MINUTES OF JOINT HEARING

SENATE AND ASSEMBLY JUDICIARY COMMITTEE

MARCH 8, 1977

Seante Members present:	Assembly Members present:
Chairman Close	Chairman Barengo
Senator Bryan	Assemblyman Hayes
Senator Ashworth	Assemblyman Banner
Senator Foote	Assemblyman Coulter
Senator Gojack	Assemblyman Polish
Senator Sheerin	Assemblyman Price
Senator Dodge	Assemblyman Ross
	Assemblyman Sena
	Assemblyman Wagner

The meeting was called to order by Senator Close at 8:09 a.m. to discuss the bills on gaming which were drafted as a result of the preliminary gaming hearings which were held previously.

AB 211: Mr. Phil Hannifin, Chairman of the Gaming Control Board was first to address this bill. He submitted a proposed amendment to this bill which is attached and marked Exhibit A. He stated that the Board was in general accord with the concept of this bill, but that the amendment would allow regulation of the lessor by the Gaming Control Board which would be consistent with the purposes of the Gaming Control Act. He stated that with that amendament included they would be in favor of the passage of this bill which would open up new avenues of financing which is needed in the industry.

Senator Dodge asked if this amendment would preclude manufacturers and/or distributors from leasing gaming equipment. Mr. Hannifin replied that it was not the intention of the bill to preclude this and that if there could be language in the bill to make that more clear, it should be added so as to include, on page one, a Nevada banking corporation, or bank holding company and/or a licensed distributor. He stated that the reason savings and loan associations were not mentioned in the bill, as well as banking institutions, was that there had been no indication from them that they wished to involve themselves in this area. Also, he stated that the leasing companies were not included because there would be no provision to have any control over those companies and that if leasing companies were to be added to this bill the Board would oppose the bill. The only exception to the restriction of leasing companies would be if the leasing company was willing to go through the licensing procedures for becoming a licensed distributor.

AB 225: Senator Close stated that this bill had been rejected in favor of AB 355.

AB 355: Mr. Bud Hicks, Deputy Attorney General, presented his testimony and proposed amendments on this bill to the committee on a section by section basis. The package of information which included the proposed amendments is attached and marked Exhibit B. He stated section 1 was self explanatory and needed no amendments. Section 2, he stated, does need an amendment. He stated currently

it is extremely difficult to prosecute those who deal in illegal gaming. He state the amendment would come in the first sentence of this section as shown in the amendments and would allow the districts courts, at the request of the Gaming Commission to issue appropriate orders concerning illegal gaming.

He stated that section three, dealing with key employees, would be a new statute to deal with licensed gaming establishments other than "corporations". Subsection two of this would deal with the termination of an employee of a corporation if that employee is denied a license or doen not apply for a license or has a license revoked. This would make it impossible for that employee to remain in that particular establishment in any capacity. Although, he could work for the same corporation, in a different location or for any other licensee. In response to a question from Senator Bryan, Mr. Hicks stated that he felt this would not lead to a constitutional rights conflict.

In section four, there would be a broader definition of which stockholers of a publicly traded company must be licensed. Also, it pertains to the suitability of companies who make loans. Mr. Hannifin interjected here in respect to loans made to licensees. He stated these loans must be reported to the state and if the loans a found to have come from an unsuitable source, then the borrower (the licensee) must return the money.

Also, in section four is the provision that a licensee is not liable to pay any further salary to an employee who has been found unsuitable by the Board, other than that which was due him before that finding. This also makes any contracts between that person and the licensee null and void as against public policy.

A discussion then followed regarding subsections three and four which deal with at which point of involvement an investor or stockholder must be licensed. They also discussed the meaning of group of people. It was also noted at this point, that in Section two the language should be the same as paragraph three which says: each person or group of persons. He said this inclusion was very important. It was pointed out by Mr. Hannifin that in order to be considered a group, the two or more people would have to be working in concert with one another and have agreements between them as set out in the 1934 Securities Exchange Act.

Mr. Hicks, Mr. Hannifin and the committee discussed the legending of stock, if a person who had been deemed unfit owned a substantial interest and would not relinquish the stocks. Mr. Hicks pointed out during this discussion that there is a statute on the books which makes it a crime for a stockholder of a publicly traded company, who has been found unsuitable, to receive dividends or vote his stock. However, this statute is only applicable to Nevada. It was noted also, at this point that the word "reasonably" should be added to line 10, page 3, between all and necessary. After discussion on subsection 6, Mr. Hicks said that this subsection should be eliminated.

Phil Hannifin then addressed section five and the practice of sending gaming markers outside the state and the problems that practice creates in audit procedures subsequent to licensing. He stated that it is extremely difficult for the state to budget for these subsequent investigative audits and that he felt that the cost of these out of state audits should lie with the companies who chose to send those markers outside of the state for collection purposes. He stated these audits are only carried out when there is some suspicion of possible misconduct or questionable circumstances involved which warrants investigation. He stated that the reason for going to the foreign state is, of course, to inspect the original markers and records and making sure that business is being carried on in a proper manner. He pointed out that this is also a safeguard for the licensee as well as the state. The costs of these audits only cover out-of-pocket expenses and not the time factor involved. He stated that this has been done in the past and that there has never been statute to cover it and now the licensees have protested this procedure in court and this bill is to make this become part of the statutes.

Mr. Hannifin stated that he felt there might be some clarification necessary on page 4, line 10, in regard to the term costs of any investigation. He said it should be made clear that this does not include any charge for man power.

Mr. Hicks pointed out that though Mr. Hannifin's concern is mostly in the tax problems, his are in the area of surveillance of the industry which is to detect wrongful acts, such as credit scams and skimming procedures, which occur outside the state but have a tremendous influence over the operating entity within Nevada. And, without the power and means to go out of state to do that, it cannot be effectively done and the policies of the state are not satisfied.

Mr. Hannifin asked that the record show that the legislative intent of the costs talked about in this section, the direct out-of-pocket expenses, be limited to this portion of the bill and not be somehow confused with the applicant investigation.

Senator Close suggested to Mr. Hicks that on page 4, § 4, lines 11 through 13 be delted from this bill and included in NRS 463.150 and Mr. Hicks stated that he would have no objection to that and that inclusion of that section in 463.150 would be consistent to that section.

In conclusion Mr. Hicks stated that this section also calls for payment of out of state investigation of a stockholder who comes into the picture subsequent to the original licensing investigations. He stated that this practice has been accepted in the past and it has only been challenged recently. These subsequent investigations are not budgeted in the statutes and someone has to pay them.

Section 6: This section is self-explanatory in the exhibit and only broadens the term applicant to include both the individual and the corporation who has filed on behalf of the individual.

Section 7: Self-explanatory.

Section 8: Mr. Hicks stated this is merely a cleanup provision and that in practice this is the way it is done anyway.

Section 9: He pointed out that this section elaborates on, and fills in, the laws which exist now regarding Nevada's stand on the gaming industry. It includes the findings in the Rosenthal case. Mr. Hannifin stated he felt this section was one of the most important as it specifically spells out public policy and he felt this was an extremely important safeguard against further challenges to the law.

Section 10: This section has some clean up language and also, adds to the police powers of the gaming agents in the area of crimes against the property of gaming licensees. This would protect those agents from civil liability. It was noted here, that on line 17, in reference to agent, the language should read: the board and commission and their authorized employees.

Section 11: Mr. Hicks stated that they are requesting that lines 19 through line 23 be excluded from the bill (subsection 3) because it is impossible to enforce. Mr. Hannifin also added here that on line 15, the language should be changed from "the board or commission" to the board and commission".

Section 12: Similar in content to section 11 in comments attachment.

Section 13: Similar in content to section 11 in comments attachment. In response to a question by Mr. Sena, Mr. Hicks stated that the current method of notification of a person that he/she is being included in the List of Excluded Persons, is by personal service and if they cannot be served personally, they try service by mail. And, the person is afforded a full and complete hearing before being put in the book.

Section 14: Self-explanatory.

Section 15: This section deals with fines levied for infractions by a gaming establishment. Senator Dodge pointed out that these fines were established as a less severe alternative to revocation of the license and that he felt these fines should not be available for review. Mr. Hicks stated that this type of a provision could be included in the judicial review statute of NRS 463.315. Also, even if the fine could not be reviewed, the facts of the matter, whether the fine was in order, could be reviewed, not the amount of the fine itself. Mr. Hannifin interjected here, that it would be wise to await the decision of the courts on this matter which is before them right now. A discussion followed regarding the equal protection areas between corporations and individuals regarding fines.

Mr. Hicks stated that he would look into the fines area in regard to non-restricted licensees, gross revenues over $500,000 per year, and restricted licensees, less than $500,000 per year. Perhaps, he stated, this would be a more fair basis. Senator Close asked him to report to report back to the committee with his suggestions.

Section 16: This section would establish a fund into which payments would be deposited, if the other statutes regarding subsequent investigations are adopted. Mr. Hannifin pointed out that on lines 26 and 27, the language "special revenue fund" comes from the legislative auditor and is to replace the old term "investigative revolving fund" to help standardize accounting procedures.

