incident which accompanied the video, and Eliason's memorandum of the incident, both contained within Exhibit 1.

46. Executive Secretary Eliason explained that when he was approached by Johnson, Johnson told him that "If you think I was a thief and dishonest there's his \$20." (Transcript of video, Exhibit 1.) Executive Secretary Eliason testified that Johnson then palmed a \$20 bill into his hand.

47. Executive Secretary Eliason then told Johnson he didn't want his \$20. Johnson responded, "Then why are you calling me a thief, because that is not my intention." (Transcript of video, Exhibit 1.)

48. Executive Secretary Eliason returned the \$20 bill to Johnson and told him that he had requested a hearing and, therefore, they would proceed to hearing and that the \$20 did not belong to him.

49. Executive Secretary Eliason testified that he was stunned by the incident and had never been approached by a licensee in such fashion and had never before had a licensee attempt to give him money.

50. As the matter was not resolved through informal consultation and based upon the Initial Complaint, Executive Secretary Eliason issued a Notice of Hearing dated January 18, 2017, scheduling the case to be heard on March 22, 2017.

51. In the Notice of Hearing, Johnson was advised that as a result of the hearing the Commission could revoke his license and place his name on the list of persons who are to be excluded or ejected from licensed gaming establishments.

52. Executive Secretary Eliason testified that the Notice of Hearing included a reference to potential placement on the Exclusion List due to the totality of the situation, including Johnson's prior offense, the fact that he stole money (took the chips of the player (Haddad) and placed them in the tip jar), the fact that Johnson stated that he yelled at the customer, the review of the video and it appearing that he had not yelled, and Johnson's attempting to slip Executive Secretary Eliason the \$20 bill. Eliason further testified that to protect the integrity of gaming in Deadwood, people with that attitude should not be licensed and should not participate in gaming.

53. Executive Secretary Eliason recommended that the Commission revoke Charles Johnson's license and place his name on the Exclusion List for such conduct.

54. The Commission finds that the actions of the Defendant, by taking the chips belonging to the player (Haddad) and placing them in the tip jar

without attempting to determine the player's identity, constituted dishonest or fraudulent conduct.

55. The Commission further finds that Johnson's statements to Agent Snyder, both in the interview as well as the answer to the Initial Complaint, and the handwritten statement form, wherein Johnson alleged that he repeatedly attempted and yelled to the unidentified player constitutes dishonest or fraudulent conduct, especially when viewed in light of the video evidence and Johnson's testimony.

56. The Commission further finds that even if Johnson was acting as a pit supervisor, Johnson should have reported the irregularity of the events of the evening to his next immediate supervisor, General Manager Austin Burnham, or had taken the chips to the cage and, therefore, did not comply with Gaming regulations or the Tin Lizzie's Casino's in-house policy.

Based upon the foregoing Findings of Fact, the Commission enters the following Conclusions of Law.

#### CONCLUSIONS OF LAW

1. That the Commission has jurisdiction over the parties and the subject matter herein.

2. That a hearing was held pursuant to the South Dakota Administrative Procedures Act, SDCL Ch. 1-26 and is a contested case pursuant to that Act.

3. That due, proper and legal notice was given to all parties and that all constitutional, statutory, and regulatory requirements for the hearing were met.

4. That ARSD 20:18:09:02 states "Any act, whether of the same or of a different character than specified in this article, that constitutes dishonesty or fraudulent conduct, whether arising within or without the pursuit of the license privilege, committed by a licensee is grounds for disciplinary action."

5. That ARSD 20:18:33:11 states "If any irregularity occurs, the dealer shall notify the box person or pit supervisor, who shall direct the dealer to take the most appropriate action which the box person or supervisor believes to be fair and equitable, and shall observe such action being taken. The box person or pit supervisor, **and not the dealer**, must make all decisions concerning disputed play or the payment or collection of wagers." (Emphasis added.)

6. The Commission finds that Defendant's actions in taking the chips of the unidentified player, placing them in the tip jar, and making no attempt to identify the player constitutes grounds for disciplinary action and is a violation of ARSD 20:18:09:02 as an act which constitutes dishonesty or fraudulent conduct.

7. That the Commission finds that the Defendant's actions in advising Agent Snyder during his interview as well as in his answer to the Commission complaint and in his handwritten statement wherein he alleged that he repeatedly notified the player that the chips were his and in fact "yelled" to the player constitute grounds for disciplinary action and is a violation of ARSD 20:18:09:02 as an act which constitutes dishonesty or fraudulent conduct, particularly when viewed in light of the video surveillance of the incident from the evening of September 19, 2016, as well as Johnson's testimony at the hearing.

8. The Commission further finds that Defendant's actions in not attempting to notify any supervisor or to take the chips to the cage violated Tin Lizzie's Casino's in-house policy and did not comply with ARSD 20:18:33:11 regarding irregularities on a craps table. In so finding, the Commission determined that the regulation is clear that a dealer must not make a decision concerning the payment or collection of wagers. Even though the Defendant was the pit supervisor, he was acting as the dealer in this instance and should have either notified General Manager Burnham or taken the chips to the cage.

9. That SDCL § 42-7B-61 states: "The commission may, by rules promulgated pursuant to chapter 1-26, provide for the establishment of a list of persons who are to be excluded or ejected from any licensed gaming establishment, including any person whose presence in the establishment is determined to pose a threat to the interest to the State of South Dakota or to licensed gaming, or both. In making the determination for exclusion, the commission may consider any of the following: . . . (4) Conduct that would adversely affect public confidence that gaming is conducted honestly. . . ."

10. That ARSD 20:18:08.01:02 states in pertinent part "The criteria to be applied by the commission to prepare a list of persons to be included on the exclusion list are the criteria set forth in SDCL 42-7B-61, any one of which is sufficient for placement of a person on the list. . . . The commission, in its discretion may establish evidence of conduct that would adversely affect public confidence that gaming is conducted honestly, as that term is used in SDCL subdivision 42-7B-61(4), by any one of the following criteria: . . . (1) The person's character, background, past activity is incompatible with the maintenance of public confidence and trust in the credibility, integrity, and stability of licensed gaming; . . . (3) The person's character, background, and

past activity could create or enhance a risk of the fact or appearance of unsuitable, unfair, or illegal practices, methods or activities in the conduct of gaming or in the business or financial arrangements incidental thereto; or (4) Any other factor reasonably related to the maintenance of public confidence in the efficacy of the regulatory process and the integrity of gaming operations and the gaming industry and its employees. . . .”

11. That ARSD 20:18:08.01:01 states in pertinent part that the Executive Secretary may recommend changes to the Exclusion List.

12. The Commission specifically finds that Defendant’s conduct as set forth herein is past activity which is incompatible with the maintenance of public confidence and trust in the credibility and integrity of licensed gaming.

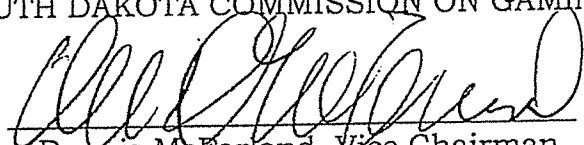
13. The Commission further specifically finds that the Defendant’s actions as set forth herein constitute past activity which could create or enhance a risk of the fact or appearance of unsuitable, unfair or illegal practices and activities in the conduct of gaming.

14. The Commission further specifically finds that the Defendant’s conduct herein amounts to conduct which could reasonably adversely affect the public confidence as to the integrity of gaming operations and the gaming industry and its employees, and therefore concludes that the Defendant has engaged in conduct that would adversely affect public confidence that gaming be conducted honestly and is therefore subject to both revocation of license and placement on the Exclusion List.

Dated this 13<sup>th</sup> day of April, 2017.

SOUTH DAKOTA COMMISSION ON GAMING

BY:

  
Dennis McFarland, Vice Chairman

STATE OF SOUTH DAKOTA  
DEPARTMENT OF REVENUE  
SOUTH DAKOTA COMMISSION ON GAMING

South Dakota Commission  
on Gaming,

Plaintiff,

-vs-

Charles Johnson  
SDCG Support License # A8365-14-SP,

Defendant.

No. 16-09-050-BS

**DECISION AND ORDER**

WHEREAS this matter having come on as a contested case hearing before the South Dakota Commission on Gaming on Wednesday, March 22, 2017, at City Hall, 102 Sherman Street, Deadwood, South Dakota, 57732, pursuant to a Notice of Hearing dated January 18, 2017, and

WHEREAS Defendant having personally appeared and also being represented through his attorney, Roger Tellinghuisen of Rapid City, South Dakota; the Plaintiff having appeared through its attorney, Michael F. Shaw of Pierre, South Dakota; Commission members present were Dennis McFarland, Karen Wagner and Karl Fischer; also present were Executive Secretary Larry B. Eliason and Gaming Commission Enforcement Agent Brandon Snyder; the Commission further noting that Defendant having held a gaming support license and an initial Complaint having been issued against the Defendant dated November 4, 2016, alleging that the Defendant had engaged in conduct constituting grounds for disciplinary action relating to an incident at a craps table at Tin Lizzie's Casino on or about September 19, 2016, where he was employed as a dealer; the Commission having entered Findings of Fact and Conclusions of Law, the same being attached hereto and specifically incorporated herein, and for other good cause shown

NOW, THEREFORE, the Commission on Gaming does hereby

ORDER, ADJUDGE AND DECREE that the gaming support license of Charles Johnson be revoked and that Charles Johnson's name be placed on the list of persons to be included on the Exclusion List.

Dated this 13<sup>th</sup> day of April, 2017.

SOUTH DAKOTA COMMISSION ON GAMING

BY:

  
Dennis McFarland, Vice Chairman

STATE OF SOUTH DAKOTA )  
 )  
COUNTY OF LAWRENCE )

IN CIRCUIT COURT  
  
FOURTH JUDICIAL CIRCUIT

SOUTH DAKOTA COMMISSION ON )  
GAMING, )

40CIV17-000131

Plaintiff, )

COURT'S FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

v. )

CHARLES JOHNSON )  
SDCG Support License # A8365-14-SP )

Defendant. )

**FINDINGS OF FACT**

1. Charles Johnson (hereinafter Johnson) has worked in the gaming industry in South Dakota for nearly three years. Prior to coming to South Dakota, Johnson had a gaming license and had worked in the gaming industry for approximately 13½ years in the State of Washington.
2. Johnson has been employed by Tin Lizzies in Deadwood since 2014.
3. Brandon Snyder (hereinafter Agent Snyder) is an Enforcement Agent with the Gaming Commission (hereinafter Commission).
4. Sometime prior to September 19, 2016, Agent Snyder was contacted by the general manager at Tin Lizzie's who notified him that there was a suspected "dice sliding" (i.e. cheating) issue at their craps table.
5. Agent Snyder went to Tin Lizzie's and reviewed video surveillance, and determined that it appeared that the suspect was, in fact, cheating at craps. Upon further investigation, Agent Snyder learned that the suspected cheater's name was Mark

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Haddad, and that Haddad previously had been charged with cheating crimes in both Colorado and Nevada.

