

1 Final agency action regarding decision below:

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3 **AAREJMOOT - rejected because moot upon stipulation of the parties by**
4 **settlement agreement and release, it is hereby ordered: The attached settlement**
5 **agreement and release between the AZ Department shall, and hereby does, issue**
6 **state certification to**
7

8 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

9
10 In The Matter Of
11 The Hearing Of An Appeal By:

12 James M. Burns

13 Identification No. 15133
14

No. 07F-013-GAM

**ADMINISTRATIVE
LAW JUDGE DECISION**

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17 **HEARING:** August 15, 2007 and September 18, 2007

18 **APPEARANCES:** On August 15, 2007, James Mapp, Assistant Attorney
19 General representing the Department of Gaming; Frederick Petti and Stephen Hart,
20 Appellant's attorneys; Charles Barry Allen, Gary Applegate, Tim Christensen, Fred
21 Driezynski, James Jorgensen, Kim Pound, Lynn Bedford, Ron Gomez, witnesses;
22 Ronald Ruiz, Scena Simon, observers Tanis Eastridge, court reporter On September
23 18, 2007, Brian Luse, Assistant Attorney General representing the Department of
24 Gaming; Frederick Petti, Appellant's attorney; James Burns, Appellant; Ronald E. Ruiz,
25 witness; C. Lopez, observer, D. Style, court reporter

26 **ADMINISTRATIVE LAW JUDGE:** Dorinda M. Lang
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29 Following the investigation of a State certification-holder, the Department of
30 Gaming issued a Notice of Intent to Deny Certification to the Appellant, James Burns.
Mr. Burns appealed. At hearing, the Department of Gaming failed to establish that its

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1 intended denial was appropriate in this case. Therefore, it is recommended that this
2 appeal be sustained.

3 FINDINGS OF FACT

4 1. Appellant, James Burns ("Mr. Burns"), has been certified by the Department
5 of Gaming (the "Department") since 1997, renewing his certification yearly until May 11,
6 2007 when the Department issued a Notice of Intent to Deny State Certification ("Notice
7 of Intent"). (Exhibit 17.)

8 2. The text of the Department's Notice of Intent set forth the basis of the
9 decision as follows:

10 Based on the information reviewed and obtained through investigation, the
11 Department has determined that you have violated provisions of the Tribal/State
12 Gaming Compact, and Denied the issuance of renewal of your State Certification.

13 **(The Tribal/State Gaming Compact provides that State Certification may be
14 denied suspended or revoked on the following applicable grounds. If the
15 applicant or certification holder...)** *Section 5(f)(1) – Has violated, failed or refused to
16 comply with the provisions, requirements, conditions, limitations or duties imposed by
17 any provision of this Compact or an provision of any State Gaming Agency rule, or
18 when any such violation has occurred upon any premises occupied or operated by any
19 such person or over which he or she has substantial control;*

20 While employed as the Salt River Tribal Gaming Facility, you knowingly engaged
21 in illegal off-shore gambling. You and Mark Preston both stated that money from wins
22 or losses were paid to, or received from, Lee Christiansen occasionally while on the
23 premises of the gaming facility where you were employed as the Chief Financial Officer.

24 *Section 5(f)(2) – Knowingly causes, aids, abets or conspires with another to cause
25 any person or entity to violate any of the laws of this State or the rules of the State or
26 Tribal Gaming Office, or the provision of this Compact.*

27 You violated State Law by conspiring with others to participate in unregulated
28 gambling as defined by A.R.S. §13-3301.6(a), as well as being in violation of A.R.S.
29 §13-3304(a), Benefiting from Gambling. By your own admission, you occasionally won
30 and you received your winnings in the form of cash payments from Lee Christiansen.

*Section 5(f)(9) – Has demonstrated a willful disregard for compliance with
gaming regulatory authority in any jurisdiction, including suspension, revocation, denial
of Application or forfeiture of license.*

You have demonstrated an apparent willful disregard for compliance with gaming
regulatory authority by your participation in unregulated gambling activity, in violation for
A.R.S. §13-3301.6(a), as well as the Salt River Community Code, Section 15.5-16,
paragraph (1), Prohibited Acts. You were employed in a Sensitive Management
Position as Chief Financial Officer at the Salt River Tribal Gaming Facility, and as such
are presumed to have at least a working knowledge of the laws governing the industry.

1 Your participation in illegal gambling flaunted the law and demonstrated a willful
2 disregard for compliance with the gaming regulatory authority.

