

NON-REMOVABLE MILLE LACS BAND OF OJIBWE  
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**DISTRICT OF NAY-AH-SHING**

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**IN THE COURT OF APPEALS**

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New Horizon Kids Quest III, Inc.  
a/k/a New Horizon Kids Quest, Inc.,

Case No. 08-App-06

Appellant,

vs.

**DECISION OF THE  
COURT OF APPEALS**

Gaming Regulatory Authority Board,  
Mille Lacs Band of Ojibwe Indians,

Respondent.

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**INTRODUCTION**

The present appeal is from a decision of the Court of Central Jurisdiction affirming a Final Compliance Determination of the Gaming Regulatory Authority Board. New Horizon Kids Quest, Inc. ("Kids Quest"), Appellant herein, appeals the decision of the Special Magistrate dated July 2, 2008 upholding the Final Compliance Determination of the Gaming Regulatory Authority Board ("Board") dated February 12, 2008. Appellant brings this appeal pursuant to 24 MLBSA Sections 2501, 2502, and argues that the trial court decision was an abuse of the trial court's discretion; and that the evidence in the record was insufficient to justify the findings and conclusions of the trial court.

**BACKGROUND AND PROCEDURAL HISTORY**

Kids Quest operated a drop-in child care Center at Grand Casino Mille Lacs. The present matter was set into motion as a result of an incident occurring at Kids Quest on

January 23, 2008, where a young child entrusted to the care of Kids Quest suffered bruising on his face and neck as a result of assaultive conduct by another older child who was also entrusted to the care of Kids Quest. The children were not being adequately supervised by Kids Quest staff.

After this incident came to the attention of the Band's Gaming Regulatory Authority Board, the Board suspended the vendor license of Kids Quest, resulting in what was then a temporary closure of both the Kids Quest facility at Mille Lacs and the Kids Quest at the Band's other gaming establishment, Grand Casino Hinkley. The Board then conducted a hearing on February 1, 2008 regarding a possible suspension or revocation of Kids Quest's vendor license. At that hearing Kids Quest employee and co-owner, Sue Dunkley, made no attempt to deny the gravity of the incident that happened on January 23, 2008, but did offer several remedial measures that Kids Quest put into place so as to avoid a repeat of the events of that day.

On February 12, 2008, the Board issued its decision revoking the vendor license of Kids Quest and ordered the closure of both daycare facilities operated by Kids Quest. Kids Quest then timely appealed the February 12, 2008 order of the Board. Simultaneously, Kids Quest brought another action seeking a declaratory judgment and injunction, asking the trial court to declare that the Board has no regulatory authority over it, because it was not engaging in any activity as a "gaming supplier" or "limited gaming supplier". Kids Quest sought to enjoin the Board from interfering with its contractual right to operate the two day care centers at the Mille Lacs and Hinkley Casinos. Kids Quest also sought a preliminary injunction contending that it was being irreparably harmed by the illegal actions of the Board in interfering with its operations.

The trial court, by order dated April 18, 2008, dismissed the independent action seeking declaratory and injunctive relief, finding that the Band had not waived the Board's immunity from such a suit, distinct from the limited waiver of immunity existent in the administrative appeal process made available to vendors such as Kids Quest. The trial court, however, denied the Board's argument that Kids Quest had waived its argument that the Board had no authority to require it to obtain a vendor license. The trial court ordered a limited remand to the Board for the purpose of allowing the Board to supplement the record on this issue. Further proceedings were held before the Board resulting in a supplemental record filed by the Board and provided by Kids Quest.

The trial court ultimately concluded that the Board did not abuse its discretion by revoking Kids Quest's vendor license. The present appeal is from the decision of the trial court upholding the Board's revocation of Kids Quest's vendor license.

#### **ISSUES ON APPEAL**

Central to the present appeal is an analysis as to whether the trial court applied the appropriate standards of review in reviewing the determinations of the Gaming Regulatory Authority Board. Specifically, this Court must determine: 1) whether the trial court's determination that *de novo* review was appropriate in reviewing the Board's decision that it had the authority to require that Kids Quest obtain a vendor license; 2) whether the trial court properly applied the "substantial evidence" standard in reviewing the Board's decision to take disciplinary action against Kids Quest's vendor license; and 3) whether the trial court properly applied the "abuse of discretion" standard in reviewing the Board's decision to revoke Kids Quest's vendor license.

Kids Quest argues that the nature of their business is such that it is not a “Gaming Supplier” within the meaning of Mille Lacs Band statutes, and that it should not have been required to obtain a gaming vendor license. The Board disagrees, and argues that all businesses that do business with Mille Lacs gaming establishments are required to have a gaming vendor license regardless of the nature of the product or service that is being supplied to the gaming establishment.