6. During his investigation, Agent Snyder identified Haddad. It is undisputed that Agent Snyder specifically and intentionally did not inform anybody at Tin Lizzie's, including Johnson, of Haddad's identity because the investigation was "ongoing." Tin Lizzie's was advised that if Haddad came in to the establishment that they were to call the enforcement agent.
7. On September 19, 2016, Haddad again visited the Tin Lizzie's casino and commenced playing craps.
8. Tin Lizzie's general manager at the time, Austin Burnham, went to contact Agent Snyder and advise that the suspected craps cheater had returned. While he did, Johnson, who was acting pit boss, went and took over the craps table position known as the "stick person."
9. Thus, at some point during Johnson's shift on September 19, 2016 he was working as both the craps dealer and the "pit boss" or "pit supervisor."
10. Johnson was also still considered the pit supervisor. Another person was actually in the dealer position at that time. Johnson thereafter acted as the dealer and the pit supervisor.
11. Agent Snyder, on behalf of the Commission, acknowledged that Johnson was wearing "both hats" as the dealer and pit supervisor at the time.
12. For some reason, no one from the Commission responded to General Manager Austin Burnham's call the evening of September 19, 2016.

13. When it became clear that Commission Enforcement Agents were not going to respond to the call that Haddad was back at the casino, General Manager Austin Burnham, approached the table to talk to Haddad. Haddad was asked to leave the casino.
14. As Haddad vacated the casino, he left approximately \$20 in chips behind at the craps table. Haddad never came back.
15. Johnson did not know his name and never saw him again. None of the other employees at Tin Lizzies knew Haddad's identity either.
16. Johnson attempted to inform Haddad verbally that he was leaving chips behind.
17. Another unidentified player also attempted to get Haddad's attention regarding his remaining chips.
18. The September 19, 2016 video surveillance of the incident contains no audio to dispute or confirm Johnson's statement that he tried to alert Haddad that he was leaving chips.
19. Johnson, as the pit boss or pit supervisor, ultimately considered the chips abandoned and placed the chips in the tip jar.
20. On September 19, 2017 Tin Lizzies did not have a written policy regarding "found money" at the craps table.
21. Johnson testified that the rules for "found money" are different for each casino.
22. It is also undisputed that the Commission does not have a specific rule that deals with the matter of "found money."
23. After being divided up among the employees on duty that evening, Johnson would have received a total of \$1.05 from the \$20 sum that was placed in the tip jar.

24. Agent Snyder did not come to Tin Lizzie's to follow up on the cheating investigation until ten days later, on September 29, 2017. At that time, Snyder reviewed the video surveillance from September 19<sup>th</sup>. During his review of the video surveillance Agent Snyder noticed Haddad's abandoned chips had been picked up by Johnson and placed in the tip jar along with money that another player had left as a tip.
25. Agent Snyder interviewed Johnson about the incident he had viewed on the surveillance video. During that discussion, Johnson said that he had verbally attempted to notify Haddad three times that Haddad still had chips on the table. There is no audio on the video. Thus, there was no evidence presented to dispute Johnson's assertions.
26. Despite Johnson finding it was a "tip", Agent Snyder asked Johnson what Tin Lizzie's policy is regarding "found money" left on the table. Johnson said that if they knew who the player was, they were to hold the money and give it to the player once he or she returned.
27. Johnson stated that he "had never run into an instance where they did not know who the player was."
28. Agent Snyder attempted to determine from other employees what Tin Lizzie's in-house policy was concerning "found money" at a craps table.
29. Agent Snyder interviewed an individual named Tyler Stuen, who was the stick man on the craps table on September 19. As it concerns the policy for "found money" at the craps table at Tin Lizzie's, Stuen said "he didn't know." Snyder also talked with Donica Schumacher and the General Manager Austin Burnham. Agent Snyder testified that both Schumacher and Burnham told him that "if they know who the

player is they hold onto the money and return it to the player. If they don't, they take it to the cage."

30. There is no evidence in the record that Johnson knew that the alleged policy was to take the chips to the cage under these circumstances. Tin Lizzie did not have a policy.
31. Nobody from Tin Lizzie's testified or offered any evidence that Johnson violated any casino policy on "found money" in effect on September 19.
32. Agent Snyder followed up and requested Tin Lizzie's *written* policies concerning "found money" at the craps table. This was important to Snyder because what is supposed to happen with the "found money" is not governed by the Commission's rules and regulations, but is instead dictated by the casino's internal policies.
33. A written "found money" policy was not in effect on September 19, 2016. The written policy was dated October 21, 2016. This is a little over a month *after* the incident and thus not in effect at the time.
34. Agent Snyder ultimately submitted a complaint for disciplinary action against Johnson alleging that he violated certain rules and regulations. Agent Snyder brought an initial complaint alleging that Johnson engaged in fraudulent and dishonest conduct constituting grounds for disciplinary action by taking property of another and by not notifying the box person or pit supervisor of an irregularity in play.
35. Significantly, no evidence was produced that the money was not a "tip".

36. After the disciplinary Complaint had been filed, Johnson attended an “informal consultation” with Executive Secretary Larry B. Eliason at the Commission office in Deadwood on January 5, 2017.
37. During this “informal consultation”, Secretary Eliason offered to have Johnson enter into a Stipulation and Assurance of Voluntary Compliance that would have required a 30 day license suspension for Johnson.
38. This agreement would have required that Johnson waive his rights to a contested hearing.
39. Johnson, believing he did nothing wrong, did not accept this resolution of the matter through the informal consultation, and instead proceeded to the contested case hearing.
40. A contested case hearing was held in front of the Commission on March 22, 2017. The Commission’s Decision and Order were entered on April 13, 2017.
41. At the hearing, Secretary Eliason requested that the Commission revoke Johnson’s license and place his name on the Exclusion List. Thus, the prior recommendation of a 30 day suspension of the Secretary morphed into the most severe sanction possible by the time of the contested case hearing on March 22, 2017.
42. The Commission thereafter entered a decision adopting the recommendation of the Secretary. There had been no change in facts to warrant this increased penalty.
43. Johnson appealed and requested that the Commission’s decision be reversed.

#### **CONCLUSIONS OF LAW**

1. SDCL 1-26-36 states that the court “may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: ...

- (5) Clearly erroneous in light of the entire evidence in the record.
- (6) Arbitrary or capricious or characterized by abuse of discretion or Clearly unwarranted exercise of discretion.

2. No evidence was produced to show the money was not in fact left as a “tip”. The Commission’s findings assume and presuppose it to be found money despite complete lack of evidence.

3. The Commission erred in finding that Johnson violated any particular rule or regulation of the Commission or Tin Lizzie.

4. ARSD 20:18:33:11 which provides that:

If any irregularity occurs, the dealer shall notify the box person or the pit supervisor, who shall direct the dealer to take the most appropriate action which the box person or supervisor believes to be fair and equitable, and shall observe such action being taken. The box person or pit supervisor, and not the dealer, must make all decisions concerning disputed play or the payment or collection of wagers.

3. The Commission erred when it concluded that Johnson violated ARSD 20:18:33:11 concerning decisions made by the pit supervisor regarding irregularities. Johnson was pit supervisor at the time, and also stepped in as the dealer. This Court is not convinced there was an irregularity in the first place as the Commission excluded Johnson’s evidence that the money was a “tip”. No evidence was provided to show it was not a tip.

4. ARSD 20:18:33:11 does not by its terms address a situation where the pit supervisor and the dealer are the same person.

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5. “The construction of an administrative rule is a question of law which is fully reviewable by the court without deference to the agency determination.” Nelson v. South Dakota State Board of Dentistry, 464 N.W.2d 621, 624 (S.D. 1991). Administrative rules are subject to the same rules of construction as statutes. Id. (citing Hartpence v. Youth Forestry Camp, 325 N.W.2d 292 (S.D. 1982)). In reviewing an administrative agency’s decision, questions of law are reviewed *de novo*. In re: Establishment of Switched Access Rates for U.S. West Communications, Inc., 2000 SD 140, 618 N.W.2d 847. No deference is given to the agency’s conclusions of law. Dakota Truck Underwriter’s v. South Dakota Subsequent Injury Fund, 2004 SD 120, 689 N.W.2d 196.

6. The court’s function is to “declare the meaning of [the rule] as clearly expressed.” Martinmaas v. Engelmann, 2000 SD 85, ¶49, 612 N.W.2d 600. Words are to be given their “plain meaning and effect,” and the court is to determine the intent of the rule is determined by what the Commission said, rather than what the court thinks it should have said. Id.

7. ARSD 20:18:33:11 has two sentences. The second sentence does not apply because this incident does not involve a decision concerning “disputed play” or the “payment or collection of wagers.”

8. Regarding the existence of an “irregularity,” ARSD 20:18:33:11 states that the dealer shall notify the pit supervisor, and that the pit supervisor shall direct the most appropriate action. The rule clearly expresses “pit supervisor”. Johnson was the pit supervisor. The Commission erred as a matter of law when it concluded that this rule had been violated. The Commission cannot read in responsibilities that are not expressly stated. ARSD 18:33:11 does not specify what Johnson should have done acting contemporaneously as pit supervisor and dealer.

9. The Court concludes that Tin Lizzie had no policy regarding “found money” left at the craps table during the time of this incident on September 19, 2016. Found money is not governed by the Commission’s rule but instead by the individual casino’s internal policy. The Court sets aside these findings as clearly erroneous.

10. The Court concludes that the Gaming Commission had no rule on “found money”. Thus, Johnson violated no rules or regulations of either the Gaming Commission or Tin Lizzie.

11. . If the issue is a question of law, then the agency’s actions are fully reviewable. Gordon v. St. Mary’s Health Care Center, 2000 SD 130, ¶ 16, 617 N.W.2d 151. As it concerns a review of findings, the court will reverse if “after careful review of the entire record, [the court is] definitely and firmly convinced that a mistake has been made.” Id.; citing Wagaman v. Sioux Falls Construction, 1998 SD 27, ¶ 12, 576 N.W.2d 237, 240.

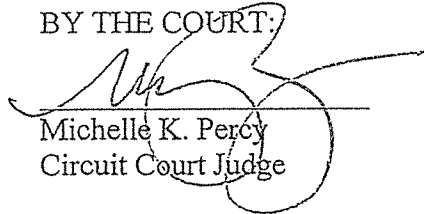
12. The Commission acted arbitrarily, capriciously and abused its discretion when it revoked Charles Johnson’s gaming license and placed him on the Exclusion List. Secretary Eliason initially offered Johnson the sanction of a 30 day license suspension based upon these exact same facts. This offer was extended on January 5, 2017, a time at which all of the facts offered at the contested case hearing were known. That recommendation then morphed into the most severe sanction possible by the time of the contested case hearing on March 22, 2017. The only thing that changed during that time frame was that Johnson exercised his right to a hearing as allowed pursuant to the applicable statutes and procedures.

13. The decision of the Commission is hereby: REVERSED. SDCL 1-26-36(6).





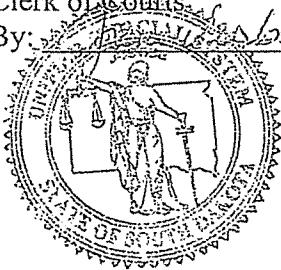
Dated this 19 day of September, 2017.

BY THE COURT:

  
Michelle K. Percy  
Circuit Court Judge

ATTEST:

  
Clerk of Courts  
By:  Deputy



FILED

SEP 20 2017

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM  
4TH CIRCUIT CLERK OF COURT

CERTIFICATE OF SERVICE

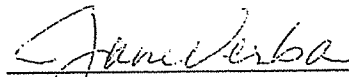
I, Jane Verba, Lawrence County Deputy Clerk, do hereby certify that I mailed a true and correct copy of the Court's Findings of Fact and Conclusions of Law in the above entitled case to:

Michael Shaw  
503 S Pierre St.  
Pierre, SD 57501

Michael Wheeler  
PO Box 1820  
Rapid City, SD 57709

by first class mail, postage prepaid.

Dated this 20<sup>th</sup> day of September, 2017.



