STATE OF ILLINOIS
ILLINOIS GAMING BOARD

In Re: Disciplinary Action Of	)	Docket No. 23-GB-004
	)	DC-V-23-161
LUCKY LINCOLN GAMING, LLC,	)	John E. White,
Terminal Operator Licensee	)	Administrative Law Judge

RECOMMENDATION TO THE ILLINOIS GAMING BOARD

Appearances: Harry Epstein, Barry Jacobs, Special Assistants Attorney General, appeared for the Illinois Gaming Board; Michael McGrath, Odelson, Sterk, Murphey, Frazier and McGrath, Ltd., Sergio Acosta, Gregory Kubly, Akerman LLP, appeared for Lucky Lincoln, LLC.

Synopsis: This matter involves an administrative complaint (Complaint) the Illinois Gaming Board (Board) issued to Lucky Lincoln Gaming, LLC (LLG). In that Complaint, the Board alleged that LLG committed violations of the Video Gaming Act (VGA), and VGA rules, and, based on those alleged violations, sought to revoke the terminal operator license (License) held by LLG.

After a period of discovery, LLG filed a Motion for Summary Judgment (LLG's Motion). The Board responded to LLG's Motion at the status conference when it was presented and waived the opportunity to respond in writing. After considering the pleadings (the sworn Complaint and Answer), the admissible evidence offered with the Motion, the text of the Illinois Administrative Procedures Act (IAPA), the Illinois Gaming Act (IGA), the VGA and applicable VGA rules, I am including in this recommendation a statement of material facts not in dispute, and conclusions of law. For the reasons expressed below, I respectfully recommend that the Board grant LLG's Motion, without delay.

Undisputed Material Facts :

1. The Board filed its two-count Complaint against LLG on May 12, 2023. LLG Motion, Ex. A (copy of Complaint), pp. 6-7.

2. The Complaint alleges, among other things, as follows:

> ***
>
> 14. Section 25(c) of the VGA prohibits terminal operators from giving anything of value to a video gaming establishment as an incentive or inducement to locate VGTs in that establishment.
> 15. Similarly, Rule 250(1) prohibits terminal operators from offering or providing anything of value to a video gaming establishment as an incentive or inducement to locate VGTs in that establishment.
>
> ***

Complaint, ¶¶ 14-15; *but see* 230 ILCS 40/25(c); 11 Ill. Admin. Code § 1800.250(l); 44 Ill. Reg. 489, 510-11 (text of VGA rule § 1800.250(l), effective December 27, 2019); 47 Ill. Reg. 2682 (Notice of Amendment of VGA rules, including § 1800.250), 2705 (page showing deletions and additions of text to amended VGA rule § 1800.250(l), effective February 10, 2023).

3. The Complaint's allegations, and some portions of LLG's Answers, further provide as follows:

RELEVANT FACTUAL BACKGROUND

21. On or before July 30, 2020, Ostry learned that MWC was interested in becoming a licensed video gaming establishment. As of that date, MWC had not yet applied for Board licensure.

ANSWER: LLG lacks knowledge or information sufficient to admit or deny the allegation in Paragraph 21 that before July 30, 2020, Ostry learned that MWC was interested in becoming a licensed video gaming establishment.

LLG further states that on July 30, 2020, MWC entered into a use agreement with LLG.

22. On or before July 30, 2020, Ostry met with Salievski to discuss MWC obtaining licensure and entering into a use agreement with Respondent.

ANSWER: LLG lacks knowledge or information sufficient to admit or deny the allegation in Paragraph 22 that Ostry met with Salievski before July 30, 2020.

LLG further states that on July 30, 2020, MWC entered into a use agreement with LLG.

23. During the meeting between Ostry and Salievski, Salievski told Ostry he did not want to replace existing dining space inside MWC with Respondent's VGTs.

ANSWER: LLG lacks knowledge or information sufficient to admit or deny the allegation in Paragraph 23.

24. Ostry offered to Salievski that Respondent could provide MWC with an adjoining structure that would attach to MWC (the "VGT Annex") to house Respondent's VGTs for patron play at MWC, and that Respondent would pay all construction costs.

ANSWER: LLG lacks knowledge or information sufficient to admit or deny all of the allegations in Paragraph 24. LLG denies the allegation in Paragraph 24 that Ostry ever offered to provide MWC with "an adjoining structure that would attach to MWC."

LLG further states that, at some time on around July 30, 2020, Ostry proposed to MWC the use of a portable shed belonging to LLG that would permit MWC to house LLG's VGTs. The portable shed would at all times remain the property of LLG and would be removed from MWC's premises upon the termination of the use agreement or at any other time agreed to by the parties. MWC was not a licensed video gaming establishment at this time.

***

25. On or about July 30, 2020, Salievski and Ostry agreed that Respondent would provide the VGT Annex at no cost to MWC in order to facilitate placement and operation of Respondent's VGTs at MWC.

ANSWER: LLG lacks knowledge or information sufficient to admit or deny all of the allegations in Paragraph 25. LLG admits that, at some time on or after July 30, 2020, Ostry proposed to MWC the use of a portable shed belonging to LLG that would permit MWC to house LLG's VGTs and that Salievski agreed. The portable shed would at all times remain the property of LLG and would be removed from MWC's premises upon the termination of the use agreement or at any other time agreed to by the parties.

26. On or about August 5, 2020, MWC applied for a video gaming establishment license. MWC's license application indicated Respondent would be MWC's terminal operator.

ANSWER: LLG admits the allegations in Paragraph 26.

27. On September 28, 2020, Rehberger personally approved Respondent's payment to a contractor for construction of the VGT Annex at MWC.

ANSWER: LLG admits that on or about September 28, Rehberger approved payment by LLG to a company for the manufacture of the LLG-owned portable shed to be used at MWC.

***

28. On October 2, 2020, following Rehberger's prior approval, Respondent issued a check, signed by Rehberger, in the amount of $21,790 to the contractor for construction of the VGT Annex at MWC.

ANSWER: LLG admits the allegations in Paragraph 28.

29. The contractor hired and paid by Respondent completed substantial construction of the VGT Annex at MWC in November 2020.

ANSWER: LLG admits that the pre-fabricated portable shed was assembled at the MWC site in or about November 2020.

30. The Board granted a video gaming establishment license to MWC on December 17, 2020.

ANSWER: LLG admits that MWC was granted its video gaming establishment license on the date alleged in Paragraph 30.

31. Following MWC's licensure, Respondent installed its VGTs at MWC in the newly built VGT Annex. Respondent's VGTs became operational for patron play at MWC on January 20, 2021.

ANSWER: LLG admits that its VGTs were installed in the LLG-owned portable shed and that the VGTs became operational in January 2021.

***

COUNT I

Inducement in Violation of 230 ILCS 40/25(c)

32. The Board re-alleges and incorporates Paragraphs 1 through 31 above as if fully alleged herein.

ANSWER: LLG re-alleges and incorporates its responses to Paragraphs 1 through 31 as though fully set forth herein.

33. Section 25(c) of the VGA prohibits a terminal operator from giving anything of value to an establishment as an incentive or inducement to locate VGTs in that establishment. 230 ILCS 40/25(c).

ANSWER: LLG re-alleges its response to Paragraph 14, above, as though fully set forth herein.

34. The VGA subjects a terminal "to termination of his or her license[.]" for violating Section 25(c). *Id.*

ANSWER: The allegations in this paragraph are legal conclusions to which no response is required.

35. In addition to its obligation as a licensee to know about and comply with all provisions of the VGA and Rules for video gaming, Respondent's receipt of the 2017 Complain gave it actual notice that offering to pay for construction at a video gaming location could subject a licensee to Board discipline.

ANSWER: LLG admits that it has an obligation to know about and comply with all provisions of the VGA and the Rules for video gaming. LLG denies that its receipt of the 2017 Complaint, which contained allegations that were incorrect as a matter of law, provided notice of any kind as to its regulatory obligations. LLG further re-alleges its responses to Paragraphs 15 and 17 as though fully set forth herein.

36. Respondent, through Ostry and with Rehberger's express knowledge and approval, provided the VGT Annex to MWC as an incentive for MWC to seek Board licensure and allow Respondent **to** operate its VGTs at MWC**.**

ANSWER: The allegations in this paragraph are legal conclusions to which no response is required. To the extent a response is required, LLG denies that the allegation sets forth in this paragraph is an accurate statement of law. LLG further denies that it allowed MWC to use the LLG-owned portable shed as an incentive for MWC to seek Board licensure and to allow LLG to operate its VGTs at MWC. LLG further re-alleges its responses to Paragraphs 24 and 25 as though fully set forth herein.

37. By engaging in the conduct described above, Respondent is subject to discipline pursuant to 230 ILCS 40/25(c).

ANSWER: The allegation contained in this paragraph is a legal conclusion to which no response is required. To the extent a response is required, LLG denies the allegation.

COUNT II
Inducement in Violation of Rule 250(1)

38. The Board re-alleges and incorporates Paragraphs 1 through 37 above as if **fully** alleged herein.

ANSWER: LLG re-alleges and incorporates its Answers to Paragraphs 1 through 31 as though fully set forth herein.

39. Board Rule 250(1) prohibits a licensed terminal operator from offering or providing anything of value to an establishment as an incentive or inducement to locate VGTs in that establishment. 11 I11. Adm. Code 1800.250(1).

ANSWER: The allegation contained in this paragraph is a legal conclusion to which no response is required. To the extent a response is required, LLG re-alleges and incorporates its response to Paragraph 15 as though fully set forth herein.

40. Board Rule 310(a)(1) provides that a licensee may be subject to discipline for any violation of Board Rules. 11 I11. Adm. Code 1800.310(a)(1).

ANSWER: The allegation in this paragraph is a legal conclusion to which no response is required.

41. Respondent, through Ostry and with Rehberger's express knowledge and approval, offered and provided the VGT Annex to MWC as an incentive for MWC to seek Board licensure and allow Respondent to operate its VGTs at MWC.

ANSWER: The allegations in this paragraph are legal conclusions to which no response is required. To the extent a response is required, LLG denies that the allegation set forth in this paragraph is an accurate statement of law. LLG further denies that it allowed MWC to use the LLG-owned portable shed as an incentive for MWC to seek Board licensure and to allow LLG to operate its VGTs at MWC. LLG further re-alleges its responses to Paragraphs 24 and 25 as though fully set forth herein.

***

Complaint & Answer, ¶¶ 21-41.

Applicable VGA Authority During the Relevant Time Period:

4. In 2019, the Illinois General Assembly amended the VGA to, among other things, define "large truck stop establishments," as a new category of video gaming establishment. 230 ILCS 40/5 (Definitions); P.A. 101-31, § 35-60 (effective June 28, 2019).