Section 17: Amendments to this section are included in the package. A great deal of discussion followed in regard to the work permit area. It was a question of the committee why, if a person qualified for a "gambling work permit", that permit could not be used in all aspects since qualifying for that permit would be more difficult. Mr. Barengo pointed out that this card could be used as a "dual card". Mr. Hannifin stated that their main concern was that a person holding a non-gambling work card sometimes goes to work for a casino in a non-gaming position and then later changes jobs and goes into an area that is gambling related without ever having gotten a gambling work permit and is therefore working in the gaming field without ever having been reported to the board and therefore, the board has not had a chance to object to that person working in a gaming related position.

It was pointed out by Mr. Hannifin that much of the problem in this area is brought about by the conflicts between state authority and county regulations overlapping and the confusion that results. Discussion in this area followed at some length.

Mr. Hannifin stated that throughout the amendments of this section, the board has tried to eliminate the word renewal and adoption of the revocation ability expanded. Discussion followed.

In response to a question from Senator Gojack, Mr. Hannifin stated that any person who did not renew his work card within ten days after changing jobs, that work card expires. Also, if a person does not work in the gaming field for a period of ninety days or longer, the work card expires. The law presently states that each employee must notify the board when they make a move and this requirement simply adds to the law what happens if they fail to do so.

Senator Gojack pointed out that, somewhere, someone must be responsible for informing the people who hold the work cards of what is expected of them in regard to these rules and regulations for renewal and notification. Mr. Hannifin stated this might be done by simply imprinting the work card itself with that information.

Section 18: Amendments to this section are included in the package. This deals with revocation of the work permits for causes listed in the attachment. Senator Close asked if involking the

fifth amendment could bring about the possibility of a person losing his work permit. Mr. Hannifin stated that currently under NRS 463.337, subsection 2c, if a person did plead the fifth amendment, in respect to an investigative hearing conducted by the board, that would be, currently, grounds for revocation. Mr. Hicks noted that exercise of that section is discretionary on the part of the commission and revocation has not been the practice in this situation.

Section 19: Self-explanatory.

Section 20: Self-explanatory. Same comments as section 3 in general.

Section 21: Self-explanatory. Same comments as section 3 in general.

Section 22: Self-explanatory. Same comments as section 3 in general.

Section 23: Self-explanatory.

Section 24: Self-explanatory.

Section 25: Self-explanatory. Same comments as section 24.

Section 26: Self-explanatory. Same comments as section 10.

Section 27: Self-explanatory.

Section 28: Mr. Hannifin stated that he felt the establishment of a scale of penalties and disciplinary actions was not a workable concept and this is the repeal of that mandate.

Senator Close, noting that the Senate was about to go into session, suggested to Mr. Hannifin that the industry and the board get together in the afternoon and try to agree on some amendments to these bills, which then could be presented to the committee at the March 9 meeting, which would hopefully save some time.

The meeting was adjourned at 11:01, and will resume at 8:00a.m. March 9.

Respectfully submitted,

Linda Chandler

Linda Chandler, Secretary

EXHIBIT A

SUBMITTED BY:
PHIL HANNIFIN

The lessor is [engaged in the business of equipment leasing as one of its primary business activities] a banking corporation organized under the laws of this state, or a national banking association which has its chief place of business in this state, or a company a majority of the stock of which is owned by a bank holding company as that term is defined in 12 U.S.C. §1841(a).

Samuel W. Belford II
Attorney and Counselor at Law
Reno, Nevada

EXHIBIT B (with attachments)

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
GAMING DIVISION

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March 4, 1977

Hon. Robert R. Barengo
Nevada State Assembly
Legislative Building
Carson City, NV 89710

Dear Bob:

The Gaming Control Board, in anticipation of the hearings on A.B. 355 to be held next week, has asked me to provide the enclosed items to you. As you will see from an examination of the enclosures, the Board believes that there should be some further additions and amendments to A.B. 355 in order to complete the administration's bill.

In reviewing the proposed amendments to A.B. 355, you will notice that vertical lines have been drawn in the right hand margin of each page. These vertical lines indicate the areas of change from A.B. 355 as it is currently drafted. The proposed additions to A.B. 355 relate to full disclosure, judicial review of the validity of gaming statutes and regulations, and confidential Board memoranda.

Also enclosed for your review are comments on A.B. 355 by section. It is believed that these comments may help further explain the Board's and Commission's intentions regarding the amendments to the Gaming Control Act which are sought. These comments may be of use to you or the members of your committee in reviewing the gaming bill. If you have any specific questions prior to the hearing on the bill it would be appreciated if you would so advise us so that we may be properly prepared for the hearings.

Also enclosed is a copy of an opinion of the First Circuit Court of Appeals in the case of Medina v. Rudman. As you will see from an examination of the opinion, the issues presented to the First Circuit Court of Appeals were almost identical to the issues presented to the Nevada Supreme

Court in the Rosenthal case. It is believed that the circuit court's opinion parallels the opinion of the Nevada Supreme Court in the Rosenthal case, and gives us great authority in any further proceeding brought by Rosenthal.

Sincerely,

ROBERT LIST
Attorney General

By
A.J. Hicks
Deputy Attorney General
Gaming Division

AJH:lc

Encs.

cc: Frank Daykin, Esq. (w/ encs.)

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1977

AMENDMENTS TO THE GAMING CONTROL ACT

COMMENTS ON A.B. 355

Section 1 Self explanatory.

Section 2 The purpose of this statute is to give the state's gaming agencies, with the assistance of the Attorney General, another means to enforce the provisions of NRS Chapters 463, 464, and 465. The current statutes give the commission broad authority over persons who already are licensed to conduct gaming, but little or no authority over those who should be licensed but are not. It has been the experience of the commission that such cases are usually very difficult to prosecute criminally with any success. This new statute would, for example, permit the state to enjoin an illegal gambling operation or illegal distributor without having to go through a difficult and time-consuming criminal prosecution. Similarly, illegal gamblers, (e.g. bookmakers) could be forced to account for taxes due and pay

them to the state. Additionally, this type of statute has been found by many law enforcement agencies to be a useful tool against infiltration of legitimate businesses by organized crime. This type of law enforcement tool is not new to Nevada and may be found in other areas of the Nevada Revised Statutes. (See for example NRS 207.176 pertaining to false and deceptive advertising; also 18 U.S.C. 1964.)

Section 3 "Key employees" of licensed gaming corporations may currently be required pursuant to NRS 463.530. However, there is no comparable statutory authority which could require a "key employee" of any other licensee (e.g. sole proprietorship, partnership) to be required to apply for licensing. This new statute cures the problem.

Subsection 2 of the new statute requires the gaming licensee for whom the "key employee" works to terminate that person if he is denied a license, fails to apply for a license, or has a license revoked. This is designed to cure the practice of changing the unsuitable person's title, but not duties, in order to keep him involved in the gambling business.

Subsections 3 and 4 provide that the gaming licensee shall not continue to pay an unsuitable employee. This is designed to prevent pay-offs for hidden interests and to minimize influence of the unsuitable employee over the business. It additionally provides a defense to an employer in a civil action based upon an employment contract with an unsuitable person. The language of paragraph 4 supplements the provisions of paragraph 3 by including language similar to that contained within NRS 598.120, as upheld by the State Supreme Court in Koscot Interplanetary, Inc. v. Draney, 90 Nev. 450 (1974).

Subsection 5 of this statute is designed to prevent an unsuitable person from attaining another position of influence with another licensee before the commission can prevent it. If the unsuitable person desires employment in a position which does not require licensing, then the commission can approve when so requested by the licensee. This provision will prevent an unsuitable person from skipping around to various jobs, always one step ahead of the commission's licensing procedures.

Section 4 Holding companies of licensed gaming corporations may be privately owned or publicly owned. In either event, the commission may require any person owning a beneficial interest in the holding company to be licensed (NRS 463.585(2) and (3)). If the holding company is a publicly traded corporation, the commission may waive the provisions of NRS 463.585 so that every beneficial owner does not have to be licensed (NRS 463.625). This is consistent with the legislature's intention to open Nevada gaming up to publicly traded companies in 1969 without unnecessarily hampering the sales of securities in the public markets.

Subsequent to the 1969 legislative amendments relating to publicly traded companies, the commission adopted Regulation 16. The relevant portions of that legislation attempt to define who is to be considered a "controlling person". (Reg. 16.020(1)) subject to licensing (Reg. 16.400 and 16.410). The current regulations establish a rebuttable presumption that a person or a group of persons who controls 5 percent or more of a registered publicly traded corporation is a "controlling person".

This proposed statute would give greater definition

as to which stockholders of a publicly traded company must be licensed. Discretion would still be left in the commission (paragraphs 1 and 2) as to beneficial owners or "groups" of beneficial owners who control up to 10 percent of the company's stock. Persons or groups of persons owning over 10 percent would, by statute, be required to be licensed.

The remaining provisions of the act relate to the company's duties should a "controlling person" be found unsuitable. These provisions impose no duties on the company which are not already present in regulation form except the declaration of other agreements with the unsuitable party as being against public policy and therefore void. This provision will benefit the company in the event of litigation between itself and a stockholder who is found unsuitable.