3 *Section 5(f)(10) – Has pursued or is pursuing economic gain in an occupational
4 manner or context which is in violation of the criminal laws of any state if such pursuit
5 creates probable cause to believe that the participation of such person in gaming or
6 related activities would be detrimental to the proper operation of an authorized gaming
or related activity in this State. For the purposes of this paragraph, occupational
manner or context shall be defined as the systematic planning, administration,
management or execution of an activity for financial gain.*

7 You were pursuing economic gain in violation of State of Arizona Criminal Laws
8 and Tribal/State Gaming Compact by knowingly participating in “off shore” gambling
since 2001, as you saw a way to make some extra money.

9 *Section 5(f)(12) – Is a person whose prior activities, criminal record, reputation,
10 habits and associations pose a threat to the public interest of the Tribe or the State or to
11 the effective regulation and control of Class III Gaming, or creates or enhances the
12 dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct
of Class III Gaming, or the carrying on of the business and financial arrangements
incidental thereto.*

13 You admitted to the above violation of the Law of the State, the Salt River
14 community code and the Tribal/State Gaming Compact. Your prior activities and habits
15 relating to your “off shore” gambling for the last five (5) years, and your associations
16 with other persons who knowingly and intentionally participated in unlawful activity for
17 financial gain, poses a threat to the public interest of the Community, the state and to
18 the effective regulation and control of Class III Gaming.

19 (Clarification provided in bold typeface.)

20 3. Mr. Burns appealed the Department’s decision. At hearing, the parties
21 offered evidence and testimony in support of their positions. Most of the factual
22 assertions were undisputed except for the Department’s assertion that Mr. Burns
23 admitted to violating the laws, rules and Compact and that he admitted to paying or
24 receiving money from gambling wins and loses while on the premises of the gaming
25 facility where Mr. Burns was employed. The actual interview of Mr. Burns is contained
26 in Exhibit 13. In it, he refers from time to time about his beliefs as to the legality and
27 illegality of the gambling he engaged in. His opinion is relevant as to his state of mind
28 and perhaps for other relevant reasons, but he is not responsible to make the ultimate
29 determination of whether his actions were illegal. Further, the interview was not a
30 formal entry of a plea of guilty in a legal action. Therefore, his admissions, such as they
may have been, do not constitute as establishment of guilt regarding the violations

1 alleged, though they may be seen as admissions of the actions he pursued that may
2 ultimately be determined to constitute guilt of the violations alleged.

3 4. With regard to Mr. Burns' "admission" that he paid or collected money from
4 his gambling while on the gaming facility premises, his actual statements are contained
5 on pages 7 and 16 of Exhibit 13. On page 7, the interviewer, Jorgensen, asked about
6 paying off Mr. Burns' lost wagers. He states, "You handed Lee cash?" Burns states,
7 "Yes". Jorgensen says, "Okay". Burns states, "Off site in a local establishment
8 somewhere else". Jorgensen states, "Okay, so is there ever a time that you handed
9 him cash on casino property?" Burns states, "I can't say no, but I definitely don't recall
10 _____ that". On page 16, Jorgensen asks, "Okay. And I -- I wanted to review -- did you
11 ever pay Lee inside the office -- or inside his office or inside your office?" Burns states,
12 "No, I don't recall doing that because I know we made a point of it to making sure that
13 any cash was transacted off site". Jorgensen asks, "And why was that?" Burns states,
14 "Just because, when you're in an environment that has a ton of cameras and stuff -- any
15 type of cash was transacted off site. Even if you -- you borrowed ten bucks from
16 somebody, you didn't want to do it on the cameral because _____ suspicion".
17 Considering Mr. Burns' overall honesty and willingness to admit all of his activities, even
18 the fact that he might have been mistaken about something, and considering that his
19 interview reflected that he was at all times conscious of any risks he may be taking
20 regarding his job, it is most likely that he never exchanged gambling money at the
21 casino. Mr. Burns also stated that he had sought help for his gambling problems before
22 but stopped going to counseling because he was afraid that the tribal board would hear
23 about it and get him fired. He stated that he was aware from people in the community
24 that board members had run for office on a platform promising to get rid of the casino
25 management.