5. As part of that same 2019 legislative amendment, VGA § 40/25(c) and (e) were amended to provide, in pertinent part:

> Sec. 25. Restriction of licensees.
>
> ***
>
> (c) Terminal operator. A person may not own, maintain, or place a video gaming terminal unless he has a valid terminal operator's license issued under this Act. A terminal operator may only place video gaming terminals for use in Illinois in licensed establishments, licensed truck stop establishments, licensed large truck stop establishments, licensed fraternal establishments, and licensed veterans establishments. **No terminal operator may give anything of value, including but not limited to a loan or financing arrangement, to a licensed establishment, licensed truck stop establishment, licensed large truck stop establishment, licensed fraternal establishment, or licensed veterans establishment as any incentive or inducement to locate video terminals in that establishment.** Of the after-tax profits from a video gaming terminal, 50% shall be paid to the terminal operator and 50% shall be paid to the licensed establishment, licensed truck stop establishment, licensed large truck stop establishment, licensed fraternal establishment, or licensed veterans establishment, notwithstanding any agreement to the contrary. A video terminal operator that violates one or more requirements of this subsection is guilty of a Class 4 felony and is subject to termination of his or her license by the Board.
>
> ***
>
> (e) Licensed establishment. **No video gaming terminal may be placed in any licensed establishment, licensed veterans establishment, licensed truck stop establishment, licensed large truck stop establishment, or licensed fraternal establishment unless the owner or agent of the owner of the licensed establishment, licensed veterans establishment, licensed truck stop establishment, licensed large truck stop establishment, or licensed fraternal establishment has entered into a written use agreement**

> **with the terminal operator for placement of the terminals.** A copy of the use agreement shall be on file in the terminal operator's place of business and available for inspection by individuals authorized by the Board. A licensed establishment, licensed truck stop establishment, licensed veterans establishment, or licensed fraternal establishment may operate up to 6 5 video gaming terminals on its premises at any time. A licensed large truck stop establishment may operate up to 10 video gaming terminals on its premises at any time.
>
> ***

230 ILCS 40/25(c), (e) (emphasis added); P.A. 101-31, § 35-60 (effective June 28, 2019).

6. As of this writing, VGA § 40/25(c) includes the same text quoted in paragraph 6. 230 ILCS 40/25(c) (2023).

7. Effective December 17, 2021, Public Act 102-689 amended sections of the VGA, to, among other things, define the term "Sales agent and broker" in VGA § 40/5, and to require such persons to be licensed by the Board in VGA § 40/25(d-10). 230 ILCS 40/5, 230 ILCS 40/25(d-10); P.A. 102-689, §§ 30 ("The Video Gaming Act is amended by changing Sections 5, 25, 27, 30, 45, 50, and 65 and by adding Section 90 as follows: …"), 99 ("Effective date. This Act takes effect upon becoming law.") (effective December 17, 2021).

8. On and after December 17, 2021, VGA § 40/5's statutory definition of "sales agent and broker" provided:

> "Sales agent and broker" means an individual, partnership, corporation, limited liability company, or other business entity engaged in the solicitation or receipt of business from current or potential licensed establishments, licensed fraternal establishments, licensed veterans establishments, licensed truck stop establishments, or licensed large truck stop establishments either on an employment or contractual basis.

230 ILCS 40/20; P.A. 102-689, § 30.

9. Public Act 102-689's addition of a definition of "Sales agent and broker" to VGS § 40/5 was the first time the Illinois General Assembly referred, in the VGA, to "*potential* licensed establishments, licensed fraternal establishments, licensed veterans establishments, licensed truck stop establishments, or licensed large truck stop establishments." 230 ILCS 40/20 (emphasis added); P.A. 102-689, § 30.

10. On and after December 17, 2021, VGA § 40/25(d-10) provided:

> Sec. 25. Restriction of licensees.
>
> ***
>
> (d-10) A person may not solicit the signing of a use agreement on behalf of a terminal operator or enter into a use agreement as agent of a terminal operator unless that person either has a valid sales agent and broker license issued under this Act or owns, manages, or significantly influences or controls the terminal operator.
>
> ***

230 ILCS 40/25(d-10); P.A. 102-689, § 30.

11. Public Act 102-689 did not amend VGA § 40/25(c) to make any change to that section's inducement prohibition. 230 ILCS 40/25(c); P.A. 102-689, § 30.

12. Public Act 102-689 also amended VGA § 40/50, and distinguished between persons initially licensed and those persons whose licenses had been renewed. 230 ILCS 40/50(c); P.A. 102-689, § 30.

13. On and after December 17,2021, VGA § 40/50(c) provided:

> Sec. 50. Distribution of license fees.
>
> ***
>
> (c) All initial terminal handler, technician, sales agent and broker, licensed establishment, licensed truck stop establishment, licensed large truck establishment, licensed fraternal establishment, and licensed fraternal establishment licenses issued by the Board under this Act shall be issued for 2 years and are renewable for additional 2-year periods unless sooner cancelled or terminated. Except as provided by Section 8.1 of the Illinois Gambling Act, all

> initial manufacturer, distributor, supplier, and terminal operator licenses issued by the Board under this Act shall be issued for 4 years and are renewable for additional 4-year periods unless sooner cancelled or terminated. No license issued under this Act is transferable or assignable.

230 ILCS 40/50(c); P.A. 102-689, § 30.

14. Since 2013, VGA § 40/78 has provided, in pertinent part:

> Sec. 78. Authority of the Illinois Gaming Board.
> (a) The Board shall have jurisdiction over and shall supervise all gaming operations governed by this Act. The Board shall have all powers necessary and proper to fully and effectively execute the provisions of this Act, including, but not limited to, the following:
> ***
> (3) To adopt rules for the purpose of administering the provisions of this Act and to prescribe rules, regulations, and conditions under which all video gaming in the State shall be conducted. Such rules and regulations are to provide for the prevention of practices detrimental to the public interest and for the best interests of video gaming, including rules and regulations (i) regarding the inspection of such establishments and the review of any permits or licenses necessary to operate an establishment under any laws or regulations applicable to establishments, (ii) to impose penalties for violations of this Act and its rules, and (iii) establishing standards for advertising video gaming.
> (b) The Board shall adopt emergency rules to administer this Act in accordance with Section 5-45 of the Illinois Administrative Procedure Act. For the purposes of the Illinois Administrative Procedure Act, the General Assembly finds that the adoption of rules to implement this Act is deemed an emergency and necessary to the public interest, safety, and welfare.

230 ILCS 40/78.

15. During the times referred to in the Complaint, the text of VGA rule § 1800.250(l) provided:

> Section 1800.250 Duties of Terminal Operators
> In addition to all other duties and obligations required by the Act and this Part, each licensed terminal operator has an ongoing duty to comply with the following:
> ***

> l) Offer or provide nothing of value to any licensed video gaming location or any agent or representative of any licensed video gaming location as an incentive or inducement to locate, keep or maintain video gaming terminals at the licensed video gaming location;
>
> ***

Compare 11 Ill. Admin. Code § 1800.250(l) (2019 through 2023); 44 Ill. Reg. 489, 510-11 (effective December 27, 2019) *with* 46 Ill. Reg. 14742 (publication of the Board's Notice of Proposed Amendments to, among other things, VGA rule § 1800.250).

16. Volume 45, issue 12 of the Illinois Register, dated February 21, 2021, included the Board's Notice of Adopted Amendments regarding, among other things, the addition of new VGA rule § 1800.350, which became effective on March 8, 2021. 45 Ill. Reg. 3424 (first page of Notice), 3451-58 (page showing text of new VGA rule § 1800.350). Volume 45, issue 12 of the Illinois Register is viewable at the ISOS website at: https://www.ilsos.gov/departments/index/register/volume45/register_volume45_issue_12.pdf.

17. Section 1800.350 includes the following text:

> Section 1800.350 Inducements
> For the purposes of Board action, the following criteria regarding the provision of goods and services shall apply.
> a) For the purposes of this Section:
>
> ***
>
> 2) "Video gaming location" means any licensed video gaming location as defined in Section 1800.110, any applicant to become a licensed video gaming location, any person who the terminal operator has reason to believe may apply to become a licensed video gaming location, and including the video gaming location's owners, employees, agents, persons of significant influence or control, or their immediate family members.
>
> ***

11 Ill. Admin. Code § 1800.350(a)(2); 45 Ill. Reg. 3424, 3451-52 (effective March 8, 2021).

18. Volume 46, issue 12 of the Illinois Register, dated September 2, 2022, included the Board's Notice of Proposed Amendments regarding, among other things, amendments to VGA rule § 1800.110, and § 1800.250. 46 Ill. Reg. 14742 (first page of Notice) (Board responses to Questions 3 & 5), 14761 (page showing proposed text of the newly added regulatory definition of "video gaming location"), 14763 (page showing proposed amendment to text of VGA rule § 1800.250(l). Volume 46, issue 12 of the Illinois Register is viewable on the ILSOS website at: https://www.ilsos.gov/departments/index/register/volume46/register_volume46_issue_36.pdf.

19. Volume 47, issue 8 of the Illinois Register, dated February 24, 2023, included the Board's Notice of Adopted Amendments regarding, among other things, amendments to VGA rule § 1800.110, and § 1800.250, all of which became effective on February 10, 2023. 47 Ill. Reg. 2682 (first page of Notice), 2703 (page showing text of new regulatory definition of "Video gaming location"), 2705 (page showing the changes to the prior text of VGA rule § 1800.250(l)). Volume 47, issue 8 of the Illinois Register is viewable at the ILSOS website at: https://www.ilsos.gov/departments/index/register/volume47/register_volume47_8.pdf.

20. On and after the effective date of the Board's 2023 amendment to VGA rule § 1800.110, the text remained the same as proposed in September 2022.

21. The regulatory definition of the term "video gaming location" which became effective February 10, 2023 (47 Ill. Reg. 2682, 2703) is substantially similar to the meaning of the same term as stated in VGA § 1800.350(a)(2), which became effective March 8, 2021. 45 Ill. Reg. 3424, 3451-52 (effective March 8, 2021). More specifically, the below table compares the substantially similar text of VGA § 1800.350(a)(2) and VGA § 1800.110:

Section 1800.350 Inducements For the purposes of Board action, the following criteria regarding the provision of goods and services shall apply. a) For the purposes of this Section: *** 2) "Video gaming location" means any licensed video gaming location as defined in Section 1800.110, any applicant to become a licensed video gaming location, any person who the terminal operator has reason to believe may apply to become a licensed video gaming location, and including the video gaming location's owners, employees, agents, persons of significant influence or control, or their immediate family members. *** 11 Ill. Admin. Code § 1800.350(a)(2); 45 Ill. Reg. 3424, 3451-52 (effective March 8, 2021).	Section 1800.110 Definitions For purposes of this Part the following terms shall have the following meanings: *** "Video gaming location": Any licensed video gaming location as defined in Section 1800.110, any applicant to become a licensed video gaming location, or any person that a terminal operator or sales agent and broker has reason to believe may apply to become a licensed video gaming location. *** 11 Ill. Admin. Code § 1800.110; 47 Ill. Reg. 2682, 2703 (effective February 10, 2023).