Section 5 The purpose of this section is to require licensees who chose to do business out of state to bear the costs of out-of-state investigations conducted by the board and commission subsequent to licensing. The legislative findings preceding the authority to charge such licensees for investigative costs sets forth the areas of concern. For example, companies which send markers out of state for

collection have been found to be subjects of criminal fraud and, in select cases, targets for criminal infiltration. Audits and investigations of such business activities are necessary if the board is to fulfill its obligations under NRS 463.140(2). Additionally, the statute addresses the problems posed by publicly traded companies which subsequent to initial licensing have controlling stockholders which must be brought forward for licensing.

463.150

It is anticipated that if this section is passed, the commission will implement these provisions in greater detail by regulation.

Section 6 In matters involving corporations licensed or registered with the commission, it is common practice for the corporation to present the applications of its key employees, officers, and controlling stockholders for licensing or finding of suitability. This amendment would clarify who is to be considered as the "applicant" by including both the individual and the corporation within the definition of the "applicant", thereby permitting the board to assess either the individual or the corporation for the costs of any applicable licensing or suitability investigations

pursuant to NRS 463.150(e).

Section 7 The Attorney General has had two deputies assigned to the gaming division since January 1974. The salaries of both deputies are specified in NRS 284.182. It is anticipated that additional deputies may be added to this division in the future.

Section 8 These amendments are designed to clarify the existing 463.110 and to implement the hearing officer provisions which are currently incorporated in NRS 463.140(5).

Section 9 The purpose of these amendments to NRS 463.130 is to further elaborate upon the state's policies toward the licensing and control of gambling. The courts of Nevada and of the federal government have repeatedly noted the importance of gambling to Nevada and the difficulties in maintaining effective gaming control. (See State v. Rosenthal, 93 Nev. ___, Adv. Opin. 18 (1977); Nevada Tax Commission v. Hicks, 73 Nev. 115 (1957); Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962).)

The language contained within paragraphs 1(d) and 2

incorporate the language of the existing statute, as upheld by the State Supreme Court in the Rosenthal case.

Section 10 These amendments clean up the language of the existing 463.140. The deletion on paragraph 3 of the words "inspectors and employees" is sought because neither the board nor commission have "inspectors". Similarly, it is not necessary that all board employees have the access provided by 463.140 (e.g., secretaries, file clerks, etc.).

As currently provided in paragraph 4 of 463.140, gaming personnel are currently classified as peace officers when exercising duties related to the enforcement of NRS Chapters 463, 464, and 465. However, Gaming Control Board members and agents are frequently involved in investigations of crimes defined by NRS Chapter 205 pertaining to crimes against the property of gaming licensees. The most common instances involve credit scams (205.090, 205.110, 205.220, 205,370, 205.375, 205.308) which affect gaming taxes and fees paid by licensees (e.g. see NRS 463.370); persons stealing money or chips from casino operators (NRS 205.220); persons breaking into slot machines (NRS 205.060); and stealing money (NRS 205.220); casino employees embezzling

money (NRS 205.300) or working with outsiders to steal the licensee's money (NRS 205.220). This amendment would permit gaming agents to be clothed in the authority of the state when involved in such investigations and arrests.

Section 11 The amendment to subsection 1 of 463.151 is designed to limit the applicability of this exclusionary provision to non-restricted gaming establishments only, i.e., those licensed to conduct table games ("gambling games" - NRS 463.0110) or those licensed to conduct pari-mutuel wagering (NRS 464.010 et seq.) This limitation of the applicability of the statute is consistent with the facts upheld in the only reported case involving the statute, Marshall v. Sawyer, 301 F.2d 639 (1962) and 365 F.2d 105 (1966). Further application of the exclusionary feature to establishments with lesser licenses poses constitutional problems with the excluded person's ability to enter the premises of grocery stores, drug stores, etc. where 15 or less slot machines are licensed.

Except for nonpayment of gaming taxes and fees, violations of NRS Chapter 463, the Gaming Control Act, are gross misdemeanors pursuant to NRS 463.360(3). Consequently, a

person could be convicted of holding a hidden interest in a Nevada casino but only be guilty of a misdemeanor. Without the requested amendment to NRS 463.151(1), such a person could not be placed on the "List of Excluded Persons". It has been the state's experience (e.g. United States v. Polizzi) that such persons are associated with organized criminal elements. Thus it is believed that the amendment to 463.151(1)(b) is necessary in order to insure that such persons may be properly identified and placed on the List.

Section 12 Please refer to the comments for Section 11.

Section 13 Please refer to the comments for Section 11.

Section 14 The addition of paragraphs 2 and 3 to NRS 463.170 is sought as a result of the Rosenthal decision wherein the State Supreme Court noted that certain "gaps" in the Gaming Control Act had been filled in by regulation. The provisions of paragraphs 2 and 3 are copied from existing Regulation 3.090.

Proposed paragraph 4 is copied from existing Regulation 4.010 and is believed necessary in order to clearly establish

that an applicant, by requesting licensing, is seeking a privilege which the state is not required to grant. This provision will also be of assistance in fending off harassment actions filed by disgruntled applicants against board and commssion members.

Section 15 The purpose of the substantive amendments to NRS 463.310(4)(e) is to set a clearly definable legislative delegation of authority to the commission in disciplinary matters. It is believed that a delegation of authority to fine, if not limited in a reasonable fashion, may arguably constitute an impermissibly delegated legislative power to an administrative agency.

Section 16 This amendment is designed to correct two current problems. First, the current statute only speaks in terms of investigations of persons who file applications for licensing. Actually, many applications are filed which are for a finding of suitability (e.g. certain affiliated companies, landlords, etc.) or for registration with the commission (e.g. private holding companies and publicly traded companies). Some of the proposed changes to 463.331 would recognize that investigations are conducted in conjunction

with these other requests for approvals and lawfully permit the board to assess the costs of these investigations to the applicant.

The second problem arises from special investigations which must be conducted subsequent to licensing or registration. These investigations are always peculiar to the circumstances; For example, an investigation of a controlling person of a publicly traded company. These amendments would conform the law to meet actual practice wherein it is the commission's experience that the licensee or holding company involved pays the costs incurred.

The amendment also contains clean-up language suggested by the legislative audit bureau following their recent audit of the board and commission.

Section 17 The amendments to paragraph 7 of NRS 463.335 seek to delinate the general grounds upon which the board may object to the issuance of a work permit. The existing NRS 463.337(2) currently sets forth the grounds on which a work card may be revoked but the statutes are silent as to grounds for initial objection to such cards. The courts are

increasingly upgrading the status of persons who work in the gaming industry as opposed to those who are licensed in the industry. Consequently, the proposed amendment to NRS 463.335(7) is offered to curtail objections to that statute on the grounds that the current designation, i.e. "any ground deemed reasonable", is standardless and therefore in violation of constitutional provisions.

The addition of paragraph 10 is designed to add emphasis to the provision of 463.335(4) which currently requires a work permit holder to obtain renewal of his permit within 10 days following any change of place of employment. Both of these provisions, paragraph 4 and proposed paragraph 10, are necessary in order for the board to satisfy the mandate of NRS 463.335(2)(a) to keep itself informed of the identity and activities of persons employed within the gaming industry. It is additionally believed that some requirement is needed for the expiration of a card if the holder does not use it for a proscribed period of time.

Section 18 The addition of paragraph 463.337(2)(f) is sought in order to fully implement the proposed amendments to NRS 463.560, 463.595, and 463.637, and sections 3 and 4

of A.B. 355. Although a finding of unsuitability for licensing does not constitute revocation of an existing work permit (State v. Rosenthal, supra), once found unsuitable, that person should not be allowed to take any employment in the industry which is a licensable position without prior specific commission approval. This is designed to prevent job hopping in licensable positions by unsuitable persons.

NRS 463.337(3) currently provides that once revoked, a work permit may never again be attained by the person involved. The commission has found several instances where persons have rehabilitated themselves and should be able to again work in the industry. This amendment would permit the commission to allow such persons to again acquire a work permit.

The addition of paragraph 5 is designed to prevent conflicts between the key employee and controlling stockholder provisions of the act and the work permit provisions. A finding of unsuitability for licensing will preclude certain employment for the unsuitable person notwithstanding his possession of a valid work permit.

Section 19 During the 1975 session all tax record maintenance requirements were increased from 3 to 5 years in order to give additional time to the board in which to conduct its audits of gaming licensees. This section was inadvertently overlooked at the time.

Section 20 Please refer to the comments for Section 3.

Section 21 Please refer to the comments for Section 3. Some of the proposed amendments to this statute are in response to the Rosenthal decision. The addition of the word "significant" in paragraphs 1 and 2 protects the state's interest without unduly hampering the individual's opportunities for employment in the holding company in a position wherein the person would exert no influence over the gaming activities of a subsidiary. Such a qualification would be consistent with NRS 463.637(2), which speaks of one being "actively and directly engaged in administration or supervision" of a subsidiary's gaming activities.