Jane Verba  
Deputy Clerk



FILED

B-23  
SEP 20 2017

SOUTH DAKOTA JUDICIAL SYSTEM  
4TH CIRCUIT CLERK OF COURT



**20:18:09:02. Proscribed conduct.** Any act, whether of the same or of a different character than specified in this article, that constitutes dishonesty or fraudulent conduct, whether arising within or without the pursuit of the license privilege, committed by a licensee is grounds for disciplinary action.

**Source:** 16 SDR 57, effective October 1, 1989.

**General Authority:** SDCL 42-7B-7.

**Law Implemented:** SDCL 42-7B-1, 42-7B-2, 42-7B-3, 42-7B-7, 42-7B-24, 42-7B-25, 42-7B-32, 42-7B-33, 42-7B-34.

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**20:18:33:11. Irregularities.** If any irregularity occurs, the dealer shall notify the box person or pit supervisor, who shall direct the dealer to take the most appropriate action which the box person or supervisor believes to be fair and equitable, and shall observe such action being taken. The box person or pit supervisor, and not the dealer, must make all decisions concerning disputed play or the payment or collection of wagers.

**Source:** 41 SDR 218, effective July 1, 2015.

**General Authority:** SDCL 42-7B-7, 42-7B-11(13).

**Law Implemented:** SDCL 42-7B-1, 42-7B-11(13).

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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

SOUTH DAKOTA COMMISSION ON	)	
GAMING,	)	Appeal No. #28436
	)	
APPELLANT,	)	
	)	
vs.	)	
	)	
CHARLES JOHNSON,	)	
SDCG Support License #A8365-14-SP	)	
	)	
APPELLEE.	)	

---

APPEAL FROM THE CIRCUIT COURT  
FOURTH JUDICIAL CIRCUIT  
LAWRENCE COUNTY, SOUTH DAKOTA

---

THE HONORABLE MICHELLE K. PERCY  
CIRCUIT COURT JUDGE

---

BRIEF OF APPELLEE

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NOTICE OF APPEAL FILED OCTOBER 25, 2017

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## **PRELIMINARY STATEMENT**

References to documents and testimony in the administrative record will be supported by a citation to AR, along with the corresponding page number(s) (“AR\_\_\_\_\_”). Citations to the South Dakota Commission on Gaming’s Findings of Fact and Conclusions of Law will be to “CGFOF/CGCOL”. The Circuit Court’s Findings of Fact and Conclusions of Law will be denoted as “CCFOF/CCCOL.” The transcript of the hearing held before the South Dakota Gaming Commission is referenced as “Tr.” Followed by the applicable page number(s).

The Appellant South Dakota Commission on Gaming is referred to as the “Commission.” Appellee Charles Johnson is “Johnson.”

## **JURISDICTIONAL STATEMENT**

Johnson agrees that the Notice of Appeal was timely filed, and that this Court has jurisdiction. SDCL 1-26-37, SDCL 15-26A-3 and SDL 15-26A-6.

## **STATEMENT OF LEGAL ISSUES**

**I. Whether the Commission erred when it determined that Johnson acted dishonestly or fraudulently under ARSD 20:18:09:02.**

The Circuit Court reversed the Commission’s decision in its entirety.

**II. Whether the Circuit Court erred when it reversed the Commission’s decision that Johnson violated ARSD 20:18:33:11.**

The Circuit Court reversed the Commission’s decision that Johnson violated ARSD 20:18:33:11.

**III. Whether the Circuit Court erred when it reversed the Commission’s decision that Johnson violated an in-house policy of Tin Lizzie’s Casino.**

The Circuit Court reversed the Commission’s decision that Johnson violated an in-house policy at Tin Lizzie’s Casino.

**IV. Whether the Circuit Court erred when it reversed the Commission's decision on the ground that it was arbitrary, capricious, and an abuse of discretion.**

The Circuit Court concluded that the Commission's decision was arbitrary, capricious and an abuse of discretion.

Most relevant authorities:

SDCL 1-26-36

ARSD 20:18:33:11

Nelson v. South Dakota Board of Dentistry, 464 N.W.2d 621, 624 (S.D. 1991)

Martinmaas v. Engelmann, 2000 SD 85, 612 N.W.2d 600

**STATEMENT OF THE CASE**

This case involves an appeal of the circuit court's Order reversing the Commission's decision that revoked Johnson's gaming license and placed his name on the Exclusion List. The matter proceeded as a contested case administrative hearing before the Commission on Wednesday, March 22, 2017, pursuant to a Complaint that Johnson had engaged in conduct constituting grounds for disciplinary action relating to an incident that occurred September 19, 2016 at a craps table at the Tin Lizzie's Casino in Deadwood, South Dakota. Despite the fact that the Commission, through its Executive Secretary Larry Eliason, previously had offered Johnson a thirty-day license suspension for this incident, after the contested case hearing and with no additional facts having been brought to light, the Commission decided that it would follow Secretary Eliason's revised recommendation that Johnson's gaming license be permanently revoked, and that he be placed on the "exclusion list" pursuant to SDCL 42-7B-61 and ARSD 20:18:01:02, thus precluding him from ever working in or even entering a casino. Johnson has supported himself as a casino worker for over sixteen (16) years.

Johnson appealed Commission's decision to the Circuit Court, which appeal was heard on June 12, 2017, the Honorable Michelle Comer, presiding. Judge Comer reversed the Commission's decision, entering Findings of Fact and Conclusions of Law on September 20, 2017. Judge Comer concluded that the Commission erred in finding that Johnson violated any rule or regulation of the Commission or his employer, Tin Lizzie's Casino. CCCOL 3. The circuit court further concluded that the Commission acted arbitrarily, capriciously, and abused its discretion when it revoked Johnson's gaming license and placed him on the exclusion list. CCCOL 12. On this issue, the trial court concluded

The Commission acted arbitrarily, capricious and abused its discretion when it revoked Charles Johnson's gaming license and placed him on the Exclusion List. Secretary Eliason initially offered Johnson the sanction of a 30 day license suspension based upon these exact same facts. This offer was extended on January 5, 2017, a time at which all of the facts offered at the contested case hearing were known. That recommendation then morphed into the most severe sanction possible by the time of the contested case hearing on March 22, 2017. The only thing that changed during that time frame was that Johnson exercised his right to a hearing as allowed pursuant to the applicable statutes and procedures.

CCCOL 12. The Commission is now appealing that decision. Johnson respectfully requests that the Circuit Court be affirmed.

### **STATEMENT OF FACTS**

This case arises out of an incident that occurred at the Tin Lizzie's Casino in Deadwood on September 19, 2016. The facts center around and involve the handling of \$20 worth of gambling chips that were left behind by a suspected cheater as he was being removed from the craps table.

At the time of the contested case hearing, which was held on March 22, 2017, Johnson had worked in the gaming industry in South Dakota for nearly three years. Tr. 66

(AR 139). Prior to coming to South Dakota, Johnson had a gaming license and had worked in the gaming industry for approximately 13½ years in the State of Washington. Tr. 66 (AR 139). He has been employed by Tin Lizzie's in Deadwood since 2014, and on September 19, 2016 Johnson was working as both the craps dealer and the "pit boss" or "pit supervisor." Tr. 67-68 (AR 140-141).

Brandon Snyder is an Enforcement Agent with the Commission. Tr. 3. Sometime prior to September 19, 2016, Agent Snyder was contacted by the general manager at Tin Lizzie's and was notified that there was a suspected "dice sliding" (i.e. cheating) issue at their craps table. Tr. 5. Agent Snyder went to Tin Lizzie's and reviewed video surveillance, and determined that it appeared that the suspect was, in fact, cheating at craps. Tr. 5. Upon further investigation, Agent Snyder learned that the suspected cheater's name was Mark Haddad, and that Haddad previously had been charged with cheating crimes in both Colorado and Nevada. Tr. 5 (AR 78).

During his investigation, Agent Snyder conducted a photo lineup with various Tin Lizzie employees for identifying Haddad and determining whether he had been in the casino. Tr. 5 (AR 78); CGFOF 5. Johnson was not present for any of these photo line ups. CTFOF 5. It is undisputed that Agent Snyder specifically and intentionally did not inform anybody at Tin Lizzie's, including Johnson, of Haddad's identity because the investigation was "ongoing." CGFOF 5. Tin Lizzie's was advised that if Haddad again came in to the establishment, they immediately were to contact the enforcement agent.

On September 19, 2017, Haddad again visited the Tin Lizzie's casino and commenced playing craps. Tr. 6, 68 (AR 79, 141). Tin Lizzie's general manager at the

time, Austin Burnham, contacted Agent Snyder<sup>1</sup> and advised that the suspected craps cheater had returned. Tr. 6, 68. For some reason, the Commission's enforcement agent(s) did not respond to the call on that evening of a person suspected of cheating on craps tables in Deadwood, South Dakota. See Tr. 68:17-24 (AR 141). It is entirely and completely undisputed that Johnson was the "pit boss" or "pit supervisor" at this time. Tr. 27, 35:23-36:3; 68:2-3; 69:17-19 (AR 100, 108-109, 141).

While general manager Burnham called the Commission's enforcement agents concerning Haddad's presence and suspected cheating in the casino on September 19, 2016, Johnson went to take over the craps table position known as the "stick person." Tr. 68 (AR 141). Johnson was also still considered the pit supervisor. Tr. 68 (AR 141). Another person was actually in the dealer position at that time. Tr. 69 (AR 142). Johnson thereafter acted as the dealer and the pit supervisor. Tr. 69 (AR 142); see also Tr. 35-36 (AR 108-109). Agent Snyder, on behalf of the Commission, acknowledged that Johnson was wearing "both hats" as the dealer and pit supervisor at this time. Tr. 35:23-36:6 (AR 108-109).

When it became clear that Commission enforcement agents were not going to respond to the call that Haddad was back at the casino, general manager Burnham then approached the table to talk to Haddad and asked him to leave the casino. Tr. 11, 69 (AR 84, 142). As he vacated the casino, Haddad left approximately \$20 in chips behind at the craps table. Tr. 70-72 (R 43-145). The specifics concerning the chips left behind are detailed by Agent Snyder at Tr. 10-14 (AR 83-87). Haddad had left three \$5 chips "on

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<sup>1</sup> Although Snyder was involved in the investigation, he could not remember whether he or another agent was contacted. Tr. 6.

the nine,” a \$4 active bet and a \$1 tip. Tr. 11-12 (AR 84-85). As Haddad was leaving, Johnson told Haddad that his money was his money in the tray. AR 31. Johnson picked these chips up, placed them off to the side of the bank with a “lammer” on top of them. Tr. 13 (AR 86). Haddad never came back. Johnson did not know his name and never saw him again. Tr. 72 (AR 145). None of the other employees at Tin Lizzies knew Haddad’s identity either.

In his written statement and in his testimony, Johnson stated that he attempted to inform Haddad verbally that he was leaving chips behind. Tr. 70 (AR 143, AR 31). Another unidentified player also attempted to get Haddad’s attention regarding his chips. Tr. 70 (AR 143). As specifically noted by the circuit court in its findings of fact and conclusions of law, the September 19, 2016 video surveillance contains no audio. CCFOF (AR 145, AR 25). Johnson ultimately placed the chips into the tip box. Tr. 72 (AR 145).

So after the second customer left the table, I determined that the guy who – I didn’t know who he was, so I considered those chips abandoned. And then so I dropped them as tips with the other tips that were received.

Tr. 72 (AR 145).