22. On and after the effective date of the Board's 2023 amendment to VGA rule § 1800.250, paragraph (l) of the rule provided:

> ***
> Section 1800.250 Duties of Terminal Operators
> In addition to all other duties and obligations required by the Act and this Part, each licensed terminal operator has an ongoing duty to comply with the following:
> ***
> l) Offer or provide nothing of value to video gaming location or any person related to or affiliated with a video gaming location as an incentive or inducement to locate, keep or maintain video gaming terminals at the video gaming location;

***

11 Ill. Admin. Code § 1800.250; 47 Ill. Reg. 2682, 2705 (effective February 10, 2023).

Exhibits Offered to Support LLG's Motion:

15. Motion Exhibit A consists of a copy of the Board's Complaint and is admissible as an official Board record. 11 Ill. Admin. Code § 1800.760(a)(1) ("… official Illinois Gaming Board records or certified copies of the records shall be admissible into evidence if the records tend to prove or disprove an allegation contained in the complaint;"), (2) ("Official Illinois Gaming Board records are documents either prepared by or provided to the Board for the purpose of conducting its regular business.").

16. LLG's Answer, as the second of the two pleadings in this contested case, is also admissible as an official Board record. 11 Ill. Admin. Code § 1800.760(a)(1)-(2).

17. Pages 3 to 21 of Motion Exhibit B are admissible as official Board records. Motion, Ex. B, pp. 3-21; 11 Ill. Admin. Code § 1800.760(a)(1)-(2). The admissible parts of this exhibit consist of four documents, each under the Board's letterhead, titled, respectively: Illinois Gaming Board Policy on Advertising by Video Gaming Licensees as of February 2014 (Motion Ex. B, p. 3); Illinois Gaming Board Policy on Inducements, Advertising & Promotions by Video Gaming Licensees in effect as of July 2014 (Motion Ex. B, pp. 4-8); Illinois Gaming Board Policy on Inducements, Advertising and Promotions by Video Gaming Licensees in effect as of March 2016 (Motion Ex. B, pp. 9-14);

Illinois Gaming Board Policy on Inducements, Advertising & Promotions by Video Gaming Licensees in effect as of February 1, 2017 (Motion Ex. B, pp. 15-21).

18. The admissible records included within Exhibit B show that, even before it adopted VGA rule § 1800.350, which first became effective on March 8, 2021, to announce how it would interpret and administer VGA § 40/25(c)'s inducement prohibition provision (45 Ill. Reg. 3424), the Board notified the public that there are things of value (the examples of which changed in each policy statement) a terminal operator may provide to licensed establishments which the Board would not consider a prohibited inducement. Motion, Ex. B, pp. 5-6 (p. 2 of Board's Policy in effect as of July 2014) (among the items "Not considered an inducement" are "[m]inimal structural changes to a Licensed Location, directly related to the segregation requirements in Section 58 of the Act."), 10-11 (pp. 2-3 of Board's Policy in effect as of March 2016), 16-17 (pp. 2-3 of Board's Policy in effect as of February 1, 2017); 11 Ill. Admin. Code § 1800.350(b).

19. Exhibit C consists of documents such as email chains, and letters, regarding which no foundation was provided. Since no foundation was provided for the documents comprising this Exhibit, it is not being considered for purposes of LLG's Motion.

20. Exhibit D consists of: a copy of volume 44, issue 12, of the Illinois Register, in which the Board published a Notice of Proposed Amendments to its VGA rules, including, among others, the addition of new VGA rule § 1800.350, titled

Inducements; and a copy of the adopted version of the same rule. It is not evidence, but is rather the history and text of a VGA rule that became effective after the time reflected in the Complaint, of which notice may be taken. Acme Maldonado v. Creative Woodworking Concepts, Inc., 296 Ill. App. 3d 935, 938, 694 N.E.2d 1021, 1025 (3d Dist. 1998) (" records from the Illinois Secretary of State's Office, … are public records that this court may take judicial notice of"); Brick & Supply Co. v. Department of Revenue, 133 Ill. App. 3d 757, 762, 468 N.E.2d 1380, 1384 (2d Dist. 1985) (a court can take official notice of administrative rules and regulations); 5 ILCS 100/10-40(c) ("Notice may be taken of matters of which the circuit courts of this State may take judicial notice.").

21. Exhibit E is a printout of the text of newly added VGA rule § 1800.350, which became effective on March 8, 2021, after the time reflected in the Complaint, of which notice may be taken. Creative Woodworking Concepts, Inc., 296 Ill. App. 3d at 938, 694 N.E.2d at 1025; Brick & Supply Co., 133 Ill. App. 3d at 762, 468 N.E.2d at 1384; 5 ILCS 100/10-40(c).

22. Exhibit F is a printout of the text of new additions to defined terms included in VGA rule § 1800.110, which became effective on February 10, 2023, after the time reflected in the Complaint, of which notice may be taken. Creative Woodworking Concepts, Inc., 296 Ill. App. 3d at 938, 694 N.E.2d at 1025; Brick & Supply Co., 133 Ill. App. 3d at 762, 468 N.E.2d at 1384; 5 ILCS 100/10-40(c).

23. Exhibit G is a copy of a recommendation to partially grant and partially deny each of the parties' cross-motions for summary judgment in a contested case, docketed as 18-GB-005, between the same parties. The Board deferred any

action on the recommendation comprising Exhibit G. Since Exhibit G is neither evidence nor authority, it is not being considered for purposes of LLG's Motion.

Conclusions of Law:

Summary judgment is proper where the pleadings, depositions, admissions, affidavits and exhibits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c); Petrovich v. Share Health Plan of Illinois, Inc., 188 Ill. 2d 17, 30-31, 719 N.E.2d 756, 764 (1999). Although summary judgment is a drastic measure, it is an appropriate tool to employ in the expeditious disposition of a lawsuit in which " 'the right of the moving party is clear and free from doubt.'" Morris v. Margulis, 197 Ill. 2d 28, 35, 754 N.E.2d 314, 318 (2001) (*quoting* Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986)).

A party filing a motion for summary judgment has both the initial burden of production and the ultimate burden of proof. Pecora v County of Cook, 323 Ill. App. 3d 917, 933, 752 N.E.2d 532, 545 (1st Dist. 1999). Until the movant meets its initial burden, the non-movant has no burden whatsoever. Rice v AAA Aerostar, Inc., 294 Ill. App. 3d 801, 805, 690 N.E.2d 1067, 1070 (4th Dist. 1998). On the other hand, if the movant does satisfy its burden, the nonmoving party must present a factual basis that would arguably entitle him to a judgment. Hernandez v. Alexian Brothers Health System, 384 Ill. App. 3d 510, 518, 893 N.E.2d 934, 940-41 (1st Dist. 2008).

During the status conference at which LLG presented the Motion, Board counsel declined an opportunity to respond to the Motion in writing. The Board's response was

recorded using WebEx software, and a copy of that audio file was provided to the parties. That audio file has not been transcribed, so this recommendation will refer to the approximate time at which certain arguments were made.

Since the Board bears no burden of proof as to whether LLG has shown an entitlement to judgment as a matter of law, Board counsel's verbal responses to LLG's motion will be addressed following an analysis of the Motion.

Analysis:

LLG seeks judgment regarding both counts of the Complaint, for two reasons. First, it argues that neither § 40/25(c) of the VGA nor VGA rule § 1800.250(l) apply because MWC was neither a "licensed establishment" nor a "licensed video gaming location" when LLG paid to have the VGT Annex constructed and affixed to MWC's site. Motion, pp. 8-11. Second, allowing the Board to impose discipline for a violation of 40/25(c) of the Act or Board Rule 250(l) would violate Lucky Lincoln's due process rights because "inducement" as used in the Act and Rule is unconstitutionally vague. Motion, pp. 12-15.

Procedurally, Illinois Supreme Court Rule 19 requires LLG to raise any constitutional objection to the Board's Complaint at the earliest appropriate time. Ill. Sup. Ct. R 19. That said, since neither an ALJ nor an administrative agency, like the Board, has the authority to declare either a statute or a properly promulgated regulation unconstitutional, I will not address LLG's constitutional claims. Here, moreover, there is no need to address LLG's constitutional objections since LLG's Motion may be granted for other, purely statutory, reasons. People v. Brown, 225 Ill.2d 188, 200, 866 N.E.2d 1163, 1170 (2007) ("our court will not consider a constitutional question if the case can be

decided on other grounds. If a court can resolve a case on nonconstitutional grounds, it should do so.").

While VGA rule § 1800.745 generally describes the procedures for review of a party's motion for summary judgment in contested disciplinary cases, more generally, such motions are authorized by § 2-1005 of Illinois' Code of Civil Procedure. 735 ILCS 5/2-1005. That Code section provides, in pertinent part:

> Sec. 2-1005. Summary judgments. (a) For plaintiff. Any time after the opposite party has appeared or after the time within which he or she is required to appear has expired, a plaintiff may move with or without supporting affidavits for a summary judgment in his or her favor for all or any part of the relief sought.
> (b) For defendant. A defendant may, at any time, move with or without supporting affidavits for a summary judgment in his or her favor as to all or any part of the relief sought against him or her.
> (c) Procedure. The opposite party may prior to or at the time of the hearing on the motion file counteraffidavits. The judgment sought shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
> ***

735 ILCS 5/2-1005.

Here, LLG is in the position of a defendant. "A defendant who moves for summary judgment may meet its initial burden of production in at least two ways: (1) by affirmatively disproving the plaintiff's case by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law (traditional test) [citation omitted], or (2) by establishing that the nonmovant lacks sufficient evidence to prove an essential element of the cause of action (Celotex test)." Williams v. Covenant Medical Center, 316 Ill. App. 3d 682, 688, 737 N.E.2d 662, 668 (4th Dist. 2000). Here,

LLG's Motion takes the first approach, by relying on the parties' pleadings which show there is no dispute that MWC was not a licensed establishment when LLG paid to have the VGT Annex constructed and affixed to MWC's site. Motion, pp. 8-11.