### **STANDARD OF REVIEW**

The standards of review for decisions of the Mille Lacs Band Gaming Regulatory Board are set out in 15 MLBSA Section 503, and provide as follows:

#### Section 503. Procedure on Appeal; Standard of Review

(a) The Court of Central Jurisdiction shall sit without a jury, confine its review to the Authority record, and apply an abuse of discretion standard. The filing of briefs and oral argument must be made in accordance with the Band rules governing civil cases.

(b) The Court of Central Jurisdiction may affirm the Compliance Determination or order of the Authority, or it may remand the case for further proceedings, or reverse the Compliance Determination or order if the substantial rights of the petitioner have been prejudiced because the decision is:

- (1) in excess of the statutory authority or jurisdiction of the Authority;
- (2) made upon unlawful procedure;
- (3) unsupported by any evidence; or
- (4) plainly in error.

The above-referenced statute specifies that an abuse of discretion standard must be utilized when a court reviews a determination of the Board. At the trial court the Board argued that all issues resolved by the Board must be evaluated under the abuse of discretion standard. Kids Quest disagreed, and argues that the abuse of discretion standard was proper for the Board’s factual determinations; but that the Board’s determinations on legal issues should be reviewed under the less deferential *de novo* standard.

The trial court noted that abuse of discretion is the standard of review that is most deferential to the decision below. Citing the decision of the United States Court of Appeals for the Eighth Circuit in Hernandez-Moran v. Gonzales,<sup>1</sup> the trial court noted that “an abuse of discretion occurs if a decision is without rational explanation, departs from established policies, invidiously discriminates against a particular race or group, or where the agency fails to consider all factors presented by the claimant or distorts important aspects of the claim”.

While the abuse of discretion standard is applicable pursuant to 15 MLBSA Section 503 when the Court of Central Jurisdiction reviews a decision of the Gaming Regulatory Authority Board, the trial court noted that a different burden of persuasion applies when reviewing the Board’s actions that result in the suspension or revocation of a vendor’s license. In such situations, 15 MLBSA Section 308 requires that the Board rely on “Substantial evidence” to support a revocation or suspension of a gaming license.

In an effort to harmonize the “abuse of discretion” standard of 15 MLBSA Section 503, with the “substantial evidence” standard of 15 MLBSA Section 308, when the Board makes decisions involving suspension or revocation of a vendor’s license, the trial court concluded that the following multi-step analysis would apply to the Court’s review of the Board’s determinations involving Kids Quest’s vendor license: 1) the Board’s determination that it had the authority to compel Kids Quest to obtain a vendor’s license shall be reviewed *de novo* because it is principally a legal conclusion; 2) the issue of whether the Board had sufficient evidence to take disciplinary action against Kids Quest will be reviewed to determine whether substantial evidence exists in the record to support the Board’s actions; and 3) the abuse of discretion standard will be used to

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<sup>1</sup> 408 F.2d 496 (8<sup>th</sup> Cir. 2005).

determine whether the Board exceeded its authority in taking the action it did, and also to assess the evidence that was before the Board when it made its determination.

After considering the arguments of the parties with regard to the standards of review to be applied in this case, together with the reasoning applied by the trial court, this Court concludes that the standards of review utilized by the trial court are consistent with Mille Lacs Band Statutes and are reasonable in the circumstances of the present case. The Court now turns to the application of these standards of review in analyzing the substantive issues raised by the parties.

**WHETHER THE TRIAL COURT PROPERLY DECIDED THAT KIDS QUEST  
WAS REQUIRED TO BE LICENSED BY THE BOARD AS A  
“GAMING SUPPLIER”**

The trial court concluded that the Gaming Regulatory Authority Board did not err as a matter of law when it concluded that Kids Quest is subject to its licensing standards. Kids Quest challenges this conclusion, and argues that the service it provides is not a “gaming activity” and that to the extent the Board seeks to regulate its business activities the Board is exceeding its authority under Mille Lacs Band law. The Board, on the other hand, argues that the definition of “Gaming Supplier” under Band law is intended to be applied broadly to virtually all vendors of the Band’s gaming establishments so long as the vendor’s annual cost to the gaming enterprise is at least \$25,000.00. Central to the dispute between Kids Quest and the Board is the definition of “Gaming Supplier” in the Band’s Gaming Regulatory Act, which provides as follows:

“Gaming Supplier” means any contractor or other supplier of gaming goods, supplies, materials, equipment, or services to any Gaming Enterprise, the annual aggregate cost of which to the Band’s Gaming Enterprises is at least \$25,000.00. The term Gaming Supplier shall

be more particularly defined in detailed gaming regulations to be promulgated by the Authority.