At this time, Tin Lizzie’s did not have any written policies regarding “found money” at the craps table under the type of circumstance that had just occurred. Johnson testified that the rules are different for each casino. Tr. 28-29 (AR 101-102). It is also undisputed that the Commission does not have a specific rule that deals with the matter of “found money.” Tr. 24:3-25:8 (AR 97-98). Agent Snyder testified as follows:

Q: OK. And there is not a specific rule that deals with found money in the Gaming Commission rules, isn’t that correct?

A: Not that I am aware of.

Tr. 24 (AR 97).

Q: ... And could you find for me the section in the rules that specifically deal with how found money is to be treated?

A: Is this Tin Lizzie's Appendix A?

Q: No. This is the South Dakota Commission on Gaming Rules and Appendices. That's – what I asked my first question, is there a specific rule within the Gaming Commission rules that deals with the matter of found money?

A: There is not.

Q: There's not, ok. Good enough.

Tr. 24:23-25-9 (AR 97-98).

Clearly, then, Johnson was not violating a Commission rule when he placed the chips in the tip box. That is because no such rule exists. Johnson testified that he has seen situations where they drop abandoned chips on tables into tip boxes. Johnson has seen chips put directly into the tray, and has “had all kinds of incidences where that has happened directly.” Tr. 76 (AR 149). Johnson did not think he was stealing Haddad's money when he placed it in the tip box. Johnson testified:

Q. Ok. What was your understanding with respect to Tin Lizzie's written policies regarding found money at the craps table and the type of circumstance that you've just described here today?

A. As far as I know, there was actually not a written policy for any of this. I just did what I did based on experience.

Tr. 72-73 (AR 145-146)

After being divided up among the employees on duty that evening, Johnson would have received a total of \$1.05 from the \$20 sum that was placed in the tip box. Tr. 75 (AR 148). Regardless of how the chips were placed on the table at the time he was asked to



leave the casino, the circuit court found that there was no evidence presented by the Commission that Haddad did not intend to leave the chips behind as a tip. CCFOF 35.

Agent Snyder did not come to Tin Lizzie's to follow up on the cheating investigation until ten days later, on September 29, 2017. Tr. 37, 44 (AR 110, 117); CGFOF 7. At that time, Snyder reviewed the video surveillance of the September 19<sup>th</sup> Haddad cheating incident. CGFOF 7. It was during his review of the video surveillance that Agent Snyder noticed the chips Haddad left behind being picked up by Johnson and ultimately being placed in the tip box along with money that another player had left as a tip. Tr. 15 (AR 88).

Agent Snyder interviewed Johnson about the incident he had viewed on the surveillance video. Tr. 16 (AR 89). During that discussion, Johnson said that he had verbally attempted to notify Haddad three times that Haddad still had chips on the table. Id.; see also SDCG 28-29; 31 (AR 101-102; 104). Snyder also claims that he asked Johnson what Tin Lizzie's policy was regarding "found money" left on the table. Johnson said that if they knew who the player was, they were to hold the money and give it to the player once he or she returned. Id. Johnson stated that he "had never ran into an instance where they did not know who the player was." Tr. 16:13-14 (AR 89).

Snyder also attempted to determine from other employees what Tin Lizzie's in-house policy was concerning "found money" at a craps table. Tr. 20 (AR 93); see also AR 26-27. This was important to Snyder because, as referenced above, the Commission itself has not such rule or regulation on the handling of alleged "found" or "abandoned" chips. Snyder interviewed an individual named Tyler Stuen, who was the stick man on the craps table on September 19. Tr. 20 (AR 93); AR 26-27. As

it concerns the policy for “found money” at the craps table, Stuen said “he didn’t know.” Tr. 20:22 (AR 93).

Snyder also talked with Donica Schumacher and general manager Burnham. Tr. 20 (AR 93). Snyder testified that both Schumacher and Burnham told him that “if they know who the player is they hold onto the money and return it to the player. If they don’t, they take it to the cage.” Tr. 21:3-5 (AR 94). In other words, according to what is claimed to have been Tin Lizzie’s verbal policy at the time, which is controlling in this instance, had Johnson brought the \$20 in chips to the cage, for the casino to keep, instead of placing it in the tip box, there would have been no violation of any gaming regulation or casino policy. Tr. 28 (AR 101).

There is absolutely no evidence in the record that Johnson knew of an alleged Tin Lizzie in-house policy to take the chips to the cage under these circumstances. The circuit court found that Tin Lizzie’s did not have such a policy. CCFOF 30. *In fact, no witness, whether from Tin Lizzie’s or elsewhere, testified or offered any evidence that Johnson violated a Tin Lizzie policy in effect on September 19.*

During the course of his investigation, Agent Snyder requested Tin Lizzie’s *written* policies concerning “found money” at the craps table. Tr. 28 (AR 101). Again, this was important to Snyder because what is supposed to happen with the “found money” is not governed by the Commission’s rules and regulations, but is instead dictated by the casino’s internal policies. Tr. 28:3-14 (AR 101).

Q: Ok. With regards to, again, your statements about what should happen with this found money, if those chips had been taken to the cage, what would have happened to them then?

A: That’s based on their policies.

Q: Their policy?

A: Correct.

Q: Ok. And if their policy is that they don't know the name of the customer, can't identify the customer, it goes back into their chip inventory, that's ok. Right?

A: If that's what their policy says.

Tr. 28 (AR 101); see also Tr. 23:25-24:6 (AR 96-97).

Q: Ok. With respect to the chips, if Tin Lizzie's had a rule that's how those chips should have been handled, that wouldn't have been a violation of the gaming rule then, would it have not?

A: It would not.

Tr. 34:2-6 (AR 107); see also 24:23-25:9 (AR 97-98) (stating that there is no Gaming Commission policy on found money).

Austin Burnham apparently told Agent Snyder that there was a written "found money" policy in effect on September 19, 2016. Tr. 28:24-25 (AR 101). According to Agent Snyder, however, even though he had requested a copy of the policy more than once, "it never showed up." Tr. 29:1-3 (AR 102). Snyder did not receive a written policy until a later date. *Id.*; see also Exhibit 3, AR 32. The written policy that Snyder ultimately received, however, was dated October 21, 2016. This is a little over a month *after* the incident. Tr. 29-30, 74 (AR 102-103, 147).

Snyder ultimately submitted a complaint for disciplinary action against Johnson alleging that he violated certain rules and regulations. Snyder brought an initial complaint Johnson alleging that Johnson engaged in fraudulent and dishonest conduct constituting grounds for disciplinary action by taking property of another and by not notifying the box person or pit supervisor of an irregularity in play. CCFOF 21; see also *Complaint AR 33-*

35. Specifically, the Complaint lodged by the Commission against Johnson alleges that “By taking the property of another and not notifying the box person or pit supervisor of an irregularity Charles Johnson has violated ARSD 20:18:09:02 and ARSD 20:18:33:11.” These are the allegations, then, upon which this contested case matter proceeded.

After the disciplinary Complaint had been filed, Johnson attended an “informal consultation” with Executive Secretary Larry B. Eliason at the Commission office in Deadwood on January 5, 2017. CGFOF 41; Tr. 49 (AR 122). During this “informal consultation”, Secretary Eliason offered to have Johnson enter into a Stipulation and Assurance of Voluntary Compliance that would have required a 30-day license suspension. CGFOF 41; Tr. 50 (AR 123). This agreement would have required that Johnson waive his rights to a contested hearing. CGFOF 41. Johnson, believing he did nothing wrong, did not accept this resolution of the matter through the informal consultation, and instead proceeded to the contested case hearing. Id.

At the hearing, however, Secretary Eliason requested that the Commission revoke Johnson’s license and place his name on the exclusion list. Tr. 56:11-15 (AR 129). The Commission thereafter entered a decision adopting this recommendation, finding that Johnson acted in a manner that constitutes dishonesty or fraudulent conduct, and that he violated rules regarding “irregularity.”

Johnson appealed to the circuit court. Judge Comer reversed the Commission’s decision, finding that there was no Commission or in-house Tin Lizzie policy that existed or that was violated by Johnson, and that the Commission’s decision to impose the most severe sanction possible on Johnson by revoking Johnson’s license and placing him on the exclusion list constituted an abuse of discretion and was arbitrary and capricious.

Johnson respectfully requests that the circuit court be affirmed. CCCOL 8, 12.

### **STANDARD OF REVIEW**

The interpretation of an administrative rule is a question of law which is fully reviewable by the Court without deference to an agency determination. Nelson v. South Dakota Board of Dentistry, 464 N.W.2d 621, 624 (S.D. 1991). Administrative rules are subject to the same rules of construction as statutes. Id. All questions of law are reviewed de novo. In Re Establishment of Switched Access Rates for U.S. West Communications, Inc., 2000 S.D. 140, 618 N.W.2d 847. No deference is given to an agency's conclusions of law. Dakota Truck Underwriters v. South Dakota Subsequent Injury Fund, 2004 S.D. 120, 689 N.W.2d 196. The Supreme Court's review of agency decisions is the same as the review made by the Circuit Court. Black v. Division of Criminal Investigation, 2016 S.D. 82, ¶ 13, 887 N.W.2d 731-735-736. Questions of fact are reviewed under the clearly erroneous standard. Application of Northwestern Bell Telephone Company, 382 N.W.2d 413 (S.D. 1986). Foley v. State X. Rel. S.D. Real Estate Commission, 1999 SD 101, ¶ 6, 598 N.W.2d 217, 219. Findings of Fact can be reversed if the reviewing Court is left with a "definite and firm conviction that a mistake has been committed". Osman v. Karlen and Associates, 2008 S.D. 16, ¶ 15, 746 N.W.2d 437, 443. "Mixed questions of law and fact are also fully reviewable." In re: Setliff, 2002 SD 58, ¶ 12, 645 N.W.2d 601, 604.

Much like the suspension or revocation of a professional's license, the revocation of Johnson's license and his placement on the exclusion list "carries with it dire consequences." In re: Setliff, 2002 SD 58 at ¶ 23. It not only involves "necessarily disgrace and humiliation," but also necessarily means the end of Johnson's employment. Id. A trial court may reverse or modify an agency decision if the substantial rights of the

appellant have been prejudiced because the administrative findings, inferences, conclusions are arbitrary or capricious or otherwise characterized by abuse of discretion or a clearly unwarranted exercise of discretion. SDCL 1-26-36.

### **ARGUMENT AND AUTHORITIES**

The Commission starts its argument by laying out a brief history of gaming in South Dakota, and the authority delegated to the Commission as it concerns managing and licensing individuals in the gaming industry. *Appellant's Brief*, p. 14-15. Johnson does not dispute that the industry's success depends upon public confidence and trust that licensed gaming will be conducted honestly. Nor does Johnson take issue with the statement that the Commission is mandated to uphold public confidence and trust in the industry.

The Commission's decisions in this regard, however, are not untethered from the Rules of Administrative Procedure. SDCL 1-26. In other words, despite the importance of the Commission's tasks as it concerns gaming in South Dakota, its decisions are not unreviewable. Indeed, every administrative agency has important decisions to make, even as it concerns licensing, and otherwise, all of which are subject to review pursuant to the Rules of Administrative Procedure set forth at SDCL 1-26. These include the right to a contested case hearing, and an avenue to appeal a decision of the Commission to the Circuit Court and ultimately to the Supreme Court. The rules of administrative procedure specifically state that the Commission's decision can be reversed based upon errors of law, erroneous findings of fact, and can be reversed in the event the circuit court determines the Commission acted arbitrarily, capriciously, or otherwise abused its discretion SDCL 1-26-36.