LLG filed its Motion without supporting affidavits. Instead, it simply attached to its Motion seven exhibits, labeled A through G. An affidavit is ordinarily the way a movant presents to a court, or to a factfinder, among other things, the foundation necessary to consider evidence offered to support the Motion. *See* Hon. Barbara McDonald, The Top 10 Ways to Avoid Losing a Motion for Summary Judgment, Ill. B. Jrnl. 128, 132-33 & n.40 (Vol. 92, No. 3) (March 2004) ("Because the rules of evidence apply to summary judgment proceedings, you cannot attach documents or photographs as exhibits to a summary judgment motion without providing the court with either a stipulation, an affidavit, or deposition testimony that lays the proper foundation for the admissibility of the exhibit.") (*citing and quoting,* in note 40, Landeros v Equity Property & Development, 321 Ill. App. 3d 57, 62, 747 NE2d 391, 397 (1st D 2001)). Additionally, when I included only some of LLG's Answers in the Statements of Material Facts, I did so because many parts of LLG's Answers are exculpatory in nature. LLG's Answers which admitted the facts alleged are admissions, if not judicial admissions. Any exculpatory matters asserted in such Answers, in contrast, are hearsay — in effect, LLG's own, prior, consistent statements. If LLG intended its Motion to be supported by any of the exculpatory statements included in such Answers, it was required to offer evidence that the factual matters asserted were true, and further, that such facts were not in dispute.

Since LLG's Motion is not supported by an affidavit, , I will only consider in this recommendation those exhibits which are self-authenticating, or published regulatory

amendments to VGA rules referred to in the Complaint and Answer, or in LLG's Motion. 11 Ill. Admin. Code § 1800.760(a)(1)-(2); Creative Woodworking Concepts, Inc., 296 Ill. App. 3d at 938, 694 N.E.2d at 1025; Brick & Supply Co., 133 Ill. App. 3d at 762, 468 N.E.2d at 1384; 5 ILCS 100/10-40(c). For example, Motion Exhibit A, which is a copy of the Complaint, is an Official Board record. 11 Ill. Admin. Code § 1800.760(a)(1)-(2). I am also considering the admissions included in LLG's Answer, as the other of the two pleadings in this matter. 735 ILCS 5/2-1005(c).

My recommendation that LLG's Motion should be granted is based solely on the undisputed facts shown by the parties' pleadings, and their application to Illinois law, which includes: provisions within the Illinois Gaming Act (IGA), the VGA, and the IAPA; the texts of VGA § 40/25(c) and the version of VGA § 1800.250(l) that was in effect when LLG provided things of value to MWC; the texts and effective dates of amended VGA rules § 1800.110 and 1800.250(l), which became effective February 10, 2023; and Illinois caselaw.

LLG has shown that the material facts set forth in its Motion are undisputed. Those facts will be addressed when analyzing, first, LLG's claim that its actions do not constitute a violation of VGA § 40/25(c), and next, that its actions do not constitute a violation of the VGA rule § 1800.250(l) which was in effect when the acts referred to in the Complaint occurred.

Did LLG Establish There is No Dispute Regarding the Facts Material to its Motion?

The purpose of summary judgment proceedings is to decide questions of law after first deciding that no genuine issue of material fact exists which is to be determined from the pleadings, depositions, affidavits, and exhibits. Makela v. State Farm Mutual

Automobile Ins. Co., 147 Ill. App. 3d 38, 50, 497 N.E.2d 483, 491 (1st Dist. 1986). Here, LLG has supported its initial burden to show that there is no dispute that MWC was not a licensed establishment when LLG admits it provided MWC with the construction and affixation of the VGT Annex as the place where MWC would offer video gaming, if MWC's later application for licensure was approved by the Board. Complaint, ¶¶ 24-31; Motion, pp. 8-11. Specifically, the pleadings establish there is no dispute regarding the following material facts:

- LLG has been a licensed terminal operator since April 30, 2014. Complaint & Answer, ¶ 6.
- During all times referred to in the Complaint, LLG employed Pat Ostry. Complaint & Answer, ¶ 10.
- LLG entered into a Use Agreement with MWC on July 30, 2020. Complaint & Answer, ¶¶ 21-22.
- On or after July 30, 2020, Ostry, for LLG, proposed that LLG could provide to MWC a portable shed belonging to LLG that would permit MWC to house LLG's VGTs, and that Salievski, for MWC, agreed. Complaint & Answer, ¶¶ 24-25.
- On or about August 5, 2020, MWC applied for a video gaming establishment license from the Board, which application indicated LLG would be MWC's terminal operator. Complaint & Answer, ¶ 26.
- On September 28, 2020, Rehberger, for LLG, personally approved LLG's payment for the manufacture of what the Board refers to as "the VGT Annex," and LLG refers to as "the LLG owned portable shed" to be used at MWC. Complaint & Answer, ¶ 27.[1]
- On October 2, 2020, following Rehberger's approval, LLG issued a check, signed by Rehberger, in the amount of $21,790 to the contractor for construction of the VGT Annex at MWC. Complaint & Answer, ¶ 28.

[1] Whether the particular thing of value described in the parties' pleadings is more correctly identified as the VGT Annex, as the Board chooses, or as a shed, as LLG prefers, is not material to LLG's Motion. What is material is that, no matter what it is called, it is undisputed that LLG's admitted act of paying over $20,000 for its construction and affixation to MWC's location, also constitute admissions that such acts provided MWC with "[a …]thing of value," as that phrase is used in VGA § 40/25(c). *See* Complaint & Answer, ¶¶ 27-30; 230 ILCS 40/25(c). LLG's argument that it did not *"give"* MWC anything of value (Motion, p. 11), is belied by its answers.

- In November 2020, the contractor LLG hired and paid completed its assembly of the VGT Annex at MWC. Complaint & Answer, ¶ 29.
- The Board granted a video gaming establishment license to MWC on December 17, 2020. Complaint & Answer, ¶ 30.
- Following MWC's licensure, LLG installed its video gaming terminals (VGTs) at MWC in the newly built VGT Annex. Complaint & Answer, ¶ 31.

Since there is no dispute regarding the facts material to LLG's Motion, and the facts material to MWC's status when LLG provided it with things of value in 2020, the only question remaining is whether such acts constituted a violation of either VGA § 40/25(c) or VGA rule § 1800.250(l). Those questions are questions of law and are appropriate subjects for summary judgment. People v. Wallace, 77 Ill. App. 3d 979, 981, 397 N.E.2d 20, 22 (5th Dist. 1979) ("Whether certain conduct occurred is a question of fact, but whether certain conduct violates a certain statute is a question of law to be decided by the court.").

Did LLG's Admitted Acts in 2020 Constitute a Violation of VGA § 40/25(c)?

Count 1 of the Complaint alleges that LLG committed a violation of VGA § 40/25(c). Whether a person's undisputed acts violate a statute involves a matter of statutory interpretation. Wallace, 77 Ill. App. 3d at 981, 397 N.E.2d at 22. In J & J Ventures Gaming, LLC v. Wild, Inc., 2016 IL 119870 (2016), 67 N.E.3d 243, the Illinois Supreme Court noted:

> ***
>
> *** When interpreting a statute, the court's primary objective is to ascertain and give effect to the intent of the legislature. [all citations omitted] The most reliable indicator of legislative intent is the language of the statute itself, which must be given its plain and ordinary meaning. […] All provisions of a statute must be viewed as a whole, with the relevant statutory provisions construed together and not in isolation. […] In addition, the court may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute in one way or

> another. […] Questions relating to the circuit court's jurisdiction and the interpretation of a statute both present issues of law, which we review *de novo.* […]
>
> ***

J & J Ventures Gaming, LLC, 2016 IL 119870, ¶ 25, 67 N.E.3d at 251.

The VGA was amended, effective June 28, 2019, to, among other things, add a definition for the new statutory term, "licensed large truck stop establishment" in VGA § 5. P.A. 101-31, § 35-60 (effective June 28, 2019). As part of that same Public Act, VGA § 40/25(c) was also amended to provide, in pertinent part:

> ***
>
> *** No terminal operator may give anything of value, including but not limited to a loan or financing arrangement, to a licensed establishment, licensed truck stop establishment, **licensed large truck stop establishment**, licensed fraternal establishment, or licensed veterans establishment as any incentive or inducement to locate video terminals in that establishment. *** A video terminal operator that violates one or more requirements of this subsection is guilty of a Class 4 felony and is subject to termination of his or her license by the Board. ***
>
> ***

230 ILCS 40/25(c); P.A. 101-31, § 35-60 (emphasis added). The text of VGA § 40/25(c) was in effect during all time period referred to in the Complaint. The quoted text remains in effect as of this writing.

The plain text of VGA § 40/25(c) specifically identifies five categories of establishments to whom no terminal operator may give anything of value. 230 ILCS 40/25(c). Each expressed category begins with the identical adjective, "licensed." *Id*. Moreover, each specifically identified category included in the list was, during the events described in the Complaint, defined in the definition section of the VGA. 230 ILCS 40/5 (statutory definitions of: "licensed establishment," "licensed truck stop establishment," "licensed large truck stop establishment," "licensed fraternal establishment," and

"licensed veterans establishment."). As of this writing, the definition of each of those statutory terms remains within VGA ¶ 40/5.

So, when reading VGA § 40/25(c) together with VGA § 40/5, any reader can discern which persons the legislature intended to include within the list of persons to whom terminal operators are prohibited from giving anything of value as an incentive to locate video terminals in such persons' establishments. 230 ILCS 40/5; 230 ILCS 40/25(c); J & J Ventures Gaming, LLC, 2016 IL 119870, ¶ 25, 67 N.E.3d at 251. The plain text of VGA § 40/25(c) makes the licensed status of the person receiving anything of value from a terminal operator an essential element of any alleged violation by a terminal operator. 230 ILCS 40/25(c); 230 ILCS 40/5.

And if the Board were inclined to conclude that the plain text of VGA § 40/25(c) is ambiguous in some way, and that this contested case requires its text to be interpreted, the ordinary rules of construction do not favor the way the Board, in the Complaint, characterizes what VGA § 40/25(c) means. Complaint ¶ 14 ("Section 25(c) of the VGA prohibits terminal operators from giving anything of value to a video gaming establishment as an incentive or inducement to locate VGTs in that establishment."); J & J Ventures Gaming, LLC, 2016 IL 119870, ¶ 25, 67 N.E.3d at 251.

First, VGA § 40/25(c) is a statute which commands certain acts ("[n]o terminal operator may give anything of value …") and establishes penalties for their violation ("… A video terminal operator that violates one or more requirements of this subsection is guilty of a Class 4 felony and is subject to termination of his or her license by the Board. …"). 230 ILCS 40/25(c). That means it is a penal statute. Mitee Racers, Inc. v. The Carnival-Amusement Safety Board, 152 Ill. App. 3d 812, 819, 504 N.E.2d 1298, 1302

(2d Dist. 1987) ("As the Act does command certain acts and establishes penalties for their violations, it falls under the generally accepted definition of a penal statute. [citations omitted]"). "Generally, penal statutes should be strictly construed [citations omitted] and must be strictly limited in their interpretation to such objects as are obviously within their terms […] A court, however, must give effect to the legislative intent and must not read a statutory enactment rigidly as to defeat that intent. […] Moreover, the right of the State to regulate all places of public amusement is universally recognized. […]"). *Id*., at 819, 504 N.E.2d at 1302-03.