Section 22 Please refer to the comments to Sections 3 and 21. The prohibition contained within this section and Section 21, as opposed to the related provisions in NRS

463.350 (corporate licensees) and Section 3 herein (individual licensees), would not require the termination of an employee found unsuitable for licensing but would prohibit further involvement by that employee with the activities of a subsidiary corporate gaming licensee. For example, assume Smith is designated Vice President in charge of subsidiary operations for XYZ Corporation, a publicly traded company registered with the commission. Smith is thereafter found unsuitable for licensing. The provisions of Section 22 would preclude him from having his job which involved the operations of the subsidiary gaming licensee. Smith could still, however, be employed by XYZ Corporation as general manager of, for example, its Florida hotels and real estate developments other than those involving the company's Nevada subsidiary.

Section 23 This amendment to NRS 463.639 brings this reporting requirement into line with the proposed new statute on the licensing requirements of controlling persons. It imposes no increased obligation on the registered companies because such reports must be made to the S.E.C. under § 13(d)(1) of the Securities Exchange Act of 1934.

Section 24 Through oversight, the manufacture and

distribution of pinball machines have been excluded from licensing even though certain pinball machines are "slot machines" as that term is defined by NRS 463.0127. This amendment would remove the current exemption of pinball machines from the licensing requirements of NRS 463.650 and would therefore require those manufacturers and distributors of those certain pinball machines which are also "slot machines" to become licensed and to pay the appropriate fees and taxes to the state.

Section 25 Please refer to the comments to Section 24.

Section 26 Please refer to the comments to Section 10.

Section 27 NRS 241.020 currently provides that except as provided in NRS 241.030, all meetings of public agencies must be open to the public. NRS 241.030 permits closed meetings only to consider personnel matters. NRS 463.120 provides that certain information is not public and is confidential (e.g., licensee's financial matters, applicant's criminal background, etc.). NRS 463.110(5) permits the board to hold investigative hearings without prior notice and such hearings frequently involve matters which are

confidential under 463.120. Similarly, other apparant exemptions from the public open meeting law are found elsewhere in the Nevada Revised Statutes which are not expressly exempted from 241.020 or which provide that certain types of information are confidential. C.f. NRS 665.055, reports of examinations by the superintendent of banks; NRS 703.190, limited exemptions for records of the public service commission; NRS 127.140, hearings, files and records in adoption cases; NRS 62.270, juvenile court records; NRS 90.160, information obtained for qualification of securities offerings; and NRS 583.475, trade secrets.

Consequently, the amendment to NRS 241.020 is sought in order to avoid the existing conflicts between that statute and other statutes, most notably NRS 463.120 and 463.110(5).

Section 28 NRS 463.310 gives the commission discretion to revoke, limit, or condition gaming licenses or to fine the holders thereof. It has been the experience of the commission that it is virtually impossible, and frequently inequitable, to apply a predetermined scale of penalties. The regulations of the commission have become too numerous and complex for the commission to fix any meaningful minimum or

maximum fines for violations of the many various sections. By repeal of this section, the legislature is not granting any additional authority to the Nevada gmaing commission but is releasing it from an obligation which has proven very burdensome in the past.

Submitted by:

A.J. Hicks

A.J. Hicks
Deputy Attorney General
Gaming Division

AJH:lc

haeuser Steamship Co. v. Nacirema Operating Co., supra.[2] So even conceiving of *Reed* and *Jackson* as creating a procedural shortcut, I see no justification for a rule that they do not apply to negligence claimants.[3]

Because I disagree with the majority on the effect of § 5, I must address the issue the majority did not find it necessary to reach: whether the district court erred in concluding that plaintiffs failed to sustain their burden of producing evidence of the employer's negligence and in entering a judgment for the defendant at the close of plaintiff's evidence. I think this was error. Plaintiffs' expert testimony regarding the custom and practice of vessels during docking and undocking was, in my view, probably sufficient to satisfy plaintiffs' burden of production. In any case, the evidence was that Mr. Murphy was not warned in any manner that the vessel was about to pull away, and, in my view, that was sufficient evidence of the vessel's negligence to shift the burden of production to the defendant. I need not express any view on whether plaintiff may have been contributorily negligent and whether he might have been barred under the law of comparative negligence.

I would vacate the judgment of the district court and remand for a new trial.

2. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, supra at 114-15, 94 S.Ct. 2174 is not inconsistent with *Weyerhaeuser*. It simply states *Halcyon's* rule regarding contribution, which, of course, is not the same thing as indemnification. *See Italia Societa v. Oregon Stevedoring Co.*, supra at 221, 81 S.Ct. 348.

3. I am satisfied that appellants were subject to the Act and will not address the related question whether the federal negligence remedy should be construed as subject to the limitations of the Massachusetts Workmen's Compensation Act.

Geraldine C. MEDINA, Plaintiff, Appellant,

v.

Warren B. RUDMAN et al., Defendants, Appellees.

No. 76-1057.

United States Court of Appeals, First Circuit.

Nov. 9, 1976.

Action was instituted on civil rights complaint for damages and an injunction by reason of a refusal to allow participation in an outstanding greyhound racing license. The United States District Court for the District of New Hampshire, Hugh H. Bownes, J., entered judgment dismissing complaint, and plaintiff appealed. The Court of Appeals, Levin H. Campbell, Circuit Judge, held that interest of plaintiff in participating in ownership of a pari-mutuel greyhound racetrack in New Hampshire was neither a right recognized under law of New Hampshire nor a "fundamental" or "natural" right that would have given plaintiff a protected remedy or property interest under due process clause of Fourteenth Amendment so as to have enabled her to bring an action under statute governing deprivation of civil rights when New Hampshire State Greyhound Racing Commission, on advice of Attorney General of New Hampshire, refused to approve plaintiff's "participation" in ownership of track through a stock purchase from club holding track license; further, interest of plaintiff in participating in ownership of a pari-mutuel greyhound racetrack in New Hampshire was not so "fundamental" to life's "common occupations" as to have elicited due process protection for plaintiff in re-

spect to her interest even though it was not otherwise defined in state law.

Affirmed.

1. Courts ⇐406.6(3)
Federal Civil Procedure ⇐1832, 2533

Trial court should either have treated defendants' motion to dismiss civil rights complaint as one for summary judgment, or else not given specific consideration, as it did in its opinion, to a number of facts outside the pleading, found principally in affidavits filed by the parties, and though the trial court erred in failing to so treat motion, error was harmless where dismissal could be justified without reference to extrinsic material which, while relevant, was not determinative. U.S.C.A.Const. Amend. 14; Fed.Rules Civ.Proc. rule 12(b), (b)(6), 28 U.S.C.A.

2. Constitutional Law ⇐136

There was no issue of contract impairment under the Constitution with respect to the refusal of the New Hampshire State Greyhound Racing Commission, on advice of Attorney General of New Hampshire, to approve plaintiff's "participation" through a stock purchase in an outstanding greyhound racing license where it was clear that greyhound racing laws in New Hampshire were fully extant before plaintiff loaned money to club holding license. RSA N.H. 284:6–a, 284:12–a, 284:15–b, 284:16–a; U.S.C.A.Const. art. 1, § 10.

3. Constitutional Law ⇐230.3(6)

There was no equal protection issue with respect to refusal of New Hampshire State Greyhound Racing Commission, on advice of Attorney General of New Hampshire, to approve plaintiff's "participation" through a stock purchase in an outstanding greyhound racing license where there were clearly insufficient facts alleged to indicate a "purposeful discrimination" by state officials. RSA N.H. 284:6–a, 284:12–a, 284:15–b, 284:16–a; U.S.C.A.Const. Amend. 14.

4. Constitutional Law ⇐287

Interest of plaintiff in participating in ownership of a pari-mutuel greyhound racetrack in New Hampshire was neither a right recognized under law of New Hampshire nor a "fundamental" or "natural" right that would have given plaintiff a protected remedy or property interest under due process clause of Fourteenth Amendment so as to have enabled her to bring an action under statute governing deprivation of civil rights when New Hampshire State Greyhound Racing Commission, on advice of Attorney General of New Hampshire, refused to approve plaintiff's "participation" in ownership of track through a stock purchase from club holding track license. RSA N.H. 284:6–a, 284:12–a, 284:15–b, 284:16–a; 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

5. Constitutional Law ⇐255(1), 277(1)

A class of "fundamental" liberties that trigger "substantive" rather than merely "procedural" protection is defined rather narrowly and, as such, is reserved to those "liberty" or "property" interests that attain status as such under the due process clause by virtue of the fact that they had been initially recognized and protected by state law. U.S.C.A.Const. Amend. 14.

6. Constitutional Law ⇐251

It is the alteration or extinguishing of a right or status previously recognized by state law that invokes the procedural guarantees contained in the due process clause. U.S.C.A.Const. Amend. 14.

7. Constitutional Law ⇐287

Once a license to operate a pari-mutuel greyhound racetrack, or its equivalent, is granted by state of New Hampshire, a right or status recognized under state law would come into being, and revocation of license would require notice and hearing under due process clause, as the law of New Hampshire now provides, but nothing so far has been promised or granted by the state to an individual wishing to "participate" in the ownership of a license already granted. RSA N.H. 284:6–a, 284:12–a, 284:15–b, 284:16–a; U.S.C.A.Const. Amend. 14.

