

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES ROOT,
Appellant,


vs.

COAST HOTELS & CASINOS, INC.,
D/B/A GOLD COAST HOTEL &
CASINO, ERRONEOUSLY NAMED AS
BOYD GAMING CORPORATION, A
NEVADA CORPORATION; MGM
RESORTS INTERNATIONAL, A
NEVADA CORPORATION; AND THE M
RESORTS SPA AND CASINO, A
NEVADA CORPORATION,
Respondents.

No. 81643-COA

FILED

SEP 22 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

James Root appeals from a district court order denying his petition for judicial review of a decision by the Nevada Gaming Control Board (NGCB). Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

James Root is a former patron at respondents'¹ respective casinos.² Root filed a gaming complaint with the NGCB asserting that respondents improperly excluded him from their properties, causing him to lose his rewards and/or status in various rewards programs. As such, Root

¹Respondents here include Coast Hotels & Casinos, Inc. d/b/a Gold Coast Hotel & Casino (Gold Coast), MGM Resorts International (MGM), and M Resort Spa and Casino (M Resort) (collectively, when possible, respondents).

²We recount the facts only as necessary for our disposition.

demanded that all of his prior monetary losses incurred by playing at respondents' casinos, dating back to 2013, be returned immediately.

NGCB Agent Gary Barboa conducted an investigation into the dispute. During the course of his investigation, Agent Barboa spoke with each respondent and with Root's counsel. Agent Barboa issued a written report and decision denying Root's complaint. In that report, Agent Barboa concluded that Root had been lawfully excluded from each casino and, per the terms of each rewards program, Root was therefore ineligible to receive any rewards, events, comps, or other promotional benefits through the rewards program. Agent Barboa additionally denied Root reimbursement for any prior gambling losses on the ground that gaming contracts are generally unenforceable in Nevada.³ Root timely filed a petition for reconsideration with the NGCB pursuant to NRS 463.363.

An NGCB hearing examiner held a hearing on the petition, during which Root presented two theories as to why he should recover all of his losses incurred at each of respondents' casinos. First, he argued that by gambling at each casino the parties had entered into a lifetime contract under which Root could use the rewards programs to increase his lifetime

³We note that this general rule is subject to two exceptions. First, casino debts evidenced by a credit agreement are enforceable. *See* NRS 463.368. This exception allows casinos to enforce credit markers against gaming patrons. The second exception allows a patron to dispute alleged wins or alleged losses or the manner in which, among others, a game, tournament, or promotion was conducted. *See* NRS 463.362. Root's dispute does not fall under either of these categories. His gambling losses were not evidenced by a credit instrument. As for the second exception, Root did not challenge the accuracy of any wins or losses or the fairness of any particular game or promotion; rather he appears to have sought to recover all losses he incurred at respondents' casinos based on a breach of contract theory.

win percentage by mitigating his gaming losses. Second, Root argued that each casino had made “separate promotions” available to him specifically through casino hosts, and that he would be required to forego those benefits as a result of his exclusion.⁴ However, Root testified that none of the casinos owed him “anything outstanding” outside of those benefits available pursuant to each respective rewards program. Root also stipulated that the terms of each respective rewards program allowed the casinos to terminate any rewards upon a patron’s exclusion from the property.

Based upon his personal records, Root claimed that respondents owed him \$320,601.03 for prior gambling losses incurred at certain MGM properties and at M Resort—losses which would have been at least partially mitigated via the rewards programs. Root could not identify an amount for his alleged losses at the Gold Coast but estimated that figure to be around \$15,000. Respondents admitted that Root had sustained some gambling losses at their respective casinos. Nonetheless, the hearing examiner concluded that neither Root nor Agent Barboa’s investigation substantiated the requested losses and rejected the claim for reimbursement for uncertain gambling losses pursuant to the rewards programs.

During the hearing, Root admitted that he was convicted in 2005 for being involved in a casino cheating conspiracy in California. Root’s conviction was part of the reason for his exclusion from each of respondents’ casinos.⁵ Root argued that his exclusion from the casinos was unlawful

⁴It is undisputed that there were no “separate promotions” made available to Root by Gold Coast, rather only by MGM and M Resort.

⁵MGM and M Resort also established that Root was excluded based upon a reasonable belief that he was an “advantage player” (i.e. a player that takes advantage of the rules of a game, albeit legally). M Resort also

because he believed that respondents knew of his criminal history prior to his exclusion and yet did not exclude him earlier. Root did not argue, however, that his exclusion was discriminatory.