So, if the Board were to conclude that VGA § 40/25(c) needs to be interpreted, I would respectfully recommend that it do so by interpreting and applying it as a penal statute. When making this recommendation, moreover, I am not ignoring that the Illinois General Assembly clearly intended the Board to "strictly regulate the facilities, persons, associations and practices related to gambling operations pursuant to the police powers of the State, including comprehensive law enforcement supervision." 230 ILCS 10/2; 230 ILCS 40/80. Instead, my point is that the General Assembly has, itself, plainly expressed what a violation of VGA § 40/25(c) consists of, "pursuant to the police powers of the State" as set forth in the VGA. 230 ILCS 40/25(c); 230 ILCS 10/2.

Second, when construing a statutory provision which sets out a list of persons or things which comprise an element of a violation that a penal statute describes — in effect, a list which defines a class — one frequent rule of construction is to apply the maxim '*expressio unius est exclusio alterius*,' meaning that the expression of one thing implies the exclusion of the other. Solich v. George & Anna Portes Cancer Prevention Center, 158 Ill. 2d 76, 82, 630 N.E.2d 820, 822 (1994) ("In this case, the statute at issue

plainly states that it is applicable to actions against four specific categories of health care providers, namely, those physicians, dentists, registered nurses and hospitals "duly licensed under the laws of this State." (Ill. Rev. Stat. 1983, ch. 110, par. 13-212(a).) Where, as here, a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions, despite the lack of any negative words of limitation."). Were that rule of construction applied in this case, a reasonable factfinder would ordinarily construe the legislature's express identification of only five categories of establishments as evincing the legislature's intent that no other persons were meant to be included in that list. Further, the legislature's consistent use of the identical adjective, "licensed," in each expressed category, would ordinarily be construed as evincing the legislature's intent that no unlicensed establishment was meant to be included.

As the Court in J & J Ventures Gaming, LLC, noted, "All provisions of a statute must be viewed as a whole, with the relevant statutory provisions construed together and not in isolation." J & J Ventures Gaming, LLC, 2016 IL 119870, ¶ 25, 67 N.E.3d at 251. When VGA § 40/25(c) was amended in 2019, § 40/25(e) was also amended to provide as follows:

> (e) Licensed establishment. No video gaming terminal may be placed in any licensed establishment, licensed veterans establishment, licensed truck stop establishment, licensed large truck stop establishment, or licensed fraternal establishment unless the owner or agent of the owner of the licensed establishment, licensed veterans establishment, licensed truck stop establishment, licensed large truck stop establishment, or licensed fraternal establishment has entered into a written use agreement with the terminal operator for placement of the terminals. A copy of the use agreement shall be on file in the terminal operator's place of business and available for inspection by individuals authorized by the Board. A licensed establishment, licensed truck stop establishment, licensed veterans establishment, or licensed fraternal establishment may operate up to 6 5 video gaming terminals on its premises at any time. A licensed large truck stop

> establishment may operate up to 10 video gaming terminals on its premises at any time.
>
> ***

230 ILCS 40/25(e); P.A. 101-31, § 35-60 (effective June 28, 2019).

When reading § 40/25(c) together with paragraph (e), the VGA's statutory scheme requires any person who wants to become one of the licensed establishments described in VGA § 40/25(c) to have entered into a use agreement with a licensed terminal operator, before obtaining an establishment license from the Board. 230 ILCS 40/25(c); Complaint & Answer, ¶ 22. Given VGA § 40/25(e)'s express requirement, it is not unreasonable to read VGA § 40/25(c)'s inducement prohibition, as it is written, as reflecting the legislature's intent that it be applicable to terminal operators who provide things of value to an establishment *after* the establishment had been issued a license, and not before. 230 ILCS 40/25(c).

Further, when the Illinois General Assembly amended the VGA, effective December 17, 2021, to add a definition of the term "Sales agent and broker" in VGA § 40/5, which included the phrase "potential licensed establishments", and to require that such persons to be licensed in VGA § 40/25(d-10), it *did not* also amend VGA § 25(c) to add the same phrase ("potential licensed establishments") to the class of persons to whom terminal operators are prohibited from providing anything of value. P.A. 102-689, § 30. This amendment shows that the legislature obviously knew the difference between licensed establishments and potential licensed establishments, and, when it amended VGA § 40/5 to use the latter language in the new definition of "sales agent and broker", it chose to keep the text of VGA § 40/25(c)'s inducement prohibition as it was. "When the legislature uses certain language in one part of a statute and different language in another, we may assume

different meanings were intended." Carver v. Bond/Fayette/Effingham Reg. Bd. of School Trustees, 146 Ill. 2d 347, 353, 586 N.E.2d 1273, 1276 (1992). The Illinois legislature's 2021 amendments to VGA §§ 40/5 and 40/25(d-10), in P.A. 102-689, did not amend the text of VGA § 40/25(c), so it cannot have affected the plain meaning of that text. "[T]here is no rule of construction which authorizes a court to declare that the legislature did not mean what the plain language of the statute imports." Solich, 158 Ill. 2d at 83, 630 N.E.2d at 823.

Regarding the specific situation in this case, I respectfully recommend that the Board not apply VGA § 40/25(c) as though it prohibits a terminal operator from offering a thing of value to a person who is not one of the specifically identified persons included in the class expressed in the statute. Section 40/25(c) does not prohibit a terminal operator from giving anything of value to anyone who is not included in the class stated in that section. Applying VGA § 40/25(c) as though it did, in this case, would render the legislature's repeated use of the term "licensed" mere surplusage. In re County Collector of Kane Co., 132 Ill. 2d 64, 72, 547 N.E.2d 107, 110 (1989) ("In construing a statute or an ordinance, a court should not adopt a construction which renders words or phrases in a statute superfluous.").

My recommendation is that the Board apply the plain text of VGA § 40/25(c) as written. The statute is unambiguous. The plain text of VGA § 40/25(c) does not include an applicant for any of the licensed establishments identified within the specifically named class of persons to whom terminal operators may not give anything of value. 230 ILCS 40/25(c). The undisputed facts clearly show that, while LLG gave something of value to MWC — payment for the construction of the VGT Annex and its affixation to MWC's site

— it did so when MWC was a license applicant, and not when MWC was a licensed establishment. Complaint & Answer, ¶¶ 24-31, 68; 230 ILCS 40/25(c). Again, the plain text of VGA § 40/25(c) makes the licensed status of the person receiving something of value an essential element of any alleged violation by a terminal operator. 230 ILCS 40/25(c). "Where an enactment is clear and unambiguous, … a court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express." Solich, 158 Ill. 2d at 83, 630 N.E.2d at 823.

LLG's Motion asserts that it is entitled to judgment, as a matter of law, because there is no dispute that MWC was not a licensed establishment when LLG gave it a thing of value. Motion, pp. 8-11. Since there is no dispute that MWC was not a licensed establishment when LLG gave it something of value, as a matter of law, LLG did not violate VGA § 40/25(c). Therefore, I recommend that the Board grant judgment to LLG regarding the Complaint's allegations that it violated VGA § 40/25(c), without delay. 230 ILCS 40/25(c); 725 ILCS 5/2-1005(c).

Did LLG's Admitted Acts in 2020 Constitute a Violation of VGA Rule § 1800.250(l) Which Was in Effect When Such Acts Occurred?

Count 2 of the Complaint alleges that LLG committed a violation of VGA rule § 1800.250(l). During all times relevant to the Complaint, the text of VGA rule § 1800.250(l) provides, in pertinent part, as follows:

> ***
>
> Section 1800.250 Duties of Terminal Operators
> In addition to all other duties and obligations required by the Act and this Part, each licensed terminal operator has an ongoing duty to comply with the following:
>
> ***

> l) Offer or provide nothing of value to any licensed video gaming location or any agent or representative of any licensed video gaming location as an incentive or inducement to locate, keep or maintain video gaming terminals at the licensed video gaming location;
>
> ***

Compare 11 Ill. Admin. Code § 1800.250(l) (2019 through 2023); 44 Ill. Reg. 489, 510-11 (amended at 44 Ill. Reg. 489, effective December 27, 2019) *with* 46 Ill. Reg. 14742 (publication of 2023 Notice of Proposed Amendment to, among other things, VGA rule § 1800.250).

The first thing to notice here is that, while VGA § 40/25(a) prohibits terminal operators from giving anything of value to different categories of "licensed establishments" (230 ILCS 40/25(c)), VGA rule § 1800.250(l) prohibits terminal operators from offering or providing anything of value to any "licensed video gaming location …." 11 Ill. Admin. Code § 1800.250(l) (2019 through 2023); 44 Ill. Reg. 489, 510-11. Until the Board adopted the 2023 amendment to VGA rule § 1800.250(l), the Board had always used the term, "licensed video gaming location," in prior versions of that VGA rule to refer to the "licensed establishments" to whom VGA § 40/25(c) prohibits terminal operators from giving anything of value. 34 Ill. Reg. 2893, 2908 (effective February 22, 2010).[2]

---

[2] The first adopted version of VGA rule § 1800.250(l) provided:

> Section 1800.250 Duties of Licensed Video Terminal Operators
>
> In addition to all other duties and obligations required by the Act and this Part, each licensed terminal operator has an ongoing duty to comply with the following:
>
> ***
>
> l) Offer or provide nothing of value to any licensed video gaming location or any agent or representative of any licensed video gaming location as an incentive or inducement to locate, keep or maintain video gaming terminals at the licensed video gaming location;
>
> ***

34 Ill. Reg. 2893, 2908 (effective February 22, 2010).

When considering whether the undisputed facts show that LLG committed a violation of VGA rule § 1800.250(l), the same rules of construction which apply to statutes also apply to administrative regulations. Weyland v. Manning, 309 Ill. App. 3d 542, 547, 723 N.E.2d 387, 391 (2d Dist. 2000) ("Courts apply the same rules in interpreting administrative regulations as in construing statutes. [citation omitted] Thus, we first consider the language of the regulation. If it is clear, we need not look to other aids for construction."). As was the case with the text of VGA § 40/25(c), the plain text of VGA rule § 1800.250(l) also makes the licensed status of the person receiving, or being offered, something of value from a terminal operator an essential element of a violation. 11 Ill. Admin. Code § 1800.250(l) (2019).