8. Constitutional Law ⇐287

A state-recognized interest protected by the due process clause might also exist if

wishing to participate in the ownership of a pari-mutuel greyhound racetrack, upon equal terms with others generally, to be licensed so as to engage in a common activity or pursuit, but since racing licenses have not been viewed by the New Hampshire courts as open to all persons who meet prescribed standards, and are treated as discretionary with the New Hampshire State Greyhound Racing Commission, such a state-recognized interest does not exist. RSA N.H. 284:6–a, 284:12–a, 284:15–b, 284:16–a; U.S.C.A.Const. Amend. 14.

9. Constitutional Law ⇐254

It seems likely that when a state holds out a right to citizens to engage in an activity on equal terms with others, a state-recognized status within context of due process exists. U.S.C.A.Const. Amend. 14.

10. Constitutional Law ⇐287

The state of New Hampshire, in its greyhound licensing law, rather than creating a general entitlement in favor of all persons who qualify, has indicated merely that the New Hampshire State Greyhound Racing Commission may issue licenses "at will" and, thus, an individual desiring to participate in the ownership of a greyhound pari-mutuel racetrack does not enjoy, either exclusively or implicitly, a protected status under New Hampshire law and, hence, does not have a protected liberty or property interest under the due process clause. RSA N.H. 284:6–a, 284:12–a, 284:15–b, 284:16–a; U.S.C.A.Const. Amend. 14.

11. Constitutional Law ⇐275(1)

Interest of plaintiff in participating in ownership of a pari-mutuel greyhound racetrack in New Hampshire was not so "fundamental" to life's "common occupations" as to have elicited due process protection for plaintiff in respect to her interest even though it was not otherwise defined in state law. U.S.C.A.Const. Amend. 14.

1. The State Greyhound Racing Commission is a three-member body established under New Hampshire law NH RSA 284:6–a (Supp.1975). No one may conduct, hold or operate any dog

society, and investment in such an enterprise, when permitted at all, is plainly open to the strictest kind of supervision.

13. Theaters and Shows ⇐3

The state, under its police powers, is entitled, if it elects, to issue racetrack licenses, and to regulate participation thereunder, on a discretionary basis. U.S.C.A. Const. Amend. 14.

14. Theaters and Shows ⇐3

While vesting discretionary powers in a state racing commission may open the way to abuse, a state may reasonably believe that discretionary control makes it easier to see that licenses do not fall into the wrong hands and that only persons who will act affirmatively in public interest obtain licenses. U.S.C.A.Const. Amend. 14.

15. Gaming ⇐4

Given the social evils associated with gambling and the state's revenue interests, the state's choice of means in the selection of licensees is entitled to prevail over the private interests of potential investors. U.S.C.A.Const. Amend. 14,

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Leonard W. Yelsky, Cleveland, Ohio, with whom David A. Snow and Yelsky, Eisen & Singer Co., L.P.A., Cleveland, Ohio, were on brief, for appellant.

David H. Souter, Atty. Gen., Concord, N.H., with whom Thomas D. Rath, Deputy Atty. Gen., James C. Sargent, Jr., Atty., Concord, N.H., were on brief, for appellees.

Before COFFIN, Chief Judge, McENTEE and CAMPBELL, Circuit Judges.

LEVIN H. CAMPBELL, Circuit Judge.

Geraldine C. Medina appeals from a judgment of the District Court for the District of New Hampshire dismissing her complaint for damages and an injunction against the members of New Hampshire's State Greyhound Racing Commission (the "Commission")[1] and its Attorney General.

1985, Mrs. Medina requested the district court to order the Commission to approve her "participation" (by purchasing stock in the licensee) in an outstanding greyhound racing license that the Commission had issued to a corporation known as the New Hampshire Kennel Club, Inc. (the "Club"). Her complaint followed upon the Commission's refusal, on advice of the Attorney General of New Hampshire, to approve her "as a financial backer, owner or participant in any way" under the Club's license.[2]

While Mrs. Medina's complaint cited several civil rights statutes, and included an unsuccessful request for a three-judge court to consider the alleged unconstitutionality of parts of New Hampshire's greyhound racing laws, this appeal is limited to the district court's determination that her complaint did not state a claim under 42 U.S.C. § 1983. Mrs. Medina contends chiefly that the Commission's disapproval of her participation without, as she asserts, "adequate notice and hearing on the merits of a controversy between herself and the unknown contents of the [Attorney General's] report", deprived her of due process of law under the fourteenth amendment, giving rise to a right of action under § 1983. The court below ruled that her interest in acquiring stock in a parimutuel greyhound racetrack was not protected liberty or property within the fourteenth amendment.

[1] Before proceeding, we observe that the court below should either have treated defendants' motion to dismiss under Fed.R. Civ.P. 12(b)(6) as one for summary judgment, or else not given specific consideration, as it did in its opinion, to a number of in affidavits filed by the parties. *See* Fed. R.Civ.P. 12(b). *O'Brien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976). Rule 12(b) provides that if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." (The court had before it a separate motion for summary judgment that was argued simultaneously with the 12(b)(6) motion but chose to act under the latter.) The court's error was, however, harmless. The dismissal can be justified without reference to the extrinsic material which, while relevant, is not determinative. *Cf. O'Brien v. Moriarty*, 489 F.2d 941 (1st Cir. 1974).

The events surrounding plaintiff's claim are clear enough. An Ohio resident, plaintiff is the principal shareholder of four Weight Watcher franchises there, and appears to possess substantial means. In the first half of 1975 she loaned $150,000 to the Club, which owned the New Hampshire real estate upon which a greyhound racing track was then in process of being built. A license to conduct greyhound races during the 1975 season had already been issued to the Club. After plaintiff's initial loan, the Club's two principal stockholders, Henry D. Bogatin, Jr. and Angelo Cassaro, assured plaintiff that, in view of her substantial financial position, they would sell her an approximately fifty per cent interest in the Club, but their undertaking to do so was explicitly made contingent upon her obtaining approval from the Commission. Pursuant to this informal understanding "in principle", but before she had obtained the Commission's approval, Mrs. Medina loaned

race or public meet at which parimutuel pools are sold without a license from the Commission. NH RSA 284:12-a (Supp.1975). If the Commission is satisfied that all provisions of law and its rules and regulations have been and will be complied with, it *may* issue a license, NH RSA 284:16-a (Supp.1975). [Emphasis supplied.]

2. Applicants for dog racing licenses, holders of such licenses, and individuals owning interests in closely-held licensee corporations, must file with the state Attorney General sworn statements disclosing their names, occupations and addresses, the nature of their ownership interest in the licensee, information as to any felony convictions, and a detailed statement of assets and liabilities. NH RSA 284:15-b (Supp.1975). New Hampshire law makes no explicit provision for a *prospective* purchaser of stock in an existing licensee like Mrs. Medina to file such a statement with the Attorney General as was done here, nor does the law expressly prohibit one who has not received Commission approval from purchasing stock.

more money to the Club, making her investment in the neighborhood of $700,000.

In August, 1975, Mrs. Medina, with the assistance of an attorney, made out and submitted to the Attorney General a form titled "Individual Disclosure of Information", this being what Mrs. Medina calls in her complaint "an application to participate in the previously issued [Club's] Greyhound Racing license". The form on its face provided that it was "To be submitted to Attorney General under RSA 284:15–b" and "Must be filed by each individual . . . holding legal or beneficial ownership interest if the ownership interest of the above applicant or license holder is held by 25 or less persons . . . ."[3]

On this form, Mrs. Medina indicated the Club as the "present license holder", and that she was presently a mortgagee of the Club which was indebted to her for $700,000. After detailing her financial condition, she went on to indicate that if approved by the Commission she hoped to participate through a limited partnership arrangement, and through stock ownership in the Club, which would be the General Partner, in the operation of a greyhound racing facility. Stock ownership in the Club "presently anticipated" was said to be as follows:

VOTING COMMON	
Henry D. Bogatin, Jr.	200 shares
Angelo Cassaro	200 shares
Geraldine Medina	300 shares
NON VOTING COMMON	
Geraldine C. Medina	300 shares

Plaintiff expressly noted that "voting control would remain in the hands of the present stockholders of the present licensee", viz. Bogatin and Cassaro.

Following submission of the so-called application, the state Attorney General conducted an investigation and, on September 26, 1975, the Commission wrote to the Club that "[b]ased upon a report from the office of the Attorney General, the Commission declines to approve Geraldine C. Medina as a financial backer, owner or participant in any way under the license granted to the New Hampshire Kennel Club." There is no allegation or evidence that Mrs. Medina at this juncture ever requested a Commission hearing.[4] But twelve days later, on October 7, 1975, she filed this action in the district court, seeking initially a temporary restraining order and preliminary injunction, which the court denied, ordering defendants to allow her to participate under the Club's license.[5]

3. The district court spoke of Mrs. Medina as an applicant for a racetrack license. Clearly, as the court acknowledged, this was not technically correct as there is no suggestion that she ever intended personally to secure a license. Moreover, since the existing stockholders, Bogatin and Cassaro, were to retain over 50% of the *voting* stock, the license issued to the Club would seem not to "automatically cease" under the provisions of NH RSA 284:16-a, upon Mrs. Medina's acquisition of stock, as the district court assumed.

