

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Peter DePaul,	:	
	:	
Petitioner	:	
	:	No. 680 F.R. 2009
v.	:	
	:	Argued: June 19, 2013
Commonwealth of Pennsylvania,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: July 11, 2013

Before the court en banc are the exceptions of Peter DePaul (DePaul) from our November 21, 2012 opinion and order which affirmed the October 20, 2009 order of the Board of Finance and Revenue (Board) dismissing DePaul's request for a refund of \$100,000 he paid to the Commonwealth pursuant to a Consent Agreement.

As set forth in our initial decision,¹ in December 2005, the Philadelphia Entertainment and Development Partners (PEDP) applied to the Pennsylvania Gaming Control Board (Gaming Board) for a Category 2 slot machine license in Philadelphia. DePaul, who held a 9.54% indirect ownership interest in PEDP, also

¹ DePaul v. Commonwealth (No. 680 F.R. 2009, filed November 21, 2012).

applied for a gaming license as a “Key Employee Qualifier” of PEDP at that time. While his license was pending, DePaul made political contributions to various candidates for public office, inadvertently violating section 1513 of the Pennsylvania Race Horse Development and Gaming Act (Gaming Act), 4 Pa.C.S. §1513.² Upon discovering his mistake, DePaul rescinded his political contributions and notified the Gaming Board of his actions. DePaul, along with PEDP, then entered into a Consent Agreement with the Gaming Board’s Bureau of Investigations and Enforcement which was ratified by the Gaming Board on December 4, 2006. In relevant part, the Consent Agreement provided that DePaul would pay \$100,000 to the Commonwealth and the Gaming Board’s Bureau of Investigations and Enforcement would consider any regulatory enforcement issues related to DePaul’s alleged violations of section 1513 to be resolved.³ DePaul’s payment of \$100,000 was deposited into the Commonwealth’s General Fund on December 13, 2006.

² Section 1513 of the Gaming Act prohibits an applicant for a slot machine license, and any officer, director, or key employee of such applicant, from contributing to a candidate for nomination or election to any public office in this Commonwealth.

³ As summarized in our prior decision, the provisions of the Consent Agreement included the following terms:

The Consent Agreement is for settlement purposes only and does not constitute an admission by PEDP or DePaul that the Gaming Act or any other law has been violated. (¶1.)

The Consent Agreement may be altered or modified by agreement of the parties in writing as approved by the Board, or set aside by the Board if any term is violated by PEDP or DePaul or if changing circumstances so warrant it. (¶3.)

The Consent Agreement shall become final and effective upon signing by the parties and approval by the Board. (¶4.)

(Footnote continued on next page...)

On November 28, 2007, DePaul filed a petition with the Pennsylvania Supreme Court challenging the constitutionality of section 1513 of the Gaming Act. The court enjoined enforcement of section 1513 on April 30, 2009, holding that its absolute ban on political contributions violated Article I, section 7 of the Pennsylvania Constitution and, therefore, was invalid. Subsequently, on May 15, 2009, DePaul requested that the Gaming Board refund the \$100,000 payment made pursuant to the Consent Agreement. The Gaming Board responded on June 4, 2009, that it did not have the authority to refund monies deposited into the General Fund. DePaul then requested a refund from the state Treasury Department, which also denied his request, explaining, *inter alia*, that DePaul provided no evidence or indication that the Gaming Board had rescinded, vacated, or amended the Consent

(continued...)

DePaul shall pay \$100,000 to the Commonwealth within 5 business days of the Board's acceptance of the Consent Agreement. (§7.)

PEDP shall pay \$100,000 to the Commonwealth. (§8.)

PEDP shall amend its internal safeguards and policies intended to prevent any violation of §1513. (§9.)

PEDP shall cause each entity/individual subject to its internal safeguards and policies to file an annual certification with the Board indicating whether they have complied with the internal safeguards and procedures during the past year. (§11.)

Upon approval by the Board, any regulatory enforcement issue relating to contributions alleged herein to be a violation of §1513 shall be resolved as to the applicants executing this consent decree. (§13.)

DePaul v. Commonwealth (No. 680 F.R. 2009, filed November 21, 2012), slip op. at 3-4.

Agreement, or that the Consent Agreement had been vacated or overturned by a court order.

DePaul then filed a petition for a refund with the Board, arguing that the Board had jurisdiction over his request pursuant to section 503(a) of the Fiscal Code.⁴ The Board dismissed DePaul's request as untimely on October 20, 2009. DePaul appealed the matter to this Court, which, after argument en banc, affirmed the Board's decision. Specifically, this Court concluded that absent any allegation that the Consent Agreement was entered into under duress, fraud, or mistake of fact, the subsequent change in law does not invalidate the Consent Agreement. This Court also held that DePaul's failure to file his petition within two years of payment deprived the Board of jurisdiction over his request under section 503(a) of the Fiscal Code. DePaul then filed the subject exceptions.⁵

In his exceptions, DePaul contends that this Court erred in not finding that DePaul was entitled to a refund following the Supreme Court's decision holding section 1513 of the Gaming Act unconstitutional. Specifically, DePaul asserts that this Court erred by: failing to recognize that DePaul paid a fine for a violation of the Gaming Act;⁶ failing to properly interpret and apply Universal Film Exchanges, Inc.

⁴ Act of April 9, 1929, P.L. 343, as amended, 72 P.S. §503(a).

⁵ In tax appeals from the Board of Finance and Revenue, this court functions as a trial court, and exceptions filed pursuant to Pa.R.A.P. 1571(i) have the effect of an order granting reconsideration.

⁶ As we previously observed, "the plain language of the Consent Agreement supports the Commonwealth's contention that the \$100,000 paid by DePaul was not a fine or penalty." DePaul v. Commonwealth (No. 680 F.R. 2009, filed November 21, 2012), slip op. at 10. We also noted that section 1513(c) mandates a minimum "fine" of \$50,000 for each violation. The record reflects that DePaul made 21 political contributions to various candidates for public office, for which the minimum "fine" would have been \$1,050,000. Id. n.8.

v. Board of Finance and Revenue, 409 Pa. 180, 185 A.2d 542 (1962), and Box Office Pictures, Inc. v. Board of Finance and Revenue, 402 Pa. 511, 166 A.2d 656 (1961); failing to find that the statute of limitations applicable to DePaul's refund request began at the time of DePaul's payment; depriving DePaul of the benefit of the Supreme Court decision concerning section 1513 of the Gaming Act; and ignoring the precept that the Due Process Clause of the Fourteenth Amendment obligates the Commonwealth to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

DePaul also argues that this Court erred in failing to recognize that he was under economic pressure when he entered the Consent Agreement. Because this argument was not raised in DePaul's appeal from the Board's decision, we do not consider it now. DePaul's remaining exceptions present the same issues that were addressed by this Court in our November 21, 2012 decision. After careful review of the record and briefs, we conclude that none of the arguments presented by DePaul warrants sustaining his exceptions and vacating this Court's prior decision.

Accordingly, DePaul's exceptions are denied.

PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Peter DePaul,	:	
	:	
Petitioner	:	
	:	No. 680 F.R. 2009
v.	:	
	:	
	:	
Commonwealth of Pennsylvania,	:	
Respondent	:	

ORDER

AND NOW, this 11th day of July, 2013, the exceptions of Peter DePaul to this Court's opinion and order in DePaul v. Commonwealth (No. 680 F.R. 2009, filed November 21, 2012), are hereby denied. Judgment shall be entered in favor of the Commonwealth.

PATRICIA A. McCULLOUGH, Judge