15 MLBSA Section 3 (ee).

The trial court agreed with the Board that the definition of "Gaming Supplier" seems to include the service that Kids Quest provides because Kids Quest's business is contemplated within the definition of a "... contractor or other supplier of gaming goods, supplies, materials, equipment or services to any Gaming Enterprise ...". The trial court reasoned that the term "contractor of services" to a Gaming Enterprise would seem to encompass Kids Quest because it does have a contract to provide daycare services to the Band's Casinos, and it is fair to assume that the majority of consumers of this service are gaming patrons. The trial court noted additional support for this conclusion in the fact that the Band Assembly had given the Board authority to further define the term "Gaming Supplier" in detailed gaming regulations. The Board did draft Detailed Gaming Regulations (DGR) to further define the definitions and policies of the Band's Gaming Regulatory Statutes.

Detailed Gaming Regulation 7a, Section 3, further defines "Gaming Suppliers" that must be licensed by the Board to include "any vendor whose annual aggregate cost is \$25,000.00 or greater". Additionally, Detailed Gaming Regulation 7a, Section 3, requires vendor licenses for "any contracted services that use their own employees". Important to the trial court's analysis was the fact that the Detailed Gaming Regulations drafted by the Board were actually approved by the Mille Lacs Band's Assembly in 2005.

This Court agrees with the trial court that the Gaming Regulatory Authority Board had the authority to draft the Detailed Gaming Regulations; and that the Board was within its authority to require that any vendor of the Band's Gaming Enterprises obtain a

vendor license if that vendor's annual cost to the enterprise is at least \$25,000.00. Kids Quest clearly meets this threshold. Additionally, the Board's regulation which required a vendor license for any contracted service that uses its own employees was within its authority. This Court agrees with the trial court that the fact that the Band's legislative body approved these Detailed Gaming Regulations weighs strongly in the Board's favor. Because Kids Quest's annual aggregate cost to the Gaming Enterprise exceeded \$25,000.00; and because Kids Quest was a contracted service at the Band's Gaming Enterprise that used its own employees, it was therefore required to obtain a vendor license from the Gaming Regulatory Authority Board. In fact, Kids Quest possessed a valid vendor license issued by the Board at the time of the triggering incident which led to these proceedings. This Court agrees with the trial court's conclusion that when applying the *de novo* standard of review, the Board did not err as a matter of law when it concluded that Kids Quest is subject to its licensing standards.

**WHETHER THE TRIAL COURT PROPERLY CONCLUDED THAT  
SUBSTANTIAL EVIDENCE EXISTS TO FIND THAT KIDS QUEST IS  
SUBJECT TO DISCIPLINARY ACTION**

The trial court concluded that substantial evidence exists in the administrative record to support the Board's finding that Kids Quest employees were negligent in their supervision of children at the Grand Casino Mille Lacs facility, and that this negligence was a licensing issue for the Board to address.

Kids Quest argues that the standards referenced during the Board's administrative process focused primarily on violations of Title 8 standards from Band law pertaining to child care; and that the Board was without sufficient expertise with the Title 8



regulations, particularly in the context of an Administrative hearing conducted pursuant to Title 15, which is pertinent to the application of gaming regulations. Kids Quest further argues that a substantial evidence review requires that this Court review the record as a whole, examining both the evidence supporting and opposing the Board's decision, to determine whether the decision is supported on the entire record by substantial evidence. Kids Quest urges this Court to conclude that the trial court erred when it decided that the Board concluded that substantial evidence exists in the record to find that Kids Quest is subject to disciplinary action.

In reliance upon case law from the United States Supreme Court, the trial court noted that the "substantial evidence standard" requires a court to ask whether a "reasonable mind might accept a particular evidentiary record as adequate to support a conclusion".<sup>2</sup> This Court concludes that the standard relied upon by the trial court is not erroneous.

The pivotal incident that resulted in the Board's disciplinary action against Kids Quest's vendor license was the incident captured on videotape that depicted two children left unattended for over one hour in the child play area where the older of the two children seriously injured the younger child. Other factors in the administrative record noted by trial court that were relied upon by the Board in its determination that disciplinary action against Kids Quest's vendor license was warranted include the following: admissions by Kids Quest that adequate background checks had not been performed on all employees; the Kids Quest facility was not meeting adequate child to staff ratio requirements at the time of the incident; and Kids Quest's own acknowledgement that its negligence contributed to the young child's injuries.

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<sup>2</sup> Dickinson V. Zurko, 527 U.S. 150, 162 (1999).

White Kids Quest does mount a variety of arguments with varying degrees of merit criticizing the Board's administrative determination, this Court cannot conclude that the trial court erred when it decided that substantial evidence exists to find that Kids Quest is subject to disciplinary action. This Court disagrees with Kids Quest that the Board is without authority or expertise to apply the requirements of the Title 8 child care standards in Mille Lacs Band statutes in the present Title 15 gaming vendor license proceeding. This Court agrees with the trial court that authority exists in Band law pertaining to the regulation of gaming, for the Board to apply "other applicable law" when such law arises in a vendor license proceeding.<sup>3</sup>

This Court concludes that the trial court properly applied the substantial evidence standard in reviewing the evidence in the record before the Board when the Board decided to take disciplinary action against Kids Quest's vendor license.