On the other hand, calling Mrs. Medina a license applicant is, as a practical matter, not too far off the mark. The Club's license was subject to annual renewal and could be revoked at any time by the Commission (though only "for good cause upon reasonable notice and hearing", NH RSA 284:16–a); and it appears that if Mrs. Medina persisted in acquiring stock without Commission approval, its license would be in jeopardy under existing Commission policy and practice. For purposes of this case, we are willing to accord Mrs. Medina the most favored status supported by the pleadings, that of a license applicant, particularly where the pleadings do not indicate how applications like hers fit in the regulations of regular licensing procedures.

4. As we agree with the district court that the fourteenth amendment afforded Mrs. Medina no right to a hearing, we need not consider the effect of her failure to allege such a request.

5. Neither in the prayers of her complaint nor in her request for preliminary relief, did Mrs. Medina make specific request for the "process" i. e. notice of charges and opportunity for hearing, the omission of which allegedly constituted a denial of due process of law. In argument to the district court, her attorney finally came round to stating that, as alternate relief, she wished a hearing and disclosure of the basis on which the Attorney General disapproved her and the court said it considered this a motion to amend and allowed it.

In her district court complaint, plaintiff alleged that "subsequent to plaintiff's application to be licensed to participate in said Club license" the Attorney General conducted "some type of investigation" in which she cooperated; and that although the results of the investigation were kept secret from her, she believed this to be the basis for turning her down. She alleged that "she has a reputation unblemished in any way" and complies with "any of the standards as set forth in New Hampshire Revised Statutes Annotated, Chapter 284 and all related sections thereto." Plaintiff further alleged, in conclusory fashion, that defendants acted willfully, knowingly and improperly with the specific intent to deprive her of her constitutional rights, and that they conspired and acted arbitrarily, in abuse of their discretion.

[2, 3] In deciding whether Mrs. Medina had a claim cognizable under § 1983, the court below assumed that the only federal right that might arguably have been denied her by New Hampshire officials, under color of state law, was a right to due process.[6] The court focused on that question, rightly we think. There was clearly no issue of contract impairment under Art. I, § 10 of the Constitution, New Hampshire's greyhound racing laws being fully extant before she loaned money to the Club, *South Terminal Corp. v. EPA*, 504 F.2d 646, 680 (1st Cir. 1974); nor is there any equal protection issue, there being insufficient facts alleged to indicate a "purposeful discrimination" by state officials. *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944); *see Cordeco Development Corp. v. Vasquez*, 539 F.2d 256, 260, n.5 (1st Cir. 1976); *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946) (Hand, J.).

The district court's due process analysis closely relied upon that in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), in which the Supreme Court said,

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. . . . [T]he range of interests protected by procedural due process is not infinite." *Id.* at 569–70, 92 S.Ct. at 2705.

The court went on to quote from *Roth* that to have a protected property interest in a benefit, a person must have more than an "abstract need or desire". Property interests

> "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that supports claims of entitlement to those benefits." *Id.* at 577, 92 S.Ct. at 2709.

The court found that Mrs. Medina lacked any such property interest here "cognizable under state law, rules, custom, or understanding. State law does not create any property interest in racetrack license applicants; the law is expressly permissive. . . . Neither can plaintiff claim any 'understanding'. In her contractual dealings with the Kennel Club, she expressly acknowledged the statutory necessity of obtaining a license in order to participate in the operation of the racetrack."

The district court rejected any notion that Mrs. Medina's application involved a "fundamental" or "natural" right—such as the right to earn a living and engage in one's chosen occupation—which might, apart from state law, be a protected "liberty" interest. *See Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Finally it distinguished various license cases, including *Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973) (driver's license), on the ground that they involved broadly-shared privileges essential in the pursuit of

6. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ." U.S.Const. amend. XIV, § 1.

a livelihood. The court accordingly ruled that the guarantees of the due process clause were simply inapplicable and that, as a consequence, plaintiff had no claim under § 1983.

[4] We agree with the district court. While the great variety and range of protected liberty and property interests make them difficult to classify, we accept the lower court's thesis that a person's interest in participating in the ownership of a parimutuel greyhound racetrack is neither a right recognized under New Hampshire law nor is it a "fundamental" or "natural" right.

[5, 6] In the recent term, after the district court's decision in the present case, the Supreme Court has come down with several decisions reiterating and narrowing the *Roth* formulation. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *see Meachum v. Fano*, —— U.S. ——, 96 S.Ct. 2532, 49 L.Ed.2d —— (1976); *Bishop v. Wood*, —— U.S. ——, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). *See also Kelley v. Johnson*, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976). While the Supreme Court in these cases recognized in passing the existence of a class of "fundamental" liberties (said to trigger "substantive" rather than merely "procedural" protection, *see Kelley v. Johnson, supra*, at 244, 96 S.Ct. 1440, *Paul v. Davis, supra*, at 710 n.5, 712–13, 96 S.Ct. 1155), the Court defined this class rather narrowly,[7] reserving particular emphasis for those "liberty" or "property" interests which attain status as such under the due process clause "by virtue of the fact that they have been initially recognized and protected by state law". *Paul v. Davis, supra*, at 710, 96 S.Ct. at 1165. The Court said it is the alteration or extinguishing of a right or status previously recognized by state law that invokes the procedural guarantees contained in the due process clause. *Id.* at 711, 96 S.Ct. 1155.

[7] Under this approach, it is difficult to see how New Hampshire law can be said to recognize or create a vested right or status in favor of potential greyhound license applicants which defendants here are taking away. Doubtless once a license, or the equivalent, is granted, a right or status recognized under state law would come into being, and the revocation of the license would require notice and hearing as, indeed, New Hampshire law now provides. *See Paul v. Davis, supra*, at 710–11, 96 S.Ct. 1155; *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). But nothing has so far been promised or granted by the state to Mrs. Medina.

[8, 9] A state-recognized interest might also exist if the New Hampshire racing law could be said to confer upon Mrs. Medina a right, upon equal terms with others generally, to be licensed so as to engage in a common activity or pursuit. In distinguishing *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), the *Paul* Court said that "the right to purchase or obtain liquor in common with the rest of the citizenry" was a right held under state law. *Paul v. Davis, supra*, at 708, 96 S.Ct. at 1164, and it seems likely that when a state holds out a right to citizens to engage in an activity on equal terms with others, a state-recognized status exists. The case of *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), finding a right of due process with respect to bar admissions, can be explained on such a ground (as well as on the ground that the right to pursue an ordinary occupation is, by itself, a "fundamental" liberty interest, *infra*). This circuit has held that obtaining a driver's license is subject to due process protection, *Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973), and the same has been held in another circuit with respect to a radio operator's license. *Homer v. Richmond*, 110

7. *See* dissenting opinions in *Paul v. Davis*, 424 U.S. 693, 714, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (Brennan, J.); *Meachum v. Fano*, —— U.S. at ——, 96 S.Ct. at 2080 (Stevens, J.). The "fundamental" liberties acknowledged by marriage, procreation, contraception, family relationships and child rearing and education. *Paul v. Davis, supra*, at 712–13, 96 S.Ct. 1155. The Court has, of course, also acknowledged the rights created by other provisions of the

U.S.App.D.C. 226, 292 F.2d 719 (1961). In these cases, the government recognized an entitlement in favor of all persons, or of a class, upon terms and conditions of general application.

But racing licenses have not been viewed the New Hampshire courts as open to all rsons who meet prescribed standards. Rather they are treated as discretionary with the racing Commission. The statute says only that the Commission *"may"* issue a license if satisfied that all provisions of law and its rules and regulations have been and will be complied with. NH RSA 284:16–a (Supp.1975). Referring to a horse racing license, the New Hampshire Supreme Court has rejected a claim that once an applicant complies with the statutes and meets all requirements, the commission had no discretion to withhold a license. *North Hampton Racing & Breeding Assoc. v. New Hampshire Racing Commission*, 94 N.H. 156, 48 A.2d 472 (1946). The court explained that the state horse racing statute, on which the greyhound racing laws are patterned

> "deals with a private enterprise which, of its nature, is not only privileged, but which presents a social problem properly coming under the exercise and jurisdiction of the police power of the state and which requires strict regulation and supervision." *Id.* at 159, 48 A.2d at 475.

Ratti v. Hinsdale Raceway, 109 N.H. 270, 272, 249 A.2d 859, 861 (1969), the court said that racetracks were permitted by the state to raise revenue, and that regulation allowed tracks to be run by private parties while guarding against "whatever social evils may be involved."

[10] We think that New Hampshire, in its greyhound licensing laws, rather than creating a general entitlement in favor of all persons who qualify, has indicated merely that the Commission may issue licenses "at will". *Cf. Bishop v. Wood, supra; Board of Regents v. Roth, supra.* We conclude, therefore, that Mrs. Medina's desire to participate in the ownership of a greyhound parimutuel track did not enjoy, either explicitly or implicitly, a protected status under New Hampshire law, and was not on that theory, a "liberty" or "property" interest.