Since there is no dispute that MWC was not a licensed video gaming location when LLG paid to have the VGT Annex constructed and affixed to MWC's site, as a matter of law, LLG did not violate the VGA rule § 1800.250(l) that was in effect at the times referred to in the Complaint. Complaint & Answer, ¶¶ 24-31; 11 Ill. Admin. Code § 1800.250(l) (2019). To the extent the Complaint alleges a violation of the VGA rule § 1800.250(l) that was in effect at all times referred to in the Complaint, I recommend that the Board grant judgment to LLG.

Illinois Law Does Not Permit the Board to Retroactively Invoke the February 2023 Amendments to VGA Rule § 1800.110 and § 1800.250(l).

What is unstated but clearly implied by the Complaint's allegations is that the violations alleged in Count 2 are not based on the text of VGA § 1800.250(l) which was in effect when LLG gave things of value to MWC in 2020. No allegation in Count 2 alleges, for example, that LLG gave things of value to a "licensed video gaming location." Instead, whenever the Board refers, in the Complaint, to either the text or effect of VGA § 40/25(c),

or to the text or effect of VGA rule § 1800.250(l), it omits the word "licensed" and instead uses the term "video gaming establishment." The text used in Count 2 of the Complaint leaves the unmistakable impression that, in this contested disciplinary case, the Board is attempting to apply the text of two amendments to the VGA rules, §§ 1800.110 and 1800.250(l), which first became effective on February 10, 2023, to acts LLG admittedly performed in 2020. Complaint & Answer, ¶¶ 21, 24-31.

For example, in Complaint ¶ 14, the Board alleged that: "Section 25(c) of the VGA prohibits terminal operators from giving anything of value to a video gaming establishment as an incentive or inducement to locate VGTs in that establishment." Complaint, ¶ 14. This allegation, however, does not accurately represent the actual text of VGA § 40/25(c). In its Answer, LLG denied this allegation, in part, by responding:

> LLG denies that Paragraph 14 accurately recites Section 25(c) of the VGA, which provides instead that:
>
> No terminal operator may give anything of value, including but not limited to a loan or financing arrangement, to a licensed establishment, … as any incentive or inducement to locate video terminals in that establishment.
>
> ***

Answer, ¶ 14. As a matter of law, LLG is correct. 230 ILCS 40/25(c); P.A. 101-31, § 35-60 (effective June 28, 2019).

In the next paragraph of the Complaint, the Board alleges that: "Similarly, Rule 250(l) prohibits terminal operators from offering or providing anything of value to a video gaming establishment as an incentive or inducement to locate VGTs in that establishment." Complaint, ¶ 15. LLG admitted this allegation, but its response was an agreement with a legal proposition — as opposed to a response to an allegation of fact. People ex. rel Department of Public Health v. Wiley, 218 Ill. 2d 207, 223, 843 N.E.2d 259, 269 (2006)

("As the appellate court below observed, a party is not bound by admissions regarding conclusions of law since it is for the courts to determine the legal effect of the facts adduced. [citations omitted]"). The material aspect of the legal proposition, for purposes of this contested case, and LLG's Motion, is that, as a matter of law, the text of VGA rule § 1800.250(l) which was in effect when LLG performed the acts described in the Complaint, in 2020, is not the text the Board used in Complaint ¶ 15.

It is certainly possible that, when the Board was drafting the Complaint paragraphs in which it asked LLG to admit the legal effect of VGA § 40/25(c), or the legal effect of VGA rule § 1800.250(l), and used text which omitted the adjective "licensed" from the terms used in VGA § 40/25(c), and from the terms used in the version of the VGA rule in effect in 2020, that was simply a mistake — a scrivener's error. Complaint, ¶¶ 14-15. But the better way to treat the Board's clearly stated allegations is to presume that they were intended to mean what they state. So, when the Board alleges that "… Rule 250(l) prohibits terminal operators from offering or providing anything of value to a video gaming establishment as an incentive or inducement to locate VGTs in that establishment." (Complaint, ¶ 15), it is not unreasonable to conclude that, in this contested case, the Board is, in fact, alleging that the version of VGA rule § 1800.250(l) that was in effect in 2020 meant what the 2023 amended version of VGA rule § 1800.250(l) now provides. In short, the allegations in Count 2 of the Complaint apply the 2023 amendments to VGA rule §§ 1800.110 and 1800.250(l), retroactively, to acts LLG performed in 2020.

Whether the Board's 2023 amendments to VGA rule §§ 1800.110 and 1800.250(l) may be applied retroactively to 2020 is a question of law. Perry v. Department of Financial & Professional Regulation, 2018 IL 122349; 106 N.E.3d 1016.

There is no need for an evidentiary hearing to resolve this question of law, especially where Illinois law is settled. In Perry, the Illinois Supreme Court was recently called upon to decide whether statutory amendments could be applied retroactively. Here again, the rules for interpreting statutes also apply when interpreting administrative regulations. Weyland, 309 Ill. App. 3d at 547, 723 N.E.2d at 391.

Perry involved a dispute over the applicability of recent statutory amendments to Illinois' Freedom of Information Act, in an action in which two plaintiffs sued the Illinois' Department of Financial & Professional Regulation, after that agency denied their separate requests to produce records kept by the agency. Perry, 2018 IL 122349, at ¶ 1. At the outset, the Court noted that:

> ¶ 33 Prior to the effective dates of both sections 2105-117 and 4-24, certain information collected by the Department could properly be sought and disclosed. No one contends otherwise. Both Perry and the Institute filed their respective Illinois FOIA causes of action prior to the effective dates of both sections. Thus, both Perry's and the Institute's cases were pending at the time sections 2105-117 and 4-24 went into effect. If sections 2105-117 and 4-24 are held to apply to Perry's and the Institute's pending causes of actions, then under section 7(1)(a) of the Illinois FOIA, the information sought would be exempt. See 5 ILCS 140/7(1)(a) (West 2016) ("Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law."). ***

Perry, 2018 IL 122349, ¶ 33.

Clearly, the nature of the dispute in Perry differs from the nature of the dispute in this contested disciplinary case. Perry involved two plaintiffs' consolidated suits seeking to enforce a statutory right to access public records, which right was affected by a subsequent amendment to statutory provisions creating that prior statutory right. Here, the Board is seeking to revoke LLG's license because it implies, in part, that LLG's conduct,

in 2020, constituted a violation of the amended version of an administrative rule which became effective in 2023. Complaint & Answer, ¶¶ 21, 24-31. Notwithstanding those differences, the decision in Perry is both relevant and directly applicable to this contested case, and to LLG's Motion.

Regarding the Court's current retroactivity jurisprudence, the Perry Court explained that it "adopted the United States Supreme Court's retroactivity analysis as set forth in [Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)]." Explaining further, the Court wrote:

> ¶ 40 Under step one of *Landgraf*, a court first determines whether the legislature has "'expressly prescribed'" the temporal reach of the new law. … [citations omitted] If the legislature has clearly indicated the temporal reach, then such temporal reach must be given effect unless to do so would be constitutionally prohibited. […]
>
> ¶ 41 However, in Caveney v. Bower, this court subsequently explained that, in light of section 4 of the Statute on Statutes, Illinois courts need not go beyond step one of the *Landgraf* approach. […]. Step two of *Landgraf* is triggered where the legislature's intent as to temporal reach is not clear. But, as has repeatedly been explained, if the temporal reach has not been clearly indicated within the text of the new law, then the legislature's intent as to temporal reach is provided by default in section 4. […]

Perry, 2018 IL 122349, ¶¶ 40-41. Regarding the effect of § 4 of the Statute on Statues, the Court explained:

> ¶ 43 "Section 4 is a general savings clause, which this court has interpreted as meaning that procedural changes to statutes will be applied retroactively, while substantive changes are prospective only." […] If a statutory change is procedural, then the change will apply retroactively, *i.e.*, to pending cases in the absence of a constitutional impediment to such retroactive application. […] As made clear in *Hunter*, section 4 of the Statute on Statutes "contemplates the existence of proceedings after the new or amended statute is effective to which the new procedure could apply." […] (under section 4, "what remained to be done" must conform to the mode of procedure under the new act). Conversely, if a statutory change is substantive, then the change is not to be applied retroactively. […]

Perry, 2018 IL 122349, at ¶ 43. The Perry Court determined that the amendments to the statutes before it in that case were substantive and could not be retroactively applied to the plaintiff's causes of actions. *Id*., ¶ 71.

While the same rules for interpreting statutes are also used to interpret administrative regulations, the powers of each respective drafter are not the same. The Illinois General Assembly is a co-equal branch of government. Ill. Const. of 1970, art. IV. The Illinois Supreme Court has recognized that the Illinois General Assembly has the power to draft statutes or amendments in which it announces that the act is intended to apply to conduct or events already completed. *E.g.* Allegis Realty Investors v. Novak, 223 Ill. 2d 318, 333, 860 N.E.2d 246, 254 (2006).

An administrative agency, in contrast, has no such inherent, constitutional authority, and lacks any general or common law powers. Lake County Riverboat L.P. v. Illinois Gaming Bd., 332 Ill. App. 3d 127, 140, 773 N.E.2d 159, 169-70 (1st Dist. 2002) ("The Board has no general or common law powers. … The only powers it possesses are those granted to it by the legislature. Any action it takes must be specifically authorized by statute."). Here, the plain text of the IGA and VGA provide that the Board's rulemaking authority, as well as its power to revoke gaming licenses, are governed by the IAPA. 230 ILCS 10/5(c)(11) ("The Board has the power to, among other things: "revoke or suspend licenses, as the Board may see fit and in compliance with applicable laws of the State regarding administrative procedures, …."); 230 ILCS 10/17 ("The Illinois Administrative Procedure Act shall apply to all administrative rules and procedures of the Board under this Act and the Video Gaming Act, except … [for four exceptions not relevant here]."); 230 ILCS 40/78; 230 ILCS 40/80.