**I. The Commission erred when it determined that Johnson acted dishonestly or fraudulently under ARSD 20:18:09:02.**

The Commission argues that Johnson acted in a manner that “constitutes dishonesty or fraudulent conduct” in violation of ARSD 20:18:09:02. This argument is supported by the allegation that Johnson: 1) “took the chips of a player and placed them in the tip box”, and 2) by “making multiple inconsistent statements during the investigation.” *Appellant’s Brief*, pg. 16-22. The Commission argues that the circuit court never addressed this issue.

The facts supporting and explaining the placing of the chips in the tip box is set forth in greater detail in this brief. Importantly, as it concerns the Commission’s argument that Johnson acted dishonestly or fraudulently, the circuit court found and concluded that Johnson did not violate any Commission regulation or policy of Tin Lizzie’s. CCCOL 3. That is because Johnson was the pit supervisor, or “pit boss”, at the time of the incident. ARSD 20:18:33:11 specifically states that Johnson as the pit supervisor has the discretion to make decisions in this regard. The court found there was no policy of Tin Lizzie’s addressing this circumstance, and it is undisputed that there is no rule or regulation from the Commission addressing this specific issue. Accordingly, the Commission’s argument that Johnson’s conduct when, as the pit supervisor, deciding to place the chips in a tip jar constitutes fraudulent and dishonest conduct is entirely incorrect, and is not supported by the facts in that it did not violate any applicable rules or regulations. Indeed, if Johnson was the pit supervisor and had the authority to make the decision pursuant to the express rules of the Commission, then as a matter of law this action cannot constitute fraudulent and dishonest conduct by placing the chips left behind by a cheater in a tip jar that when ultimately divided among all of the employees resulting in \$1.05 for Mr. Johnson.

The Commission supports its allegation of fraudulent and dishonest conduct by arguing that Johnson supposedly made “multiple inconsistent statements” during the investigation. *Appellant’s Brief*, p. 20. First of all, this is not an allegation stated in the formal Complaint brought against Johnson. AR 33-34. That Complaint alleges that Johnson acted fraudulently and dishonestly by 1) taking the property of another, and 2) not notifying the pit boss or pit supervisor of an irregularity. *Id.* Moreover, the Commission’s findings are belied by a review of the entire record. As the circuit court found, for example, there is no audio on the surveillance video relied upon by the Commission to refute Johnson’s statement that he attempted to advise Haddad that he was leaving chips behind. CCFOF 18. Indeed, this is undisputed. Additionally, the circuit court found that the Commission presented no evidence that Haddad, the suspected cheater, did not intend to leave the chips behind as a tip when he left the casino. CCFOF 35; CCCOL 3. The circuit court also concluded that Johnson did not violate any rule of the Commission or of Tin Lizzie’s. CCCOL 3.

As it concerns the argument that the circuit court “never addressed” this issue, it is clear that Judge Comer reversed *the entirety* of the Commission’s decision, which necessarily includes this particular finding of fraudulent and dishonest conduct. CCCOL’s Judgment. Moreover, this finding of the Commission is intertwined with and based upon the exact same set of facts that pertain to the allegation that Johnson violated certain rules or regulations of the Commission and/or Tin Lizzie’s, all as addressed further in this brief. In accordance with SDCL 1-26-36, circuit court entered its own Findings of Fact and Conclusions of Law. “A court shall enter its own Findings of Fact and Conclusions of Law or may affirm the findings and conclusions entered by the agency as part of its



judgment.” SDCL 1-26-36. The circuit court in this instance entered sufficient findings of fact and conclusions of law to support its reversal of the Commission’s decision.

**II. The Circuit Court correctly concluded that the Commission erred in concluding that Johnson violated ARSD 20:18:33:11 concerning decisions made by the pit supervisor regarding irregularities.**

The Commission found that Johnson violated ARSD 20:18:33:11. This administrative rule provides that

If any irregularity occurs, the dealer shall notify the box person or the pit supervisor, who shall direct the dealer to take the most appropriate action which the box person or supervisor believes to be fair and equitable, and shall observe such action being taken. The box person or pit supervisor, and not the dealer, must make all decisions concerning disputed play or the payment or collection of wagers.

The Commission entered the following Conclusion of Law:

8. Defendant’s actions in not attempting to notify any supervisor or to take the chips to the cage violated Tin Lizzie Casino’s in-house policy and did not comply with ARSD 20:18:33:11 regarding irregularities on a craps table. In so finding, the Commission determined that the regulation is clear that a dealer must not make a decision concerning the payment or collection of wagers. Even if the defendant was the pit supervisor, he was acting as the dealer in this instance and should have even notified general manager Burnham or taken the chips to the cage.

CGCOL 8, AR 62.

This is clearly a question of law for the court. It was a question of law for the circuit court, and is a question of law for this court. The facts are undisputed as it concerns Johnson’s status at the time of the incident. Johnson was pit supervisor at the time. This fact is admitted by Agent Snyder. Tr. 27:20-28:1; 35-36 (AR 100-101; 108-109).

Q: Ok. Who was the pit supervisor at that time?

A: Mr. Johnson was.

Q: Ok. So effectively he was wearing both hats at that time?

A: Correct.

Q: Ok. So technically there was no pit supervisor to report this to have a decision made as to the most fair and equitable way to handle this situation beside Mr. Johnson?

A: Not right then.

Tr. 36:2-10 (AR 109).

ARSD 20:18:33:11 does not by its express terms even address a situation where the pit supervisor and the dealer are the same person. This is a serious matter involving the revocation of a gaming license and thus Johnson's present livelihood. The Commission should is not be allowed to read its administrative rules in any manner it wants. As Judge Comer concluded, the Commission should not be allowed to read responsibilities and obligations into rules that are not expressly stated, and then find a violation of those non-existent responsibilities to revoke an individual's gaming license. See CCCOL 8 ("The Commission cannot read in responsibilities that are not expressly stated.")

"The construction of an administrative rule is a question of law which is fully reviewable by the court without deference to the agency determination." Nelson v. South Dakota State Board of Dentistry, 464 N.W.2d 621, 624 (S.D. 1991). Administrative rules are subject to the same rules of construction as statutes. Id. (citing Hartpence v. Youth Forestry Camp, 325 N.W.2d 292 (S.D. 1982)). In reviewing an administrative agency's decision, questions of law are reviewed *de novo*. In re: Establishment of Switched Access Rates for U.S. West Communications, Inc., 2000 SD 140, 618 N.W.2d 847. No deference

is given to the agency's conclusions of law. Dakota Truck Underwriter's v. South Dakota Subsequent Injury Fund, 2004 SD 120, 689 N.W.2d 196.

This rule does not even does not even appear to be applicable to these facts and circumstances. This is a simple matter of Administrative Rule construction, which is subject to the same rules as statutory construction. In that regard, the court's only function is to "declare the meaning of [the rule] as clearly expressed." Martinmaas v. Engelmann, 2000 SD 85, ¶49, 612 N.W.2d 600. Words are to be given their "plain meaning and effect," and the court is to determine the intent of the rule is determined by what the Commission said, rather than what the court thinks it should have said. Id.

ARSD 20:18:33:11 has two sentences. The second sentence can be entirely disregarded under these facts because this does not involve a decision concerning "disputed play" or the "payment or collection of wagers." As it concerns the existence of an "irregularity," ARSD 20:18:33:11 states that the dealer shall notify the pit supervisor, and that the pit supervisor person shall direct the most appropriate action. Again, Johnson was the pit supervisor. The Commission erred as a matter of law when it concluded that this rule had been violated. The circuit court correctly reversed the Commission, and correctly concluded that Johnson did not violate ARSD 20:18:33:11.

This administrative rule at issue should have been strictly and narrowly construed by the Commission. That is because it is necessary for Johnson to have a license to continue working in the gaming industry. "If it is necessary to procure a license in order to carry on a chosen profession or business, the power to revoke a license once granted is penal and should be strictly construed." Wolfenbarger v. Hennessee, 520 P.2d 809, 811, (OK 1974).

Here, the Commission instead employed a broad reading of ARSD 20:18:33:11, concluding that it pertains to a situation such as this where Johnson was, in fact, the pit supervisor and the dealer. The Commission interprets the rule to mean that Johnson was required to contact the General Manager, despite the fact that such a requirement appears *nowhere* in the language of the applicable rule. The Commission argues what it expects a “reasonable licensee” to do. Johnson, however, was charged with violating a specific rule.

It was also important to the circuit court that, again, no witness was produced to testify that Haddad did not intend to leave the chips behind as a tip. CCFOF 35; CCCOL 3. Importantly, the Commission’s determination presupposes that Haddad did not intentionally leave the money behind as a tip. CCFOF 35, CCCOL 8. The Commission’s findings assume that the chips were “found money” and were not intended to be deemed a tip – despite that fact that at least one chip was indisputably a “tip bet.” Johnson wrote in his initial statement that he believed the money to be a tip. AR 31 (“I assumed they were tips as he was tipping us anyway....”)<sup>2</sup>

A review of the surveillance video (AR 25) clearly shows Johnson placing chips right next to Haddad’s other chips, as he is being talked to by general manager Austin Burnham. Haddad then picks up his pile of other chips, and walks off. *Id.* In his written statement, Johnson states that Haddad had been tipping that evening and he “assumed they were tips since he was tipping us anyway and after handing the chips to his rail position while he was still there and he refused to take them ... .” AR 31.<sup>1</sup>

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<sup>2</sup> The Complaint filed against Johnson alleges that “you took chips from a craps table and placed them in the tip jar *knowing that the chips belonged to another player.*” AR 50. Despite the existence of the specific allegation, the Commission made no effort to prove that the chips left behind by Haddad were not intended as a tip.

If Haddad intended to leave the chips as a tip, it would have been entirely appropriate for Johnson to place the chips in the tip box. The Commission did not produce a single witness to testify that this money was not intended by Haddad as a tip. Moreover, the Commission did not produce a single witness or offer any other evidence that, had Johnson notified the General Manager of this situation, the end result would have been any different. The Commission could have attempted to call such witnesses had any such testimony existed. The Commission did not enter any findings or conclusions that Haddad's chips were *not* a tip. AR 54-63. The Commission bears the burden of proof in this case.

**III. The Circuit Court correctly reversed the Commission's erroneous finding that Johnson violated a gaming regulation and a Tin Lizzie's in-house policy.**

The Commission clearly erred when it found that there was a Tin Lizzie policy regarding "found money" left at the craps table during the time of this incident on September 19, 2016. Clearly, there was not. The Commission, nonetheless, made the following findings:

9. Agent Snyder interviewed general manager Austin Burnham and Donica Schumacher, Tin Lizzie's table games manager and supervisor of Charles Johnson. Both Burnham and Schumacher advised Agent Snyder that Tin Lizzie's policy on found or unclaimed chips was to hold the chips if they knew who the player was until the player returned. If they did not know who the player was, the found chips should be taken to the cage.  
...
56. The Commission further finds that even if Johnson was acting as a pit supervisor, Johnson should have reported the irregularity of the events of the evening to his next immediate supervisor, general manager Austin Burnham, or had taken the chips to the cage and therefore, did not comply with Gaming regulations or the Tin Lizzie Casino's in house policy.

These findings are paramount because they are the underpinnings of the decision to revoke Johnson's gaming license and banning him from working in or even entering a casino by placing him on the exclusion list. It is these findings upon which the Commission relies to find that Johnson's conduct was fraudulent and dishonest. These findings of fact are, however, not supported by evidence in the record and are clearly erroneous.