The hearing examiner concluded that, based upon the evidence, the casinos were well within their rights to exclude Root because the casinos' purposes for excluding him were not discriminatory or unlawful. See NRS 463.0129(3)(a) (providing that gaming establishments have a right to "exclude any person from gaming activities or eject any person from the premises of the establishment for any reason"); *Slade v. Caesars Entm't Corp.*, 132 Nev. 374, 381, 373 P.3d 74, 79 (2016) ("Pursuant to NRS 463.0129, gaming establishments generally have the right to exclude any person from their premises; however, the reason for exclusion must not be discriminatory or unlawful."). The hearing examiner also rejected Root's "lifetime contract" argument per the express terms of the rewards programs because Root had been lawfully excluded from each casino, and therefore, gambling losses were not recoverable. Additionally, the hearing examiner concluded that there was "nothing else to decide" with regard to the separate promotions based upon Root's admissions that the casinos fulfilled the promises to which Root was entitled. The NGCB reviewed and adopted the hearing examiner's recommendations in its final written order.⁶

based its decision to expel Root on incidents during which Root violated the terms of its rewards program and tried to cheat a promotional drawing by attempting to place 300 tickets into a ticket drum in one day even though only five tickets per week were allowed.

⁶See Nev. Gaming Comm'n Reg. (NGCR) 7A.170.

Root timely filed a petition for judicial review in district court. The district court affirmed the NGCB's decision, concluding that sufficient evidence supported the NGCB's conclusions that respondents lawfully excluded Root and that Root was not entitled to recover any benefits under any of the rewards programs' express terms or any "separate promotions."

On appeal, Root contends that "NO evidence" supported the NGCB's decision.⁷ Root argues that because he was the only party to present evidence at the NGCB hearing, and his evidence did not support the NGCB's decision, the decision was clearly erroneous.⁸ Respondents object to Root's characterization of the NGCB hearing, and additionally assert Root did not include the full administrative record on appeal. Respondents alternatively argue that sufficient evidence supports the NGCB's decision. We agree with respondents.

The NGCB has exclusive jurisdiction to resolve a disputed claim, such as Root's, by a patron of a gaming licensee for payment of a gambling debt that is not evidenced by a credit instrument. See NRS 463.361(2)(a). Where the NGCB has resolved any such gaming dispute, a

⁷Root also argues that the district court erred in denying him an evidentiary hearing on his petition for judicial review despite the clear language to the contrary in NRS 463.3666(2). However, we need not consider Root's argument because he does not cite any legal authority in support of it nor does he elaborate on his assertion that it was error to deny his request for an evidentiary hearing. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

⁸Root does not argue on appeal that his exclusion from any of the casinos was unlawful or discriminatory.

reviewing court may only reverse the decision if “the substantial rights of the petitioner have been prejudiced” because the decision is:

- (a) [i]n violation of constitutional provisions;
- (b) [i]n excess of the statutory authority or jurisdiction of the board or the hearing examiner;
- (c) [m]ade upon unlawful procedure;
- (d) [u]nsupported by any evidence; or
- (e) [a]rbitrary or capricious or otherwise not in accordance with law.

NRS 463.3666(3).⁹ “This court’s role in reviewing administrative decisions is identical to that of the district court.” *Sengel v. IGT*, 116 Nev. 565, 571, 2 P.3d 258, 262 (2000) (internal quotation marks omitted). On appeal, we show “great deference” to decisions made by the NGCB. *Id.* at 570, 2 P.3d at 261; see *Redmer v. Barbary Coast Hotel & Casino*, 110 Nev. 374, 378, 872 P.2d 341, 344 (1994) (“This court shows great deference to a Nevada Gaming Control Board decision on appeal.”). A reviewing court should affirm a decision by the NGCB “which is supported by *any evidence whatsoever*.” *Sengel*, 116 Nev. at 570, 2 P.3d at 261 (emphasis in original). This is true even where the evidence is less than “that which ‘a reasonable mind might accept as adequate to support a conclusion.’” *Id.* (quoting *City of Las Vegas v. Laughlin*, 111 Nev. 557, 558, 893 P.2d 383, 384 (1995)). An appellant is responsible for making an adequate appellate record. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).¹⁰ An

⁹Root does not specifically argue that the NGCB’s decision falls into any of these categories. However, because Root argues that the NGCB’s decision was unsupported by any evidence we will address the issue under NRS 463.3666(3)(d).