Among other things, the IAPA requires agencies with rulemaking authority to provide the public with information whenever they propose new or amended administrative regulations. 5 ILCS 5/5-40(b); *see also, e.g.*, 46 Ill. Reg. 14742. When the Board proposed to amend VGA rule § 1800.110 and § 1800.250(l) in September 2022, its Notice of Proposed Amendments provided the following response to a request for "A Complete Description of the Subjects and Issues Involved:"

> Effective December 17, 2021, Public Act 102-689 amended the Video Gaming Act (the "Act") to require the licensing of sales agents and brokers soliciting use agreements on behalf of terminal operators. [230 ILCS 40/25(d-10)]. Prior to this amendment, terminal operators were required by Board Rule 220(e)(2) to disclose to the Board all individuals engaged in such solicitation, but those individuals were not subject to pre-approval. The present rulemaking implements this new license type, standardizes and clarifies certain activities related to the solicitation of use agreements, and makes other changes. Specifically, the proposed rulemaking does the following:
>
> First, it specifies duties for the licensed sales agents and brokers which broadly match duties previously imposed on terminal operators as they relate to the solicitation of use agreements. The rulemaking also explicitly requires licensure to solicit all agreements that purport to control the placement of and control of video gaming terminals.
>
> Second, the rulemaking codifies the temporary identification badge process that the Board currently uses for terminal handlers and technicians, expanding that process to the sales agents. Previously, the Board published lists of applicants that were either eligible or ineligible to work while their applications were pending, but that system was not governed by any promulgated rule. The proposed amendment to Section 1800.595 will standardize this process and bring it in line with similar processes found in the Riverboat and Casino Gambling Part and Sports Wagering Part of the Illinois Administrative Code.
>
> Third, the rulemaking expands upon and clarifies certain aspects of economic disassociation. It provides for the suspension of all payments owed to, or in connection with, the subject of the hearing during the pendency of the hearing process, and provides that after a Board order of economic disassociation no further payments may be made to the disassociated person other than fair market value consideration for a loss of ownership interest.

> Lastly, the rulemaking makes clarifying and technical changes including standardization of certain terminology, elimination of fee schedules duplicated in statute, removal of an obsolete provision relating to submission of applications, and clarification of how Section 1800.570 (Renewal of License) interacts with Section 1800.210 (General Duties of All Video Gaming Licensees).

46 Ill. Reg. at 14742-43.

Neither the proposed addition of the new regulatory definition of "video gaming location" within VGA rule § 1800.110, nor the proposed amendment to the text of VGA rule § 1800.250(l), are mentioned in the Board's response to question 5. *Id.* As of this writing, the term "video gaming location" is not included within VGA § 5, which sets forth the statutory definitions of terms used in the VGA. *See* 230 ILCS 40/5.

The Board's 2023 amendment to VGA rule 1800.110 defined the term "video gaming location" to mean "[a]ny licensed video gaming location as defined in Section 1800.110, any applicant to become a licensed video gaming location, or any person that a terminal operator or sales agent and broker has reason to believe may apply to become a licensed video gaming location." 47 Ill. Reg. at 2703. This regulatory definition is substantially similar to the meaning of the same term which the Board adopted effective March 8, 2021, in VGA rule § 1800.350(a)(2). 45 Ill. Reg. at 3451-52.[3] On the same date it adopted this definition into VGA rule § 1800.110, the Board also amended the text of VGA rule § 1800.250(l). 47 Ill. Reg. 2682, 2703, 2705. This amendment substituted within VGA rule § 1800.250(l) the newly defined regulatory term, "video gaming location," for each of the times the term "licensed video gaming

[3] Since the Board does not allege that LLG's actions constituted a violation of VGA rule § 1800.350 (*see* Complaint, *passim*), this recommendation will address only the Board's implied invocation of the version of VGA rule § 1800.250(l) which became effective in 2023 to claim that LLG's admitted acts in 2020 violated that amended rule.

location …" had appeared in the pre-amendment text of the rule. *Id*. at 2705.

At first blush, the Board's substitution of "video gaming location" for "licensed video gaming location," in amended rule § 1800.250(l), appears innocuous. By carefully reading it together with the text of the new definition of "video gaming location," however, one can see that the amendments fundamentally changed one of the duties previously imposed on all terminal operators. 11 Ill. Admin. Code § 1800.250(l); J & J Ventures Gaming, LLC, 2016 IL 119870, ¶ 25, 67 N.E.3d at 251 ("All provisions of a statute must be viewed as a whole, with the relevant statutory provisions construed together and not in isolation."). To demonstrate this point, below, I am substituting the new regulatory definition of the term "video gaming location" for each of the first two times that new term is used in the 2023 amendment to VGA rule § 1800.250(l):

> Section 1800.250 Duties of Terminal Operators
> In addition to all other duties and obligations required by the Act and this Part, each licensed terminal operator has an ongoing duty to comply with the following:
>
> ***
>
> l) Offer or provide nothing of value to … [[a]ny licensed video gaming location as defined in Section 1800.110, any applicant to become a licensed video gaming location, or any person that a terminal operator or sales agent and broker has reason to believe may apply to become a licensed video gaming location] … or any person related to or affiliated with … [[a]ny licensed video gaming location as defined in Section 1800.110, any applicant to become a licensed video gaming location, or any person that a terminal operator or sales agent and broker has reason to believe may apply to become a licensed video gaming location] as an incentive or inducement to locate, keep or maintain video gaming terminals at the video gaming location;
>
> ***

See 47 Ill. Reg. at 2705; 11 Ill. Admin. Code §§ 1800.110, 1800.250 (effective February 10, 2023).

Section § 5-10 of the IAPA provides, in pertinent part:

> Sec. 5-10. Adoption and availability of rules.
>
> ***
>
> (c) No agency rule is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection and filed with the Secretary of State as required by this Act. No agency, however, shall assert the invalidity of a rule that it has adopted under this Act when an opposing party has relied upon the rule.
>
> ***

5 ILCS 100/5-10(c).

This statutory provision is critically important when considering whether the 2023 amended VGA rule § 1800.250(l) may be applied retroactively to LLG's admitted conduct in 2020. The plain text of this statutory provision means that, until an agency rule is properly adopted, it has no effect, on anyone. 5 ILCS 100/5-10(c). In the case of an administrative regulation which prescribes required duties, and provides penalties for the non-performance of such duties, the plain text of § 5-10(c) means that no person can be held to have violated such a regulation until (1) the rule has been properly adopted, and (2) thereafter, the person engages in the conduct described as a violation of the rule. Again, no person can violate a rule before the rule becomes effective. 5 ILCS 100/5-10(c).

The plain text of IAPA § 5-10(c) and its related provisions provide a protectable, *statutory* right[4] to persons affected by agency action. This is especially important to persons regulated by the IGA and VGA, because the Illinois Supreme Court has held that:

[4] My reference to this purely statutory right created by § 5-10(c) of the IAPA, and by the Illinois General Assembly's decision to adopt the IAPA's rulemaking and other procedural safeguards within the IGA and VGA (230 ILCS 10/5(c)(11); 230 ILCS 10/17) is not intended to suggest that LLG has some protectable *constitutional* due process right to its terminal operators' license. To the contrary, see Dolly's Café LLC v. Illinois Gaming Board, slip op. (No. 19-C-01666), at 3, 2019 WL 6683046 (N.D. Ill.) (Dec. 6, 2019) (court construed the Illinois Supreme Court's holding in J & J Ventures Gaming, LLC as "flatly foreclose[ing] the notion that a protected liberty interest exists in the form of a gambling license."); Sypolt v. Illinois Gaming Board, 2021 U.S. Dist. LEXIS 62617, at 3; 2021 WL

> ¶ 26 There is no common-law right in Illinois to engage in or profit from gambling. … [all citations omitted] The Act, which legalized the use of video gaming terminals under certain limited circumstances, is an exception to the general prohibition against gambling. […] Consequently, gambling on video gaming terminals is permitted in Illinois only as authorized by the Act, and gaming contracts that do not conform to the applicable regulatory requirements are void.

J & J Ventures Gaming, LLC, 2016 IL at ¶ 26, 67 N.E.3d at 251.

In § 10/5 of the IGA, the legislature granted the Board the discretionary authority to revoke any gaming license "as the Board may see fit *and* in compliance with applicable laws of the State regarding administrative procedures, ….") (emphasis added). 230 ILCS 10/5(c)(11); 230 ILCS 10/17. This plainly stated legislative intent, that the Board's discretionary authority to revoke gaming licenses be in compliance with the State's administrative procedure laws, means that, if the Board's decision to revoke a license is based on its claim that a licensee violated one of the Board's rules, the licensee has a statutory right to demand that the rule was adopted and is being applied "in compliance with applicable laws of the State regarding administrative procedures, ….". 230 ILCS 10/5(c)(11); 5 ILCS 100/5-10(c). Section 5-10(c) of the IAPA has already been cited by an Illinois court as authority which protects a regulated VGA licensee against the Board's invocation of an interpretive rule which was not adopted in compliance with the IAPA. Windy City Promotions, LLC v. Illinois Gaming Board, 2017 IL App (3d) 150434, ¶ 28, 87 N.E.3d 915, 923 ("… we hold that the Gaming Board had authority to issue an interpretive rule and to post it but that, because it failed to follow the appropriate rulemaking procedures, the attempted rule is invalid. To the extent that the circuit court made a contrary finding, its judgment is reversed.") (*citing*, among other

---

1209132 (E.D.Ill.) (March 31, 2021) (after citing to Dolly's and J & J Ventures Gaming, LLC, court held that it "agrees that there is no protected liberty interest in gaming.").

authority, § 5-10(c) of the IAPA); Riverboat Development Corp. v. Illinois Gaming Board, 268 Ill. App. 3d 257, 259, 644 N.E.2d 10, 11 (1st Dist. 1994) ("The Riverboat Gambling Act specifically provides for all administrative rules and procedures to be promulgated in accordance with the IAPA.").

Here, there is no dispute that the Board filed this Complaint against LLG after the 2023 amendments to VGA rule §§ 1800.110 and 1800.250(l) became effective. *Compare* Complaint, pp. 6-7 *with* 47 Ill. Reg. 2682. The Complaint allegations, however, clearly imply that LLG violated the 2023 amendment to VGA § 1800.250(l) by engaging in conduct which occurred *before* the amended rule became effective. Complaint & Answer, ¶¶ 21, 24-31. However, there is no dispute that the conduct complained of occurred years before newly amended VGA rule § 1800.250(l) became effective. Complaint & Answer, ¶¶ 24-31; 47 Ill. Reg. 2682. I respectfully submit that the only way the Board may properly invoke the 2023 amendment for the purpose of claiming that a licensed terminal operator violated newly amended VGA § 1800.250(l) is to do so in instances where the conduct claimed as constituting a violation occurred *on or after February 10, 2023*, which was the effective date of the amendment. 5 ILCS 100/5-10(c); 230 ILCS 10/5(c)(11); 47 Ill. Reg. 2682.