The circuit court correctly reversed on this issue, concluding that the Commission's factual findings can be set aside if they are clearly erroneous. If the issue is a question of law, then the agency's actions are fully reviewable. Gordon v. St. Mary's Health Care Center, 2000 SD 130, ¶ 16, 617 N.W.2d 151. As it concerns a review of findings, the court will reverse if "after careful review of the entire record, [the court is] definitely and firmly convinced that a mistake has been made." Id.; citing Wagaman v. Sioux Falls Construction, 1998 SD 27, ¶ 12, 576 N.W.2d 237, 240.

Johnson did not violate an in-house policy of Tin Lizzie's. That is because Tin Lizzie's did not have such a policy at that time of the incident. It is undisputed that Tin Lizzie's had no written policy concerning "found money" on a craps table at the time this incident occurred on September 19, 2016. The Tin Lizzie's written policy in this regard was not created until over a month later. Tr. 29 (AR 102); Exhibit 3. Agent Snyder requested a copy of the alleged "found money" policy more than once. According to Snyder, the written policy was not produced, despite more than one request. Tr. 29 (AR 102). When Snyder finally was presented with the alleged policy, it was dated a month after the incident had occurred. Tr. 29 (AR 102); Exhibit 3; SDCG 53. Tyler Stuen, the

craps dealer that night, told Agent Snyder that he did not know of the alleged policy. Tr. 20 (AR 93).

During his interview with the agent Brandon Snyder, Stuen state the following:

BS: Do you know what the policy is for found money?

TS: Found money?

BS: Yup. So like if a player

TS: or if they leave money

BS: Has chips, yup, and they leave

TS: I mean you're suppose, you're supposed to put an off button on it, and wait until the table closes or (...) as far as I am aware.

BS: Ok. And then, what happens if that player doesn't come back, or

TS: I, usually put it back in the tray.

BS: Ok.

TS: I think.

BS: OK. But you don't know what the policy actually is.

TS: I don't know what the actual policy is.

Statement of Tyler Stuen, 9-30-16 (AR 27).

This record shows that if a customer leaves chips behind at a table, those chips are to be handled per the house policy. Tr. 39:7 (AR 112); see also Tr. 28, 58 (AR 101). Johnson testified that there wasn't a policy covering this situation. The only "house rule" regarding found money was adopted by Tin Lizzie's *before craps was even available in Deadwood*. Tr. 59:7-63:17 (AR 132-136). As stated, the only rule regarding money at a craps table was adopted *after* this incident. Id. Exhibit 3. Moreover, nobody from Tin

Lizzie's offered any evidence at the hearing or even told Snyder that Johnson was informed of, or that he had violated, a Tin Lizzie's policy.

The Commission attempts to rely upon the Tin Lizzie's Table Game Manual, November 2014 Edition. For some reason, the Commission quotes the following rule to prove the existence of a Tin Lizzie's policy that addresses this situation:

What if a player places a bet, gets cards, and leaves? No extra cards will be given to the hand, the hand will be played out. If the hand loses, the chips go to the tray, if the hand wins, the chips will be placed off to the side of the tray and will be taken to the cage by the pit boss as "found property."

*Appellant's Brief, pg. 21 (citing AR 21)*

Clearly, however, simply reading the language of this hypothetical shows that this rule does not apply to craps. This is an internal rule that was apparently in existence as it concerns card games, such as blackjack. Johnson's stated that he did not know of a Tin Lizzie's internal policy that controlled the situation that occurred on September 19, 2016, and the Commission never produced one. Johnson testified that he has seen situations where they drop abandoned chips on tables into tip boxes. Johnson has seen chips put directly into the tray, and has "had all kinds of incidences where that has happened directly." Tr. 76 (AR 149). Johnson did not think he was stealing Haddad's money when he placed it in the tip box. Johnson testified:

Q. Ok. What was your understanding with respect to Tin Lizzie's written policies regarding found money at the craps table and the type of circumstance that you've just described here today?

A. As far as I know, there was actually not a written policy for any of this. I just did what I did based on experience.

Tr. 72-73 (AR 145-146).



The Commission describes Johnson's "lack of written policy argument" as a "red herring." *Appellant's Brief*, p. 26. The only "red herring" in this case, however, is the written policy offered by Tin Lizzie's management, attempting to pass it off as having been in place at the time of the incident even though it was undisputedly not adopted until a month later. According, the circuit court correctly determined that it was clearly erroneous for the Commission to have found that Johnson violated a Tin Lizzie's policy when he placed the chips that Haddad left behind in the tip box. CCFOF 35.

Likewise, there is no Commission rule or administrative regulation concerning this type of situation. Tr. 24-25 (AR 97-98). That bears repeating. *Johnson's license was revoked and he was placed on the exclusion list, even though the Commission can point to no specific Gaming rule or regulation pertaining to this situation that he violated.* The South Dakota Commission on Gaming Rules leaves situations such as this up to the individual casino.

Q: OK. And there is not a specific rule that deals with found money in the Gaming Commission rules, isn't that correct?

A: Not that I am aware of.

Tr. 24 (AR 97).

Q: ... And could you find for me the section in the rules that specifically deal with how found money is to be treated?

A: Is this Tin Lizzie's Appendix A?

Q: No. This is the South Dakota Commission on Gaming Rules and Appendices. That's – what I asked [in] my first question, is there a specific rule within the Gaming Commission rules that deals with the matter of found money?

A: There is not.

Q: There's not, ok. Good enough.

Tr. 24:23-25-9 (AR 97-98).

The testimony at the hearing from Agent Snyder was that if Tin Lizzie's would have had a policy that chips left at a craps table were to be put into the tip box, Johnson's conduct would have been just fine. Tr. 34:2 (AR 107). It would not have been a violation of any Commission gaming rule or regulation. Id. Tr. 24-25 (AR 97-99).

Q: Ok. With respect to the chips, if Tin Lizzie's had a rule that's how those chips should have been handled, that wouldn't have been a violation of the gaming rule then, would it have not?

A: It would not.

Tr. 34:2-6 (AR 107); see also Tr. 24:23-25:9 (AR 97-98) (stating that there is no Gaming Commission policy on found money).

As such, as noted by the circuit court, the Commission finding that that Johnson violated a rule or regulation of the Commission is clearly erroneous because it is directly contradicted by the actual evidence and testimony in the record.

The Commission further found that Johnson's actions, "by taking the chips belonging to the player (Haddad) and placing them in the tip jar without attempting to determine the player's identity, constituted dishonest or fraudulent conduct." CGFOF 54. Snyder testified Haddad did not live in South Dakota, that Tin Lizzie employees were not told his name because he was under investigation, and that if he showed back up in South Dakota, he'd be arrested pursuant to an outstanding warrant. Johnson, therefore, could not have ascertained Haddad's identity from his supervisors because they didn't know who he was, either.

Additionally, the enforcement agent had decided not to reveal Haddad's identity because the investigation was "ongoing." The enforcement agent had already been

contacted that night, while Haddad was still in the casino, and did not respond at that time and in fact did not show up at the casino to follow up on the report until ten days later. Again, Johnson was the pit boss or pit supervisor at this time pursuant to the rules was authorized to make decisions regarding chips. There was no evidence offered that, even assuming that Tin Lizzie's did have a policy that addressed this circumstance that Johnson was even advised what it was. Johnson told Snyder that he had never had a situation where he did not know who the person was. The circuit court was correctly left with a firm and definite conviction that a mistake had been made.

**IV. The Circuit Court correctly concluded that the Commission acted arbitrarily, capriciously and abused its discretion when it revoked Charles Johnson's gaming license and placed him on the Exclusion List.**

The Circuit Court may modify or reverse the Commission's decision if it concludes that the decision is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." SDCL 1-26-36(6). The South Dakota Supreme Court has ruled that a circuit court does not "substitute [its] judgment for the agency's judgment on the weight of evidence pertaining to questions of fact unless the agency's decision is clearly erroneous, or is arbitrary, capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion." Appeal of Templeton, 403 N.W.2d 398, 399 (S.D. 1987).

An "abuse of discretion" is defined as "a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Roberts v. Roberts, 2003 SD 75, 666 N.W.2d 477. In re: Application of Benton, 2005 SD 2, 691 N.W.2d 598 ("a decision of an agency may be reversed or modified if the decision was an abuse of discretion or clearly unwarranted exercise of discretion.") The circuit court may affirm an

agency decision or remand the case for further proceedings. Reviewing an agency determination for an abuse of discretion includes an inquiry into the authority for the decision as well as the facts supporting the decision. Williams v. South Dakota Board of Pardons and Paroles, 2007 SD 61, ¶ 7, 736 N.W.2d 499.

As stated above, the circuit court correctly concluded that many Commission findings and conclusions were erroneous. In addition, the circuit court correctly concluded that the Commission's decision is arbitrary, capricious, and characterized by an abuse of a clearly unwarranted exercise of discretion. It is acknowledged that Johnson did not violate a specific rule or regulation of the Commission as it concerns the handling of found money. See Tr. 24-25 (AR 97-98). Moreover, any written policy of Tin Lizzie's concerning found money at a craps table was not generated until over a month after the September 19, 2016, incident. Exhibit 3; Tr. 29 (AR 102). It strains credulity to suggest that it is an appropriate exercise of the Commission's discretion to impose the most severe sanction possible upon Johnson under these facts and circumstances.

The Commission does not dispute that, if Tin Lizzie's had in effect a policy that the "found" chips were to be returned to the *cage* under this circumstance, so that they could be placed in the casino's inventory, that would have been fine. Tr. 28 (AR 101). The Commission's decision, then, is entirely unwarranted because, as to the gambler who left the chips behind, the end result is exactly the same.

Q: Ok. And at the house – if they're turned into the cage and nobody comes to claim them, they get put back into inventory. It's really the same effect, isn't it?

A: If they were turned into the cage, correct.

Tr. 34:18-22 (AR 107).

Moreover, if Tin Lizzies had a policy that the abandoned chips were to be placed in the tip box, this also would have been acceptable provided it was a policy of the casino. Tr. 34:2-6 (AR 107). As detailed above, Johnson submits that Tin Lizzies did not have *any* policy regarding found money at a craps table on September 19, 2017. Moreover, even if there were an oral policy, there is no evidence that Johnson was advised of it. Additionally, Secretary Eliason initially offered Johnson the sanction of a 30-day license suspension based upon these exact same facts. Tr. 50:2-10 (AR 123). This offer was extended on January 5, 2017, a time at which all of the facts offered at the contested case hearing were known to the Executive Secretary. In other words, a 30-day license suspension was apparently an appropriate sanction for the Commission to accept on January 5, 2017, but that recommendation somehow morphed into the most severe sanction possible by the time of the contested case hearing on March 22, 2017. The only thing that changed during that time frame was that Johnson exercised his right to a hearing as allowed pursuant to the applicable statutes and procedures.

The Commission argues one circumstance that occurred after the offer of voluntary compliance and prior to the contested case hearing. *Appellant's Brief*, pg. 33. This "incident" occurred following the meeting between Johnson and Executive Secretary Eliason on or about January 5, 2017. This was the "informal consultation" at which Secretary Eliason offered Johnson a 30-day voluntary compliance suspension, in lieu of taking the case to a contested hearing. CGFOF 41. Following the meeting, Johnson apparently approached Secretary Eliason and attempted to hand him a \$20 bill, stating "If you think I was a thief and dishonest here is \$20." CGFOF 46; Tr. 49-50 (AR 122-123).