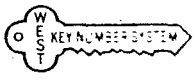
[11, 12] Not being state-created, any asserted "right" to participate in the racetrack comes under the due process clause only if it is a right so "fundamental" as to elicit protection even though not otherwise defined in state law. Rights of this potency are a special breed, *see* note 7, *supra*, and we find little authority for so classifying Mrs. Medina's wishes. Over fifty years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923) the Supreme Court described the right "to engage in any of the common occupations of life" as one of the fundamental privileges "long recognized at common law as essential to the orderly pursuit of happiness by free men." *See Schware v. Board of Bar Examiners, supra. Meyer* has recently appeared mostly in dissenting opinions; but even assuming its continued vitality, we do not consider racetrack ownership to be one of life's "common occupations". Gambling is traditionally suspect in our society, and investment in such an enterprise, when permitted at all, is plainly open to the strictest kind of supervision.

[13–15] We think the state, under its police powers, is entitled, if it elects, to issue racetrack licenses, and to regulate participation thereunder, on a discretionary basis as it has chosen to do here.[8] Given the social evils associated with gambling and the state's revenue interests, the state's choice of means in the selection of licensees is entitled to prevail over the private interests of potential investors. We do not decide if and to what extent a similar analysis

8. While vesting discretionary powers in a state commission may open the way to abuse, a state may reasonably believe that discretionary control makes it easier to see that licenses do not fall into the wrong hands and that only persons who will act affirmatively in the public interest obtain licenses. *Cf. Kelley v. Johnson, supra*, 425 U.S. at 247, 96 S.Ct. 2532. New Hampshire law does provide a remedy by which an aggrieved party may appeal to the state courts to challenge Commission decisions deemed arbitrary. NH RSA 284:12 (Supp.1975).

would stand up if applied to another type of enterprise. *Cf. South Gwinnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir.) *cert. denied* 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974); *Atlanta Bowling Center, Inc. v. Allen*, 389 F.2d 713 (5th Cir. 1968); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1963).

Affirmed.



NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

OTIS HOSPITAL, Respondent.

No. 76–1138.

United States Court of Appeals, First Circuit.

Nov. 15, 1976.

National Labor Relations Board sought enforcement of an order requiring an employer to provide employees a promised wage increase following a finding that the employer committed an unfair labor practice by withholding the promised wage increase for the purpose of pressuring employees in their decision as to unionization. The Court of Appeals, Levin H. Campbell, Circuit Judge, held that where the pay increase was promised by the employer prior to the union's appearance, the employer's past practice was to grant such increases and the employer attempted to blame the union for the withholding of the pay increase by stating that he did not know if it would be proper during a union election campaign, but refused an offer to seek union approval of the increase, the employer committed an unfair labor practice; and the Board's order directing the employer to pay the employees wage increases that were promised, with interest of 6%, was not improper, even though the amount of the increase had never been specified.

1. Labor Relations ⇐367

Employer commits unfair labor practice by interfering with employees in exercise of their collective bargaining rights if effect and purpose of actions can be said to impinge upon employees' rights to unionize. National Labor Relations Act, § 8(a)(1) as amended 29 U.S.C.A. § 158(a)(1).

2. Labor Relations ⇐559

To establish that employer discriminated in regard to hire or tenure of employment in violation of National Labor Relations Act, there must be proof of discriminatory act undertaken by employer with intent to prejudice employees because of their membership or nonmembership in union. National Labor Relations Act, § 8(a)(3) as amended 29 U.S.C.A. § 158(a)(3).

3. Labor Relations ⇐393, 617

Where pay increase was promised by employer prior to union's appearance, increase would normally have been granted as part of pattern of increases established by past practice, and employer attempted to blame union for withholding of increase on ground that he did not know if it would be proper during union election campaign, but employer refused offer to seek union approval of pay increase, employer committed unfair labor practice; and National Labor Relations Board order requiring employer to pay promised increase, with interest at 6%, was not improper, even though actual amount of increase had not been specified by employer. National Labor Relations Act, §§ 8(a)(1), 10(c) as amended 29 U.S.C.A. §§ 158(a)(1), 160(c).

4. Labor Relations ⇐393

Employer's withholding or granting wage increase becomes unfair labor practice only if employer is found to be manipulating benefits in order to influence his employees' decision during union's organizing campaign. National Labor Relations Act, § 8(a)(1) as amended 29 U.S.C.A. § 158(a)(1).

5. Labor Relations ⇐364

Employer may change existing condi-

PROPOSED AMENDMENTS TO A.B. 355

3/1/77

Sec. 2. 1. The district courts, upon application of the Nevada Gaming Commission, may prevent and restrain violations of chapters 463, 464 and 465 of NRS by issuing appropriate orders, including:

(a) Ordering a person to divest himself of any interest, direct or indirect, in any enterprise.

(b) Imposing reasonable restrictions on the activities or investments of any person, including prohibiting him from engaging in an enterprise required to be licensed under this chapter.

(c) Ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(d) Ordering a person to cease and desist from any activity which is conducted in violation of chapters 463, 464 or 465 of NRS.

(e) Requiring an accounting of liabilities for taxes, fees or charges due to the state under chapters 463 and 464 of NRS.

(f) Ordering payment to the state of any taxes, fees or charges, and penalties and interest due under chapters 463 or 464 of NRS.

2. The attorney general may institute proceedings on behalf of the gaming commission. In any action brought under this section, the court shall proceed as soon as practicable to a hearing and determination. Pending final determination, the court may enter restraining orders or prohibitions.

3. The remedies provided by this section are civil in nature, and do not preclude the imposition of criminal or administrative remedies.

Sec. 11. NRS 463.151 is hereby amended to read as follows:

463.151 1. The commission may by regulation provide for the establishment of a list of persons who are to be excluded or ejected from any [licensed] gaming establishment [.] which is licensed to operate any gambling game or to conduct pari-mutuel wagering. This list may include any person:

(a) Who is of notorious or unsavory reputation;

(b) Who has been convicted of a crime which is a felony in the State of Nevada or under the laws of the United states , [or] a crime involving moral turpitude [; or] , a violation of a provision of this chapter; or

(c) Whose presence in a licensed gaming establishment would, in the opinion of the board [or] and commission, be inimical to the interests of the State of Nevada, or of licensed gambling, or both.

2. Race, color, creed, national origin or ancestry, or sex shall not be grounds for placing the name of a person upon [such] the list.

[3. Any list compiled by the board or commission of persons to be excluded or ejected shall not be deemed an all-inclusive list, and licensed gaming establishments have a duty to keep from their premises persons known to them to be inimical to the interests of the State of Nevada, or of licensed gambling, or both.]

Sec. 17. NRS 463.335 is hereby amended to read as follows:

463.335 1. As used in this section:

(a) "Gaming employee" means any person connected directly with the operation of a nonrestricted establishment, and includes without limitation:

(1) Boxmen;

(2) Cashiers;

(3) Dealers;

(4) Floormen;

(5) Hosts or other persons empowered to extend credit or complimentary services;

(6) Keno runners;

(7) Keno writers;

(8) Machine mechanics;

(9) Security personnel;

(10) Shift or pit bosses;

(11) Shills; and

(12) Supervisors or managers.

"Gaming employee" does not include bartenders, cocktail waitresses or other persons engaged in preparing or serving food or beverages.

(b) "Nonrestricted establishment" means any establishment except one in which slot machines only are operated incidentally to some other primary business of the licensee.

(c) "Temporary work permit" means a work permit which is valid only for a period not to exceed 30 days from its date of issue and is not renewable.

(d) "Work permit" means any card, certificate or permit issued by the board or by a county or city licensing authority, whether denominated as a work permit, registration card or otherwise, authorizing the employment of the holder as a gaming employee. A work permit, card, certificate, or otherwise issued for nongaming employment by any authority is not a valid work permit for the purposes of this statute. A work permit issued to a gaming employee must have clearly imprinted thereon a statement that the work permit is for gaming employment only.

2. The legislature finds that, to protect and promote the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada and to carry out the policy declared in NRS 463.130, it is necessary that the board:

(a) Ascertain and keep itself informed of the identity, prior activities and present location of all gaming employees in the State of Nevada; and

(b) Maintain confidential records of such information.

3. No person may be employed as a gaming employee unless he is the holder of:

(a) A valid work permit issued in accordance with the applicable ordinances or regulations of the county or city in which his duties are performed and the provisions of this chapter ; or

(b) If no work permit is required by either [such] the county or [such] city, a work permit issued by the board.

4. Whenever any person applies for the issuance or renewal of a work permit, the county or city officer or employee to whom [such] the application is made shall within 24 hours mail or deliver a copy thereof to the board, and may at the discretion of the county or city licensing authority issue a temporary work permit. If within 30 days after receipt by the board of the copy of the application, the board has not notified the county or city licensing authority of any objection, [such] the authority may in its discretion issue , renew or deny a work permit to the applicant. Any holder of a work permit must obtain renewal of the permit from the issuing agency within 10 days following any change of place of employment.