26 5. It was not disputed at hearing that Mr. Burns admitted that he took part in
27 gambling over a period of time while he was employed by the Salt River Pima-Maricopa
28 Indian Community ("SRPMIC") casino, Casino Arizona, as the Chief Financial Officer. It
29 was not disputed that the SRPMIC Council actively pursued Mr. Burns' certification
30 revocation once his gambling became known because, as they openly stated in front of
tribal police officer Kim Pound, they did not want him to go work at another casino for

1 fear that he may take trade secrets with him. Mr. Burns also stated in his interview,
2 Exhibit 13, page 29, that members of the SRPMIC Council ran on a platform to "get rid
3 of the management at the casino".

4 6. It was not disputed that Rudy Casillas, a Department official, took an active
5 part in ensuring that the investigation of Mr. Burns went forward. Although he later
6 excused himself from further involvement, the action against Mr. Burns had already
7 begun with his help. This is significant because it was not disputed that Rudy Casillas
8 was in a long term relationship with Mr. Burns' ex-wife at that time.

9 7. Evidence at hearing established that some casinos have treatment programs
10 for employees with first time alcohol and illegal drug problems. Employees attending
11 such programs are not reported to the Department and, though it has the right to all
12 employee records and the duty to enforce the Compact, the Department has never
13 requested to review the records of these employees before recertifying them. In
14 addition, the Department has knowingly granted certification to individuals who worked
15 for Indian gaming casinos in California before they were legal. Being employees of
16 illegal casinos, their activities in illegal gaming were much more involved and organized
17 than the activities of a bettor such as Mr. Burns. Yet no action has ever been taken
18 against them by the Department for those activities.

19 8. It was established at hearing that the SRPMIC-owned golf course, Cypress
20 Golf Course, advertises online gambling of the type that Mr. Burns was engaged in. By
21 allowing the paid advertisements of this type at the golf course, the tribe is involved in
22 an activity that profits from the very type of gambling that the Department is arguing in
23 this matter is illegal.

24 9. A nationally known legal expert on gambling, I. Nelson Rose, testified that
25 federal law is not violated by the placing of a bet by the bettor and Arizona statutes
26 against gambling are not applicable to bettors. Those laws are directed at individuals
27 who set up and run illegal gambling businesses and games. Additionally, he stated that
28 the idea of "bootstrapping" a violation of those statutes by claiming that the bettor aided,
29 abetted or conspired to make or allow the criminal to do the crime are not supported in
30 the law. He stated that the federal and State illegal gambling laws have never been
used to charge anyone who was a bettor only, such as Mr. Burns. As an expert on the

1 gaming agencies and their activities throughout the country, he stated that no
2 jurisdiction that he knows of would permanently revoke certification in a case such as
3 this. He stated that a sanction of this magnitude is beyond the industry standards.

4 10. The evidence at hearing showed that there are mitigating factors at work in
5 this matter. Mr. Burns stopped gambling when the issue first came to light and has no
6 interest in ever doing so again. In fact, his history was that he started sports betting,
7 then stopped for a while and sought counseling. He became afraid that the tribal
8 council would fire him if they found out he was in counseling for gambling because of its
9 political promises so he stopped going to the counseling for a while. Then he started
10 internet and off shore gambling, which he understood to be legal. He stopped again
11 just before he was contacted by the tribal police department when his investigation
12 began. He has since received extensive counseling. He cooperated fully in the
13 investigations by the U.S. Attorney's Office, the FBI, the tribe and the Department. His
14 work as the Chief Financial Officer of the SRPMIC casino was exemplary and his
15 former boss, the Chief Executive Officer and president of the Board of Directors
16 testified emphatically that he would not hesitate to work with him again. The casino he
17 worked at was in full financial regulatory compliance throughout his service there. And
18 he underwent routine investigations of his credit and personal financial dealings through
19 the Department for his annual recertification, which revealed no troubles or issues of
20 any kind.

21 11. The Department argued that Mr. Burns violated the Tribal/State Compact
22 ("the Compact"), Salt River Community Code, and State and federal laws, and the
23 Department made a thorough and reasoned decision to deny recertification. Therefore,
24 the Department argued, it was justified in denying his certification renewal.

25 12. Mr. Burns argued that it has not been established that his activities violated
26 any State or federal laws as they are read or enforced. He argued that he did not
27 violate the Salt River Community Code because it applies only to American Indians and
28 there was no evidence that his acts took place on tribal lands. He argued that he did
29 not violate the Compact. If, however, the Director should find that there was any
30 violation, however, he argued that the sanction imposed by the Department was
extreme and not warranted.

CONCLUSIONS OF LAW

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1. The Arizona Department of Gaming has jurisdiction in this matter pursuant to A.R.S. §§ 5-601 and 5-602. Hearings on appeal from Department of Gaming decisions are conducted through the Office of Administrative Hearings according to A.R.S. § 41-1092.07.