**WHETHER THE TRIAL COURT ERRED IN ITS APPLICATION OF THE  
ABUSE OF DISCRETION STANDARD IN REVIEWING THE BOARD'S  
DECISION TO REVOKE KIDS QUEST'S VENDOR LICENSE**

The trial court applied the abuse of discretion standard in reviewing the determination of the Board to revoke Kids Quest's vendor license, and concluded that the Board did not abuse its discretion in arriving at this decision. Kids Quest does not dispute the trial court's use of the abuse of discretion standard, but instead argues that the Board made an unreasonable judgment; that the Board's sanction was too severe in the circumstances of this case; and that the Board abused its discretion because it did not adequately explain the reasons it did not choose a less drastic sanction.

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<sup>3</sup> 15 MLBSA Section 11 (d) (7).

The trial court noted that the applicable Mille Lacs Band statutes state that enforcement actions need to be “fair and reasonable under the circumstances... proportionate to the violation... designed to promote the goals of correction and improvement, unless the violation is such that correction and improvement is not possible”.<sup>4</sup> The possible actions authorized in that section include: “revoking or suspending any license issued to an individual, Gaming Supplier, or Gaming Enterprise...”.<sup>5</sup> The trial court also referenced prior case law of the U.S. Eighth Circuit Court of Appeals and the United States Supreme Court in noting that in order for the trial court to find that the Board abused its discretion in choosing a remedy permitted it under the law that it would have to find that the underlying “decision is without rational explanation, departs from established policies, invidiously discriminates against a particular race or group, or where the agency fails to consider all factors presented by the claimant or distorts important aspects of the claim.”<sup>6</sup> The trial court noted that the Supreme Court has also said that deference, especially in regard to evidentiary findings, to the decision made below is the “hallmark of abuse-of-discretion review”.<sup>7</sup>

Kids Quest argues strenuously that it had a blemish-free record of providing child care services at the Mille Lacs Band’s gaming establishments for 15 years; that it could have come into full compliance with all applicable regulations within a very short timeframe; and the severe sanction of license revocation is unfair and unreasonable. Kids Quest also noted the secondary impacts of the vendor license revocation of having to

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<sup>4</sup> 15 MLBSA Section 310.

<sup>5</sup> 15 MLBSA Section 310 (a).

<sup>6</sup> Hernandez–Moran v. Gonzales, 408 F.3d 496 (8<sup>th</sup> Cir. 2005).

<sup>7</sup> General Elec. Co. v. Joiner, 522 U.S. 136, 137 (1997).

report the revocation on other licensing applications at other child care facilities it either now operates or seeks to operate.

There is no question that the revocation of Kids Quest's vendor license is a severe sanction. While it is possible that the Board could have chosen a lesser sanction than revocation, the fact of the matter is that it did not. A reviewing court cannot substitute its judgment for that of the administrative body simply because a lesser sanction was available. Additionally, the Board relied upon the severity of the injuries sustained by the three year old child at the hands of a nine year old child; and the fact that it is the primary purpose of Kids Quest's business to assure the safety of children entrusted to their care, when concluding that revocation of its vendor license was the appropriate sanction.

After considering the record before the Board when it made its decision to revoke Kids Quest's vendor license, this Court cannot conclude that the trial court erred when it decided that the Board did not abuse its discretion in making the decision that it did. The decision of the Board was within the permissible options available to it; and considering the nature of Kids Quest's negligence, it was not an abuse of discretion for the Board to conclude that a revocation of Kids Quest's vendor license is appropriate. Even though other lesser sanctions were available to the Board, it is not an abuse of the Board's discretion to conclude that a revocation of Kids Quest's vendor license is appropriate in the circumstances of this case.

Accordingly, the decision of the trial court is AFFIRMED.

BY THE COURT OF APPEALS:

Dated: 2-23-10

Kathy Hedstrom  
Kathy Hedstrom  
Court of Appeals Justice

Dated: 2-25-10

Clarence Boyd  
Clarence Boyd  
Court of Appeals Justice

Dated: 2/22/10

Joseph Plumer  
Joseph Plumer  
Special Court of Appeals Magistrate

BY THE COURT OF APPEALS:

Dated: \_\_\_\_\_

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Kathy Hedstrom  
Court of Appeals Justice

Dated: 2-25-10

Clarence Boyd  
Clarence Boyd  
Court of Appeals Justice

Dated: 2/22/10

Joseph Plumer  
Joseph Plumer  
Special Court of Appeals Magistrate