I return now to the Perry decision, where the Court clearly explained the difference between procedural versus substantive amendments to a statute:

***

> ¶ 69 *** [D]istinguishing between procedural and substantive changes can sometimes be unclear. [all citations omitted] "Procedural ramifications of a substantive amendment do not make the amendment procedural." […] To aid our analysis, we turn to several dictionary definitions. Webster's Third New International Dictionary provides the following definitions: "procedural" is defined as "of or relating to procedure … ; esp : of or relating to the procedure … by courts or

> other bodies (as governmental agencies) in the administration of substantive law (~ due process)" […]; "procedure," as relevant here, is defined as "an established way of conducting business (as of a deliberative body): as *** (2) : the established manner of conducting judicial business and litigation including pleading, evidence, and practice" […]; and "substantive law" is defined as "a branch of law that prescribes the rights, duties, and obligations of persons to one another as to their conduct or property and that determines when a cause of action for damages or other relief has arisen" […].
>
> ¶ 70 Black's Law Dictionary defines "procedural law" as "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves." […]. "Substantive law" is in turn defined as "[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of the parties." […].
>
> ***

Perry, 2018 IL 122349, ¶¶ 69-71; Doe v. Department of Public Health, 2017 IL App (1st) 162548, 81 N.E.3d 523.

The newly amended VGA rule § 1800.250(l) describes one of the several duties the Board requires terminal operators to follow, or risk a penalty, up to revocation of its license. 11 Ill. Admin. Code § 1800.250; Mitee Racers, Inc., 152 Ill. App. 3d at 819, 504 N.E.2d at 1302. Newly amended VGA rule § 1800.250(l) created a categorical expansion of the class of persons to whom § VGA 40/25(c), and pre-amendment rule § 1800.250(l), prohibited terminal operators from giving anything of value as an incentive to locate VGTs in any of the named person's establishments. *Compare* 230 ILCS 40/25(c) *and* 11 Ill. Admin. Code § 1800.250(l) (2019 through 2023) *with* 47 Ill. Reg. 2682, 2703, 2705.[5] As a matter of law, the newly amended regulatory definition of "video gaming location," and the amendment to VGA rule §

[5] At this stage of the proceedings, LLG's Motion does not assert, or request judgment as a matter of law, that newly amended VGA rule § 1800.250(l) is invalid because it exceeds the scope of the VGA's statutory inducement prohibition. 230 ILCS

1800.250(l), are substantive, not procedural, amendments to the Board's VGA rules. Perry, 2018 IL at ¶¶ 69-71, 106 N.E.3d at 1033-34.

Both the IGA and the VGA provide that the Board's rulemaking authority is governed by the IAPA, and that its authority to suspend or revoke a person's gaming license be "in compliance with applicable laws of the State regarding administrative procedures." 230 ILCS 10/5(c)(11); 230 ILCS 10/17; 230 ILCS 40/78; 230 ILCS 40/80. Section 5-10(c) of the IAPA does not permit an agency to invoke a rule for any purpose until it has been properly adopted. 5 ILCS 100/5-10(c); Windy City Promotions, LLC, 2017 IL App (3d) at ¶ 28, 87 N.E.3d at 923.

To the extent the regulatory history included in the Board's Notice of Adopted Amendments constitutes the Board's clear statement of the temporal reach of the 2023 amendments to VGA rule §§ 1800.110 and 1800.250(l), the Board plainly stated that the amendments would become effective on February 10, 2023. 47 Ill. Reg. 2682. Nowhere within the Board's Notices of Proposed or Adopted Amendments for its VGA rule §§ 1800.110 or 1800.250(l) did the Board announce that it would seek to apply those rules to terminal operators' conduct which occurred before the amended rules became effective. 46 Ill. Reg. 14742; 47 Ill. Reg. 2682. Since the Board did not make clear that it intended the rules at issue to apply to conduct performed by terminal operators prior to the rules' effective date, the presumption is that such rules may be applied only prospectively, which means regarding conduct occurring after February 10, 2023. Perry, 2018 IL 122349, ¶¶ 40-41, 43; 5 ILCS 100/5-10(c). Finally, since the 2023 adopted amendments to VGA rule §§ 1800.110 and 1800.250(l) are substantive, then, as a matter of law, they may not be applied

---

40/25(c). My recommendation that the Board grant LLG's Motion is not based on any such determination.

retroactively, to make LLG's admitted acts in 2020 become a violation of amended VGA rule § 1800.250(l), which first became effective in February 2023. Perry, 2018 IL 122349, ¶¶ 69-71.

For all the foregoing reasons, Illinois law does not permit the Board to invoke its 2023 amendments to VGA rule § 1800.110 and § 1800.250(l) for the purpose of claiming that acts LLG admitted performing in 2020 constituted a violation of the 2023 amendment to VGA rule § 1800.250(l). 230 ILCS 10/5(c)(11); 230 ILCS 10/17; 5 ILCS 100/5-10(c). Since LLG's admitted conduct in 2020 cannot have constituted a violation of a substantive amendment to VGA rule § 1800.250(l) which first became effective in 2023 (Perry, 2018 IL 122349, ¶¶ 69-71), LLG is entitled to judgment, as a matter of law, that it did not commit any violation alleged in Count 2 of the Complaint.

The Board's Response Does Not Overcome LLG's Motion

Board counsel's response consisted of three parts. First, regarding LG's claims that VGA § 40/25(c) and Board rule § 1800250(l) were impermissibly void for vagueness, Board counsel cited the Illinois Supreme Court's decisions in Texaco-Cities Service Pipeline Co. v. McGaw, 182 Ill. 2d 262, 695 N.E.2d 481 (1998) and Goodman v. Ward, 241 Ill. 2d 398; 948 N.E.2d 580 (2011). Tr. (ap. 2:00 – 2:30 minute mark of audio). Second, counsel argued that LLG's Motion was more in the nature of a motion to dismiss than a motion for summary judgment, and specifically asserted that the Board's rules only allow motions for summary judgment and do not allow motions to dismiss. Tr. (ap. 2:45 – 3:30 minute mark). Finally, counsel argued that Motion Exhibit G, which is a copy of a recommendation this ALJ issued in a prior, and still current, contested disciplinary case between the same parties, is irrelevant and does not provide any authority which supports

LLG's Motion. On this point, counsel argued that the prior recommendation had no bearing on this case because the persons to whom the Board alleged LLG gave something of value in the prior matter never became licensed by the Board, but here, MWC did become licensed. Tr. (ap 4:30 – 5:15 minute mark).

Regarding the Board's first response, I wholeheartedly agree with counsel's arguments regarding the inability of an ALJ or administrative agency to declare a statute or properly promulgated administrative regulation unconstitutional. The recommendation to grant LLG's Motion, however, is not based on LLG's constitutional arguments, and does not substantively address them.

Regarding the Board's third point, my recommendation to grant LLG's Motion is not based on anything which occurred in the contested case regarding which LLG attached Exhibit G to its Motion. Nothing in that exhibit forms the basis for any conclusion of law made in this recommendation.

Regarding the Board's arguments that LLG's Motion should be denied because it is more in the nature of a motion to dismiss, and the Board's rules allow only motions for summary judgment and not motions to dismiss (Tr. (ap. 2:45 – 3:30)), neither argument is persuasive. First, LLG's Motion does not seek to dismiss the Board's Complaint. Rather, it seeks judgment, as a matter of law, that the Board is unable to show that LLG committed a violation of either VGA § 40/25(c) or of VGA rule § 1800.250(l), because the undisputed facts show that MWC's was not a licensed establishment at the time LLG provided it with something of value. Motion, pp. 8-11.

Second, the Board's assertion that its rules only allow motions for summary judgment and not motions to dismiss cannot be supported by a plain reading of the Board's

applicable hearing rules. Section 1800.745 of the Board's VGA disciplinary hearing rules provides as follows:

> Section 1800.745 Motions for Summary Judgment
> The Administrative Law Judge may recommend the granting or denial of a summary judgment motion upon the filing of an appropriate motion by any party. A recommendation for denial of a summary judgment motion shall not be considered by the Board until the completion of the proceedings pursuant to Section 1800.750.

11 Ill. Admin. Code § 1800.745.

The plain text of this regulation grants an assigned ALJ with the discretionary authority to recommend the grant or denial of any party's motion for summary judgment, and it provides notice that, in the event the ALJ's recommendation is to deny such a motion, the Board would not consider the recommendation until an evidentiary hearing was completed. There is no limiting text within the rule. It does not say, for example, that an assigned ALJ has *only* the discretionary authority to recommend the grant or denial of any party's motion for summary judgment. Nor does it say anything about any other type of motion any party might file in a contested disciplinary case.

Moreover, when reading the text of § 1800.745, it must be read consistently with the Board's other related rules. J & J Ventures Gaming, LLC, 2016 IL 119870, ¶ 25, 67 N.E.3d at 251. Section 1800.790 of the Board's disciplinary hearing rules provides, in part, as follows:

> Section 1800.790 Transmittal of Record and Recommendation to the Board
> a) The record shall consist of the following:
> 1) The notice of proposed disciplinary action, the response and all motions and rulings on motions;
> ***

11 Ill. Admin. Code § 1800.790. The plain text of this rule provides that the record following a contested case disciplinary hearing shall include, among other things, "*all*

motions and rulings on motions ….” *Id*. (emphasis added). The reasonable inference drawn from the plain text of this rule is that the Board both anticipated and planned that: (1) parties in contested disciplinary cases would file motions otherwise permitted in civil practice; (2) assigned ALJs would impliedly have the discretion to rule on such motions; and (3) the record in any contested disciplinary case would include, among other things, copies of *all* such motions and rulings thereon. *Id*.

The substance and relief sought in LLG's Motion is more in the nature of a motion for summary judgment, and the Board's response does not persuade that the Motion be denied..

WHEREFORE, IT IS RECOMMENDED THAT:

1. Since the undisputed facts show, as a matter of law, that LLG's actions did not constitute a violation of the plain texts of either VGA § 40/25(c) or the version of VGA rule § 1800.250(l) that was in effect when the acts referred to in the Complaint occurred, LLG's Motion should be granted, without delay. 735 ILCS 5/2-1005(c).
2. Since, as a matter of law (230 ILCS 10/5(c)(11); 230 ILCS 10/17; 5 ILCS 100/5-10(c); Perry, 2018 IL at ¶¶ 69-71, 106 N.E.3d at 1033-34), the Board may not invoke its 2023 amendments to VGA rule §§ 1800.110 and 1800.250(l) for the purpose of claiming that acts LLG admitted performing in 2020 constituted a violation of the version of VGA rule 1800.250(l) which first became effective in February 2023, LLG is entitled to judgment, as a matter of law, that it did not commit a violation as alleged in Count 2 of the Complaint.
3. This recommendation resolves this contested disciplinary case in LLG's favor, as a matter of law, and, if accepted by the Board, no further proceedings before this ALJ shall be necessary.
4. The ALJ takes note that the Board's next meeting is set for February 8, 2024.
5. Since VGA rule § 1800.745 implicitly requires the Board to review and act upon a recommendation to grant a party's motion for summary judgment, the hearing currently scheduled to begin on January 22, 2024 is cancelled. 11 Ill. Admin. Code 1800.745.

January 17, 2024
Date

John E. White, Administrative Law Judge