2. All tribal casinos, if they are to carry on Class III games, must enter a compact with the State of Arizona in order to operate. The Department administers the provisions of the compacts, all of which contain the same requirements for certification, referred to en masse as the Tribal/State Gaming Compact ("the Compact").

3. Pursuant to A.R.S. § 5-602(A), the Department is responsible for enforcing the Compact through certifying gaming employees and, in carrying out its duties, "shall seek to promote the public welfare and public safety and shall seek to prevent corrupt influences from infiltrating Indian gaming". A.R.S. § 5-602(B) states, "Certification pursuant to this chapter is a privilege and not a right." And, A.R.S. § 5-602(C) states, the Department "shall execute the duties of the state under the tribal-state compacts in a manner that is consistent with this state's desire to have extensive, thorough and fair regulation of Indian gaming permitted under tribal-state compacts".

4. In this case, the Department has not established that its decision to deny recertification to Mr. Burns was consistent with its duty to enforce the Compact fairly. It also does not reflect an accurate enforcement of the Compact with regard to its allegations of illegal activity.

5. The Notice of Intent was not appropriate with regard to Section 5(f)(1), (2), (9) and (10) of the Compact because these subsections all rely on the Department's finding that Mr. Burns violated the law when he gambled. The Department has failed to establish a violation of any gambling laws, as they are written or enforced. It was undisputed at hearing that the laws upon which the Department relied in arguing a violation have never even been charged against a bettor only, such as Mr. Burns. It has not been established, then, that they are supportable or enforceable in criminal courts. Therefore, they are not clear enough to be the basis of a finding that Mr. Burns' actions were illegal.

1 6. The Department's argument that betting constitutes aiding, abetting or
2 conspiring with an illegal book operation is unconvincing. Here again it was not shown
3 that the criminal laws have ever been read, charged, or enforced as meaning that a
4 bettor aids, abets or conspires with an illegal gaming operator to violate the law when
5 his sole activity is betting. If it cannot be established that Mr. Burns' gambling, as the
6 bettor only, was, in fact, illegal, it cannot be established that his actions in betting
7 constitute a violation of the Compact.

8 7. Salt River Community Code § 15.5-16(1) provides that it is a violation to
9 conduct or participate in Class II or Class III gambling on tribal lands not in the casino.
10 There was no evidence at hearing that Mr. Burns did any Class II or Class III gambling
11 on the reservation that was not in the casino. He stated in his interview in Exhibit 13
12 that he probably did some on-line gambling at his office, but his office was at the
13 casino. No witness at hearing identified any tribal land locations off of the casino site
14 where Mr. Burns was alleged to have taken part in any of his gambling activities.
15 Therefore, the allegation that Mr. Burns violated the Salt River Community Code was
16 not supported by any evidence and should not be sustained.

17 8. To the extent that the Notice of Intent regarding Section 5(f)(12) relies on
18 allegations that Mr. Burns violated any law, it is also unsupported. However, to the
19 extent that it is based on Mr. Burns' association with a criminal, Mr. Christiansen, it is
20 arguably supported because associating with a criminal in the gaming community can
21 potentially endanger the Department's ability to regulate gambling. The tolerance of
22 such illegal activity by a casino official is likely a potential threat to the public interest of
23 the tribe and the State. Therefore, the allegation that Mr. Burns violated the Compact
24 by his on-going association with Mr. Christiansen was supported by the evidence.

25 9. Having established that a violation of the Compact took place, consideration
26 now turns to what the appropriate action, if any, would be in this case. The Compact
27 affords the Department discretion in matters such as this. However, in determining how
28 much discretion to exercise in this matter, the Director may wish to consider several
29 practical considerations that may affect the ability of the Department to regulate the
30 gaming industry.

1 10. The weight of the evidence clearly shows that a full denial of recertification
2 would be unprecedented in Department history and throughout the country based solely
3 on the bettor-only activities engaged in by Mr. Burns. Nevertheless, the Department
4 may feel strongly that enforcement in this area is now due and appropriate. If that is
5 the case, the Department may wish to reconsider whether this is the appropriate case
6 for announcing such an intent considering the unique and specific circumstances at
7 play.