5. If the board within the 30-day period notifies the county or city licensing authority that the board objects to the granting of a work permit to the applicant, [such] the authority shall deny the work permit and shall immediately revoke and repossess any temporary work permit which it may have issued.

6. Application for a work permit, valid wherever a work permit is not required by any county or city licensing authority, may be made to the board, and may be granted or denied for any cause deemed reasonable by the board.

7. Any person whose application for a work permit has been denied because of an objection by the board or whose application for a work permit has been denied by the board may apply to the board for a hearing. At [such] the hearing, the board or any designated member of the board or an examiner appointed by the board shall take any testimony deemed necessary. After [such] the hearing the board shall review the testimony taken and any other evidence introduced [in its files], and shall within 30 days from the date of the hearing announce its decision sustaining or reversing the denial of the work permit or the objection to issuance of a work permit. [Such decision may be made upon any ground deemed reasonable by the board, and shall be conclusive unless reversed as provided in subsection 8.] The board may object to the issuance of a work permit or may refuse to issue a work permit for any cause deemed reasonable by the board. The board may object or refuse if the applicant has:

(a) Failed to disclose, misstated or otherwise attempted to mislead the board with respect to any material fact contained in the application for the issuance or renewal of a work permit;

(b) Knowingly failed to comply with the provisions of chapters 463, 464 or 465 of NRS or the regulations of the Nevada gaming commission at a place of previous employment;

(c) Committed, attempted or conspired to commit any crime of moral turpitude, embezzlement or larceny against his employer or any gaming licensee, any law pertaining to gaming, or any other crime which is inimical to the policies of this state as expressed in NRS 463.130;

(d) Defied legislative investigating committees or other officially constituted bodies acting on behalf of the United States or any state, county or municipality which seeks to investigate crimes relating to gaming, corruption of public officials, or any organized criminal activities;

(e) Been identified in the published reports of any federal or state legislative or executive body as being a member or associate of organized crime, or as being of notorious and unsavory reputation;

(f) Become subject to the constructive custody of any federal,

state or municipal law enforcement authority;

(g) Had a work permit revoked under the provisions of NRS 463.337 or has committed any act which could result in a revocation of a work permit under the provisions of NRS 463.337;

(h) Been refused the issuance of any license, permit, or approval to engage in or be involved with gaming or pari-mutuel wagering in any jurisdiction other than Nevada, or had any such license, permit, or approval revoked or suspended; or

(i) Been prohibited under color of governmental authority from being present upon the premises of any gaming establishment or any establishment where pari-mutuel wagering is conducted.

8. Any applicant for a work permit aggrieved by the decision of the board may, within 15 days after the announcement of the decision, apply in writing to the commission for review of the decision. [Such review] Review shall be limited to the record [, any testimony submitted and the files in the case.] of the proceedings before the board. The commission may sustain or reverse the board's decision. The decision of the commission shall be subject to judicial review pursuant to NRS 463.315.

9. All records acquired or compiled by the board or commission relating to any application made pursuant to this section [are confidential and no part thereof may be disclosed except in the proper administration of this chapter or to an authorized law enforcement agency. All] and all lists of persons to whom work permits have been issued or denied and all records of the names or identity of persons engaged in the gaming industry in this state are confidential and shall not be disclosed except in the proper administration of this chapter or to an authorized law enforcement agency.

10. A work permit expires unless renewed within 10 days following any change of place of employment or if the holder thereof becomes unemployed as a gaming employee within the jurisdiction of the issuing authority for a period of greater than 90 days.

Sec. 18. NRS 463.337 is hereby amended to read as follows:

463.337 1. If any gaming employee as defined in NRS 463.335 is convicted of a violation of NRS 465.070 to 465.085, inclusive, or if in investigating an alleged violation of this chapter by any licensee the commission finds that a gaming employee employed by [such] the licensee has been guilty of cheating , the commission shall after a hearing as provided in NRS 463.310 and 463.312:

(a) If [such] the gaming employee holds a work permit issued by the board, revoke [such work permit.] it.

(b) If [such] the gaming employee holds a work permit issued by a county or city licensing authority, notify such authority to revoke [such permit,] it, and the county or city licensing authority shall revoke [such permit.] it.

2. The commission may revoke a work permit issued by the board or, if issued by a county or city licensing authority, notify [such] the authority to revoke [such permit,] it, if the commission finds after a hearing as provided in NRS 463.310 and 463.312 that the gaming employee has failed to disclose, misstated or otherwise misled the board in respect to any fact contained within any application for a work permit or, subsequent to being issued [such] a work permit:

(a) Committed, attempted or conspired to do any of the acts prohibited by NRS 465.070 to 465.085, inclusive;

(b) Knowingly possessed or permitted to remain in or upon any licensed premises any cards, dice, mechanical device or any other cheating device whatever, the use of which is prohibited by statute or ordinance;

(c) Concealed or refused to disclose any material fact in any investigation by the board;

(d) Committed, attempted or conspired to commit larceny or embezzlement against a gaming licensee or upon the premises of a licensed gaming establishment ; [or]

(e) Been convicted in any jurisdiction other than Nevada of any offense involving or relating to gambling [.] ;

(f) Accepted employment, without prior commission approval, in

a position for which he could be required to be licensed pursuant to the terms of this chapter of the NRS after having been denied a license by the commission for any reason involving personal unsuitability or after failing to apply for licensing when so requested by the commission;

(g) Been refused the issuance of any license, permit, or approval to engage in or be involved with gaming or pari-mutuel wagering in any jurisdiction other than Nevada, or had any such license, permit, or approval revoked or suspended;

(h) Been prohibited under color of governmental authority from being present upon the premises of any gaming establishment or any establishment where pari-mutuel wagering is conducted; or

(i) Defied any legislative investigative committee or other officially constituted bodies acting on behalf of the United States or any state, county or municipality which seeks to investigate crimes relating to gaming, corruption of public officials, or any organized criminal activities.

3. A work permit shall not be issued by any authority in this state to a person whose work permit has previously been revoked pursuant to this section [.] or who has been denied the issuance or renewal or a work permit pursuant to NRS 463.335 except with the unanimous approval of the commission members.

4. A gaming employee whose work card has been revoked pursuant to this section is entitled to judicial review of the commission's action in the manner prescribed by NRS 463.315.

5. Nothing in this statute shall be construed as limiting or prohibiting the enforcement of the provisions of NRS 463.____, 463.560, 463.595, or 463.637.

PROPOSED ADDITIONS TO A.B. 355

3/1/77

Sec. ___. Add the following statute relating to full disclosure.

463.___. An applicant for licensing, registration, finding of suitability, work permit, or any approval or consent required by this chapter shall make full and true disclosure of all information to the board, commission, or other relevant governmental authority, as necessary or appropriate in the public interest or as required in order to implement the policies of this state relating to licensing and control of the gaming industry.

Sec. ___ NRS 463.145(4) is hereby repealed, and the below new statute added:

463.___ Judicial determination of validity.

1. Validity of statutes and regulations. The board or commission, any applicant, licensee, holding company or intermediary company, or publicly traded corporation which is registered with the commission may obtain a judicial determination of the validity of any statute contained within this chapter of the NRS or of any regulation of the commission by bringing an action in the First Judicial District Court of the State of Nevada, in and for Carson City, or in the district court of the district in which the person resides.

2. Parties. When a determination of validity is sought pursuant to this statute by a party other than the commission, the commission shall be named as a party to the action and the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.

3. Construction. Statutes and regulations reviewed pursuant to this statute shall, whenever possible, be construed in a manner consistent with the policies of this state regarding the regulation and control of gambling as set forth in this chapter.

4. Jury trial. When a proceeding under this statute involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

5. Supplemental relief. The filing of a petition for determination of validity under this statute does not stay enforcement of any commission or board action affected thereby. The commission may, in its absolute discretion, grant a stay of its own decision or order upon appropriate terms. Supplemental relief, including the use of any extraordinary common law writs or other equitable proceedings, shall not be granted by the district court.

6. Review. All judgments and decrees issued by the district court may be reviewed as other judgments and decrees.

7. Exclusion of chapter 30 of the NRS. The provisions of chapter 30 of the NRS shall not apply to matters regarding this chapter or any regulation promulgated thereunder.

Sec. ___ Add the following § 9 to NRS 463.130:

9. Any person seeking an order of a court of competent jurisdiction to reveal any information deemed to be confidential by any provision of chapter 463 of the NRS must serve a copy of the motion to obtain the order and all supporting documents on all parties involved, the board or commission, and the attorney general at least 10 days prior to the entry of such order.

Sec. ___ NRS 463.144 is hereby amended to read as follows:

463.144 1. The commission and the board may refuse to reveal, in any court proceeding except a proceeding brought by the State of Nevada, the identity of any informant, or the information obtained from the informant, or both the identity and the information.

2. Reports and memoranda prepared by board agents for internal use within the board or commission are privileged communications and the board or commission may refuse to reveal such documents in any administrative or judicial proceeding.