The Commission uses terminology in its Findings and Conclusions, such as “palm” and “slip” as it concerns the \$20, suggesting or implying that this was an attempted bribe. CCFOF 52. Secretary Eliason testified that: “Well for the first few minutes I was actually just stunned. I’ve been a regulator since 1979 and nobody has ever tried to *get their way out of a situation by handing me money.*” Tr. 53 (AR 126) (emphasis added); see also Tr. 62 (AR 135) (testimony of Secretary Eliason implying this was an attempted \$20 bribe.)

Although the Commission now only describes Johnson’s conduct in this regard “questionable,” it argues that this is the incident that “specifically supported Eliason’s increased recommendation.” *Appellants’ Brief*, pg. 33. Even the Commission, however, did not have the audacity to actually find that Johnson attempted to bribe the Secretary of the South Dakota Commission on Gaming with a \$20 bill in order to “get his way out of a situation.” There is absolutely no such finding. If the Commission is going to use this incident to revoke Johnson’s license because the Commission believes it was a bribe, then it should have made such a finding.

This would be absurd, however, and the Commission knows it. It is difficult to ascertain what relevance, if any, this incident even bears on the case, other than being a ridiculously weak attempt to discredit Johnson’s character. This was clearly nothing more than Johnson expressing to Eliason his frustration, along with the fact that he did not believe he did anything wrong, and did violate any rules of the Gaming Commission. As it turns out, Johnson was right. He did not violate any Gaming Commission rule, nor did he violate an in-house policy of Tin Lizzie’s Casino. Importantly, the Commission fails to identify any rule or regulation that Johnson violated as a result of this \$20 discussion

with Secretary Eliason that warranted changing a 30-day suspension into a life time revocation and complete banishment from the casino business. It was entirely arbitrary, capricious, and a complete abuse of discretion for the Commission to punish Johnson by revoking his license and placing him on the Exclusion List under these facts, and to punish him more severely simply because he decided to exercise the due process rights afforded to him pursuant to the applicable administrative rules.

### **CONCLUSION**

Based upon the foregoing, Appellee respectfully requests the circuit court's judgment be affirmed.

Dated this 28<sup>th</sup> day of February, 2018.

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## **CERTIFICATE OF SERVICE**

Michael V. Wheeler of DeMersseman Jensen Tellinghuisen & Huffman, LLP  
hereby certifies that on the 28<sup>th</sup> day of February, 2018, he served an electronic copy of the  
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## **CERTIFICATE OF COMPLIANCE**

Michael V. Wheeler, counsel for Appellee, hereby certifies that the foregoing Brief of Appellee complies with the type volume limitation provided for in the South Dakota Codified Laws and pursuant to SDCL 15-26A-66(b)(4). This brief contains 8,476 words and 42,034 characters, no spaces, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix, and Certificates of Counsel. Counsel relied on the word and character count of Microsoft Word, word processing software, used to prepare this Brief at font size 12, Times New Roman, and left justified.

DATED this 28<sup>th</sup> day of February, 2018.

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The undersigned hereby certifies that pursuant to SDCL 15-26C-3 he served an electronic copy in Word format, and the original and two (2) hard-copies of the above and foregoing Appellee's Brief on the Clerk of the Supreme Court by mailing the same this date to the following address:

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DATED this 28<sup>th</sup> day of February, 2018.

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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

SOUTH DAKOTA COMMISSION ON	)	
GAMING,	)	Appeal No. #28436
	)	
APPELLANT,	)	
	)	
vs.	)	
	)	
CHARLES JOHNSON,	)	
SDCG Support License #A8365-14-SP	)	
	)	
APPELLEE.	)	

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APPEAL FROM THE CIRCUIT COURT  
FOURTH JUDICIAL CIRCUIT  
LAWRENCE COUNTY, SOUTH DAKOTA

---

THE HONORABLE MICHELLE K. PERCY  
CIRCUIT COURT JUDGE

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REPLY BRIEF OF APPELLANT

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## ARGUMENT

For this case, the Supreme Court performs its review of the agency's findings "unaided by any presumption that the circuit court's decision was correct[.]" and "give[s] great weight to the findings of the agency[.]" *Peterson v. Evangelical Lutheran Good Samaritan Soc'y*, 2012 S.D. 52, ¶ 13, 816 N.W.2d 843, 847 (citation omitted). "When presented with a mixed question, courts apply the clearly erroneous standard if the 'analysis is essentially factual, and thus is better decided by the agency or lower court . . .,' and the de novo standard when the 'resolution requires consideration of underlying principles behind a rule of law . . .'" *In re Application of Dorsey*, 2001 S.D. 35, ¶ 5, 623 N.W.2d 468, 471 (citing *Rios v. Department of Soc. Servs.*, 420 N.W.2d 757, 759 (S.D. 1988)). After giving deference to the Commission's findings on credibility and giving great weight to the Commission's factual findings, this Court should reverse the circuit court's decision because no mistake was made at the administrative level and uphold the Commission's decision to revoke Johnson's gaming license and place him on the exclusion list.

This reply brief is limited "to new matter[s] raised in the brief of the appellee." SDCL 15-26A-62. Therefore, the Commission continues to rely on factual statements, legal authority, and its arguments stated in Appellant's Brief and will only respond to arguments made by Johnson in his Appellee's Brief.

### I.

*Whether the Commission correctly concluded that Johnson acted dishonestly or fraudulently under ARSD 20:18:09:02.*

The circuit court completely failed to consider whether Johnson's conduct was dishonest or fraudulent in violation of ARSD 20:18:09:02. No findings or conclusions were entered by the circuit court regarding whether Johnson acted dishonestly or fraudulently. Johnson argues that the circuit court did mention and consider the regulation, ARSD 20:18:09:02, by reversing the Commission's entire decision. *Appellee's Brief* at 15. Johnson generalizes that the issues in this case are "intertwined." *Id.* at 15. Johnson's argument reads into the circuit court's silence that a complete reversal necessarily reversed the Commission's Finding of Fact 54 and 55 and Conclusion of Law 6 and 7. The issues are not intertwined. One can act dishonestly or fraudulently without violating a specific rule or policy, and that conduct in and of itself is the violation of ARSD 20:18:09:02. There is no manner in which to read the circuit court's findings and conclusions to construe that it specifically reviewed Johnson's conduct for a violation of ARSD 20:18:09:02.

Johnson also argues that the Commission did not meet its burden of proof because it failed to present witnesses to testify that the suspected cheater *did not* intend the chips to be a "tip." *Appellee's Brief* at 15, 19-20. This argument would seem to require the Commission to subpoena Haddad himself to the hearing to explain his own intent. The law does not require direct testimony to prove intent, as it is often not available, but allows inferences from circumstantial evidence to prove intent. *People in the Interest of W.Y.B.*, 515 N.W.2d 453, 455 (S.D. 1994) (citing *North Dakota v. Lovejoy*, 464 N.W.2d 386, 389 (N.D. 1990); *State v. Holzer*, 2000 S.D. 75, ¶ 16, 611 N.W.2d 647, 651-52; see *Novak v. McEldowney*, 2002 S.D. 162, ¶ 13, 655 N.W.2d 909, 914; see also *Minnesota v. Obasi*, 427 N.W.2d 736, 738 (Minn.App. 1988) ("Intent is a subjective state of mind and

is established by reasonable inferences drawn from surrounding circumstances.”).

“Circumstantial evidence may often be the only way to prove intent.” *People in the Interest of W.Y.B.*, 515 N.W.2d at 455 (citation omitted). Here, there was circumstantial evidence presented sufficient to determine that these chips were a bet and not a tip. There was (1) video evidence, (2) Snyder’s testimony, and (3) Johnson’s testimony, all which permit a reasonable inference that Haddad intended those chips to be a bet.

There was sufficient circumstantial evidence proving that Haddad was not tipping the dealer \$19 when he was being escorted out of the casino. The video shows the entire event unfolding. Notably, one sees where on the craps table Haddad placed his bets before being asked to leave. Johnson states in his brief that, “[r]egardless of how the chips were placed on the table at the time [Haddad] was asked to leave the casino, the circuit court found that there was no evidence presented by the Commission that Haddad did not intend to leave the chips behind as a tip.” *Appellee’s Brief* at 7-8 (citing CC FOF 35) (emphasis added). The court cannot disregard how the chips were placed on the table. Where the chips are placed on the craps table is direct evidence of the player’s intention. In this case, Haddad intended to bet \$15 on the nine, \$4 hard way, and \$1 was a tip. CG FOF 11, 12. The greater weight of the evidence indicates that \$19 was a bet that was then abandoned and not a tip. The surveillance video shows the simultaneous actions of Haddad leaving and Johnson placing the chips on the rail. AR. 25. It does not appear that Haddad said anything to Johnson as Haddad is being escorted out of the casino. *Id.*

Johnson’s conduct and testimony also are evidence of Haddad’s intent. At first, Johnson’s statement to the Commission was that Johnson assumed the chips were left as



tips since Haddad was tipping the dealers anyway. AR. 31. But Johnson's conduct does not comport with that story. *Johnson* was the one who removed three chips from the "9" and placed those on the rail for Haddad to take with him. By his conduct, Johnson indicated that he believed those chips were the property of Haddad and not a tip. Then, Johnson changed his story to better his position at the administrative hearing. Johnson testified that once Haddad left the table and his chips, that Johnson "considered those chips abandoned" and not tips. AR. 145, 161. Johnson's actions of moving the chips from a bet, to the rail, and then to the side with a lammer is evidence that these chips were not a tip but remained the property of Haddad even after he left.

Johnson's testimony that he believed the chips were abandoned is also consistent with Agent Snyder's testimony. Agent Snyder testified that in the video, it did not appear Haddad spoke to Johnson at all, much less gave instruction to Johnson that the chips were a tip. AR. 88; CG FOF 20. The video also reveals that while the other player was still at the table, Johnson kept the chips to the side and placed a lammer over them, demonstrating that he was saving the chips because they were not tips. AR. 86. If Johnson believed the chips were a tip when Haddad failed to take them from the rail, Johnson would have been free to place the chips into the tip box at that moment and not wait until the other player left.

The bet itself is direct evidence of intent. Haddad's actions, the surveillance video, the testimony and conduct of Johnson, and the testimony of Agent Snyder are circumstantial evidence supportive of the Commission's finding that the chips were found or abandoned chips, and not a tip. No other witness or direct evidence was necessary to prove that the chips were not intended as a tip.

The Commission's opening brief details the facts and arguments as to why this Court should affirm the Commission's decision that Johnson acted dishonestly or fraudulently in violation of ARSD 20:18:09:02. *Appellant's Brief* at 15-22. Johnson took chips that were not tips and put them in the tip box (CG FOF 11, 12, 16), did not attempt to identify Haddad (CG FOF 29-33), gave multiple inconsistent statements (CG FOF 13, 24, 26), changed his story at the hearing after the Commission viewed the surveillance video (CG FOF 35), and palmed a \$20 bill into the Executive Secretary's hand (CG FOF 46-49). Further, the Commission did not believe parts of Johnson's testimony and specifically found him not credible. CG FOF 34, 35. Credibility findings, in addition to factual findings detailed above, are entitled to great weight. Johnson's dishonest or fraudulent conduct alone is sufficient support for revoking his license without any further consideration of the irregularity violation or the in-house policy violation (Issue 2 and 3). Johnson violated ARSD 20:18:09:02 and his discipline was appropriate.