8 11. The evidence is quite clear and undisputed that the SRPMIC is openly
9 seeking Mr. Burns' denial of certification for its own commercial and political purposes,
10 and the Department may be wise to avoid being used by the tribes in this manner. If
11 the tribes want to protect their trade secrets, they have the same opportunities as every
12 other business to make contractual non-compete agreements with their employees. It
13 is not the Department's duty to protect them from any unwise employment or
14 contracting decisions. Additionally, the Department may wish to avoid being involved in
15 any activities in which it appears that they act at the behest of certain elected tribal
16 officials in carrying out their own political promises or agendas. Other politicians in the
17 tribe and other tribes may see it as favoritism, and they may insist on the same kind of
18 assistance from the Department, thus involving the Department in issues and rivalries
19 that are not in the best interest of the public or the gaming industry.

20 12. Issues with the tribe aside, the Department may wish to consider the
21 appearance of its actions in the eyes of the public when a Department official such as
22 Rudy Casillas takes positive steps to further the investigation of the ex-husband of his
23 long-time romantic interest, an action that took place very shortly after the divorce. It
24 creates the appearance of impropriety when the investigation results in an
25 unprecedented sanction against the ex-husband.

26 13. Finally, casinos and, by its inaction against them, the Department have
27 treated first time illegal drug users¹ with more compassion and/or leniency than is
28 contemplated in this case. Some casinos offer them treatment and, so long as the

29 ¹ One may call Mr. Burns a "first time" bettor in the same sense that an illegal drug user is considered a
30 first time drug user the first time they are caught by the casinos. It is not expected that many illegal drug
users or bettors are actually caught the first time they ever engage in the activity.

1 employees accept it, their certification never even becomes an issue. This is despite
2 the fact that they, too, regularly associate with known criminals who pose a threat to the
3 community and the tribe. In fact, they are much more in violation of the Compact
4 because they break State and federal laws that are clearly aimed directly at them, an
5 activity that could violate several different subsections of the Compact. Other
6 "criminals", i.e., those who worked in illegal Indian casinos in California before they
7 became legal, have been granted certification and have not as yet come under
8 investigation or suspicion by the Department for their illegal activities, even though their
9 actions are also more egregious than Mr. Burns' activities. The weight of the evidence
10 has established that an appropriate exercise of discretion would include an attempt by
11 the Department to be consistent in its approach to applicants and certificate-holders so
12 as to avoid a decision that would be arbitrary and capricious. Consequently, even if a
13 minor violation of the Compact such as the one at issue would justify the imposition of a
14 suspension or civil penalty, even that would be extreme compared to the lack of interest
15 the Department has taken in other, similar cases.

16 14. In addition to the above practical considerations, the Department may wish
17 to consider the mitigating factors at work here. Mr. Burns, despite all that he had to
18 lose, and despite how much he cared about his job, chose to cooperate fully throughout
19 the entire process of investigation. He sought help for his gambling and other
20 problems, and he has stopped gambling and has no desire to do so again. He was
21 under stress at the time of the alleged violations because he was going through a
22 divorce. Nevertheless, his service to the casino was exemplary throughout his
23 employment despite his personal issues.

24 15. In sum, the Notice of Intent should not be upheld on the grounds that Mr.
25 Burns violated State or federal statutes or the Salt River Community Code because it
26 has not been established that he did so, and, to the extent that it is based on Mr. Burns'
27 associations, it should not be upheld because it would be an abuse of discretion to
28 deny his recertification when others whose activities are more clearly and more
29 extensively in violation of the same subsections of the Compact are not denied theirs.
30 It would not be appropriate to take an unprecedented action against Mr. Burns when his
investigation was furthered by the long-term romantic interest of his ex-wife and the

1 motives of the tribe in furthering the investigation were questionable. Additionally, Mr.
2 Burns deserves consideration of the mitigating factors of his case. Based upon the
3 above factors, it is recommended that Mr. Burns' certification be renewed without
4 restriction or suspension.
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2 **RECOMMENDED DECISION**

3 Based upon the foregoing considerations, the undersigned Administrative Law
4 Judge hereby recommends to the Director of the Department of Gaming that this
5 appeal be sustained.
6

7 Done this day, October 4, 2007
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9 OFFICE OF ADMINISTRATIVE HEARINGS
10

11 _____
12 Dorinda M. Lang
13 Administrative Law Judge
14

15 Original transmitted by mail this
16 _____ day of _____, 2007, to:
17

18 Department of Gaming
19 Paul Bullis, Director
20 ATTN: Sheri Koss
21 202 East Earll Drive, Suite 200
22 Phoenix, AZ 85012
23

24 By _____
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