## II.

*Whether the Commission correctly concluded that Johnson violated ARSD 20:18:33:11 by not seeking direction from his supervisor.*

While this Court could affirm the Commission's decision under section I above, the Commission contends that Johnson also violated ARSD 20:18:33:11 because, as the dealer, he was prohibited from making any decision on what action to take. Johnson argues that this issue is a question of law. *Appellee's Brief* at 16. The Commission asserts that it is a mixed question because there is discretion inherent in this regulation

making it, in part, a question of fact whether the pit supervisor took fair and equitable action. ARSD 20:18:33:11 states:

If any irregularity occurs, the dealer shall notify the box person or pit supervisor, who shall direct the dealer *to take the most appropriate action* which the box person or supervisor believes to be *fair and equitable*, and shall observe such action being taken. The box person or pit supervisor, and not the dealer, must make all decisions concerning disputed play or the payment or collection of wagers.

ARSD 20:18:33:11 (emphasis added).

First, Johnson tries to assert that neither sentence of ARSD 20:18:33:11 applies to this incident. *Appellee's Brief* at 18. The Commission fails to understand how taking a bet as a tip is not the collection of a wager. Further, the incident on September 19, 2016 is best described as an irregularity when a player, suspected of cheating, is escorted out in the middle of play leaving his money behind. This regulation is on point and applicable.

In Johnson's Appellee's Brief, he argues that he has discretion under ARSD 20:18:33:11 as the pit supervisor to make any decision he wants with regard to an irregularity in play. *Appellee's Brief* at 18. Johnson makes the assertion that because he was the pit supervisor and had authority to make the decision of handling an irregularity, then as a matter of law, his action cannot constitute fraudulent and dishonest conduct and did not violate the irregularity rule. *Id.* Reading this rule as Johnson does, Johnson is arguing that he gets to direct himself to take any action during an irregularity. But Johnson is still constrained to act in fairness and in equity. To take his argument to its natural conclusion, if Johnson as pit supervisor has unfettered authority to direct any action under ARSD 20:18:33:11, then he could pocket the chips as his own and not be disciplined for it. This, of course, would be viewed as dishonest or fraudulent. Likewise, having authority and executing that authority within its proper scope are two separate

matters. The Commission interprets its rule, ARSD 20:18:33:11, not to grant any authority to a dealer, like Johnson, to direct any action. But the Commission also argues that in the alternative, even if Johnson had authority as the pit supervisor, he exceeded that authority by failing to take the most appropriate action which was fair and equitable. “In matters of construction, a board should be allowed a reasonable range of informed discretion, as long as its construction is reasonable and not inconsistent with the rules.” *Nelson v. S.D. State Bd. of Dentistry*, 464 N.W.2d 621, 625 (S.D. 1991).

Johnson’s argument here also fails when tested by an analogy. One with a driver’s license has authority to drive but not in whatever manner they wish. Even if Johnson is construed to be the dealer and pit supervisor at this same time, and even if Johnson was authorized under this rule to direct his own actions if any irregularity occurs, which the Commission disputes, Johnson failed “to take the most appropriate action” and do what is “fair and equitable.”

Johnson also argues that whether it was a tip or was found money which should have been brought to the cage, the result is the same to the gambler. *Appellee’s Brief* at 27. This argument flies in the face of what Deadwood gambling is all about. Gaming must be administered in the most transparent, honest manner, free from corruptive elements, and with absolute strict regulation to ensure complete public confidence that the games are fair and honest. SDCL 42-7B-2.1. Allowing a dealer to decide if he should benefit from an irregularity occurring at his table would damage the public confidence.

Johnson cites to *In re Setliff* for the proposition that losing his license would be a dire consequence. 2002 S.D. 58, 645 N.W.2d 601. That case involved a medical license.

The Legislature has distinguished a gaming license from all other occupational licenses. The Legislature declared as public policy that a gaming license is (a) revocable, (b) not transferable, and (c) does not create a vested interest or property right. SDCL 42-7B-24; see also *Appellant's Brief* at 14-15. No similar limitations on medical licenses are found in South Dakota laws.

Finally, Johnson cites an Oklahoma rule of law from *Wolfenbarger* arguing that this gaming rule on irregularity should be narrowly construed in Johnson's favor. *Appellee's Brief* at 18. There are two errors committed in citing *Wolfenbarger*. One is that a gaming license is different from all other licenses; the Legislature declared it revocable and twice declared that no gaming license grants any property right. SDCL 42-7B-2.1(4); SDCL 42-7B-24. Two, this Oklahoma rule is not good law in South Dakota. In a South Dakota dental licensing case, Dr. Nelson made the same argument as Johnson, that "because his license to practice dentistry was subject to suspension, the rules are penal in nature and should be strictly construed." *Nelson v. S.D. State Bd. of Dentistry*, 464 N.W.2d 621, 625 (S.D. 1991). This Court disagreed and held:

The rule of the common law that penal statutes are to be strictly construed has no application to this title. All its criminal and penal provisions and all penal statutes are to be construed according to the fair import of their terms, with a view to effect their objects and promote justice.

We see no reason to depart from this statutory standard in the construction of administrative rules which may have a penal effect. We are acutely aware that a professional license, reputation, and livelihood are at stake whenever suspension is a possibility. Under those circumstances, a professional is due every consideration. However, those considerations should not lead to a construction so strict that the object and purpose of a rule are thwarted.

*Id.* The object and purpose of the irregularity rule in gaming is to prohibit a dealer from resolving the irregularity in play when he may have a pecuniary interest in the outcome.

Johnson violated ARSD 20:18:33:11 by not seeking a supervisor to consult on the most appropriate action. The essential intent and plain meaning of this regulation is not to permit the *dealer* to make the decision about handling an irregularity. Johnson also violated the rule as pit supervisor because he did not direct himself to take the most appropriate action that is fair and equitable under the circumstances.

### III.

*Whether the Commission correctly concluded that Johnson violated a Tin Lizzie's in-house policy on treatment of found money.*

Johnson argues that the outcome may have been the same had he asked his supervisor. *Appellee's Brief* at 20. Johnson argues, "the Commission did not . . . offer any other evidence that, had Johnson notified the General Manager of this situation, the end result would have been any different." *Id.* at 20. General Manager Burnham knew Tin Lizzie's policy was to return found money to the cage. Had Johnson asked Burnham what to do that night consistent with Johnson's obligations under ARSD 20:18:33:11, it is beyond doubt that Burnham would have directed Johnson to comply with the oral policy that Burnham and also Schumacher stated was in place.

Johnson continually ignores that Tin Lizzie's oral policy was in place on September 19 which direct dealers what to do when they come across "found money." *Appellee's Brief* at 20. The Commission presented testimony from Agent Snyder that both Tin Lizzie's managers, Donica Schumacher and Austin Burnham, told Snyder the oral policy was to take found money to the cage when the player's name is unknown. AR. 116. Johnson has never disputed that an oral policy should not have the same effect as a written policy. Johnson admits knowing the first half of this oral policy, but then

fails to answer the question about the second half of the policy on found money when the player is unknown. AR. 29-30. Johnson admits that if he found chips on the floor, he would bring them to the cage. AR. 145. Johnson admits that if an unknown person left money on a card table, he would take it to the cage. AR. 161. Johnson admits that if the amount is significant enough, he would take the chips to the cage. AR. 161. After reviewing the entire record, this Court will be firmly convinced no mistake was made when the Commission concluded that Tin Lizzie had a policy that found and abandoned money was taken to the cage, and Johnson violated that policy. CG COL 8.

Tin Lizzie's Table Game Manual, November 2014 edition, is also relevant to this case despite Johnson's assertion to the contrary. *Appellee's Brief* at 23. Johnson testified that he took the chips as a tip based on experience. AR. 146. Experience should have told him that found chips are brought to the cage under this analogous policy for table games. AR. 21, 161. When the table game policy manual was written, craps was not played in Deadwood. Therefore, the Commission only relies on this Manual as an analogous situation that should lend guidance to an experienced dealer as to what is the "most appropriate action" to be taken and what is "fair and equitable" when something irregular happens.

Johnson acted completely outside of both the oral policy and the analogous policy on table games and deposited the chips in question into the tip box. Johnson did so only after the other player left the table. AR. 87. Johnson's conduct violated Tin Lizzie's oral policy, and the Commission's finding is supported by the entire record.

#### IV.

*Whether the Commission's decision was arbitrary, capricious, and an abuse of its discretion when it revoked Johnson's gaming license for dishonesty or fraudulent conduct and placed him on the exclusion list.*

Johnson erroneously argues that “the only thing that changed during that time frame was that Johnson exercised his right to a hearing as allowed pursuant to the applicable statutes and procedures.” *Appellee's Brief* at 28. The circuit court similarly found that “[t]here had been no change in facts to warrant this increased penalty.” CC COL 12. Sliding the Executive Secretary a folded up \$20 bill was captured on video. AR. 25. Eliason testified to it. AR. 123-24. Johnson admitted that it occurred. AR. 158. Johnson now argues that this action was just a result of his frustration. *Appellee's Brief* at 29. The Executive Secretary of the Commission was greatly offended by the unprofessional and potentially dishonest conduct of palming him a twenty. CG FOF 49; AR. 126-28. While the Commission did not amend its charge of discipline to include this action as a violation of ARSD 20:18:09:02, the Commission recognized that the incident happened, and it supported the Executive Secretary's final recommendation. CG FOF 46-49. Stating that nothing happened in between the offer to settle and the increase in recommended discipline is inaccurate. Even though the Commission did not specifically find that the action constituted dishonesty or fraudulent conduct, Eliason's testimony was persuasive that Johnson's actions and attitude were incompatible with the maintenance of public confidence in the gaming industry. See AR. 128.

Furthermore, the credibility findings of the Commission must be emphasized. The Commission did not believe Johnson's testimony that he had no one to whom he



could report the irregularity. CG FOF 34. The Commission did not believe Johnson's testimony that he made any attempt, much less three attempts, to tell Haddad he was leaving chips. CG FOF 35. After viewing the video evidence, the Commission thought Johnson lied to them about yelling to Haddad about his chips. *Id.* The Commission's findings on credibility should be given great weight. *In re Jarman*, 2015 S.D. 8, ¶ 18, 860 N.W.2d 1, 8-9 (deferring to "agency on the credibility of a witness").

The Executive Secretary offered a settlement (not unlike a plea agreement) with the purpose of disposing of the matter quickly with compromise on both sides. The Commission was not bound by that offer. After hearing the evidence, the Commission exercised its discretion and disciplined Johnson. AR. 64. The Commission was justified in taking action. Johnson took chips and put them in the tip box (CG FOF 11, 12, 16), did not attempt to identify Haddad (CG FOF 29-33), gave multiple inconsistent statements (CG FOF 13, 24, 26), changed his story at the hearing after the Commission viewed the surveillance video (CG FOF 35), gave sworn testimony that the Commission specifically found not to be credible (CG FOF 34, 35), and palmed a \$20 bill into the Executive Secretary's hand (CG FOF 46-49). The Commission's decision should be upheld.

## **CONCLUSION**

When considering the totality of how Johnson acted at the time of the irregularity and during the investigation, and his attitude throughout the investigation and the hearing, he has shown a disregard for the rules and integrity of the gaming process. As such, the Commission was justified in disciplining Johnson and its decision should be upheld.

DATED this 15th day of March, 2018.

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## **CERTIFICATE OF COMPLIANCE**

Katie J. Hruska, counsel for Appellant, hereby certifies that the foregoing Brief of Appellant complies with the type volume limitation provided for in the South Dakota Codified Laws and pursuant to SDCL 15-26A-66(b)(4). This brief contains 3,628 words and 18,310 characters, no spaces, exclusive of the Table of Contents, Table of Authorities, and Certificates of Counsel. Counsel relied on the word and character count of Microsoft Word, word processing software, used to prepare this Brief at font size 12, Times New Roman, and left justified.

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