¹⁰In appeals from a district court’s review of an NGCB decision, we follow the same procedure as in appeals of civil actions. NRS 463.3668(1).

appellant's appendix must include any documents required for inclusion in a joint appendix and any other portions of the record essential to determining the issues raised on appeal. *Id.*; see NRAP 30(b)(3). Where an appellant fails to include such requisite documentation, we presume that the missing portion supports the district court's decision. *Cuzze*, 123 Nev. at 603, 172 P.3d at 135.

We conclude that sufficient evidence supports the NGCB's decision for two reasons. First, because Root failed to include the full administrative record in his appendix, we presume that the missing portions of the record support the NGCB's decision. Second, notwithstanding the sparse appellate record, sufficient evidence supports the NGCB's decision.

Although the record on appeal includes the NGCB's written order and Agent Barboa's written report, it does not include any transcripts from the NGCB hearing. Root's briefing includes lengthy descriptions of the NGCB hearing without any citation to the record. Because Root failed to provide this court with an adequate record on appeal, we necessarily presume that the missing portions of the record support the NGCB's decision.

Next, per the NGCB's written order, the hearing examiner heard testimony from at least four witnesses. The witnesses included Root, Agent Barboa, an executive host at New York New York Hotel and Casino, and Root's expert witness. Two additional witnesses were present, although it is unclear whether either testified. In completing his investigation, Agent Barboa spoke with representatives of each of respondents' casinos and with Root's counsel. Agent Barboa included this information in his written report and testified at the hearing regarding his findings. Root stipulated

to the terms of each respective rewards program and to the right of each casino to terminate his rewards upon his lawful exclusion from a property. Root also testified that he could not remember whether any of the respondents had failed to fulfill their promises under any offer that was made specifically to Root related to his play. Indeed, Root testified that none of the respondents owed him “anything outstanding” outside the benefits he would have received from participating in the rewards programs.

On appeal, Root also attempts to minimize and distinguish his testimony with new factual allegations outside of the record. In reviewing NGCB decisions, however, we review only the evidence presented to the NGCB to determine whether there is any evidence to support its decision. *See M & R Inv. Co. v. Nev. Gaming Comm’n*, 93 Nev. 35, 35-36, 559 P.2d 829, 830 (1977); *see also Sengel*, 116 Nev. at 571, 2 P.3d at 262 (explaining that this court’s role in reviewing administrative decisions is identical to that of the district court). As such, we need not consider Root’s supplemental information. *See* NRAP 28(a)(10)(A) (stating that contentions must be supported by citations to the record).

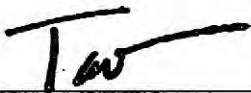
The NGCB hearing examiner concluded, and Root now concedes on appeal, that respondents lawfully excluded him from their respective casinos. With that established, Root’s hearing testimony and stipulations—that the casinos were within their rights to terminate his rewards upon his exclusion and that there did not exist “anything outstanding” outside the rewards programs—constitutes sufficient evidence to affirm the NGCB’s decision.


Root nonetheless argues that the NGCB’s decision was clearly erroneous because he was the only party to present evidence and the

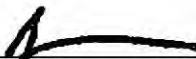
evidence he presented did not support the NGCB's final determination. However, we need not consider Root's argument because he cites to no legal authority for the assertion that respondents' failure to present evidence is determinative. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38 (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority); NRAP 28(a)(10)(A) (requiring appellant's argument to be supported by citations to legal authority). Indeed, Root acknowledges that "there is no direct or persuasive authority for [his] argument." Rather, he relies on public policy concerns to support his position. We need not address those concerns. As the Nevada Supreme Court has explained, "it is not [the courts'] role to dictate public policy in gaming." *Sengel*, 116 Nev. at 574, 2 P.3d at 263. Rather, the Legislature has delegated such policy decisions to the NGCB. *Id.*

Moreover, Nevada law explicitly states that the petitioner bears the burden of affirmatively showing by a preponderance of the evidence that the decision by an NGCB agent should be reversed or modified. *See NRS 464.364(1)*; *see also NGCR 7A.160*. Root failed to meet this burden, regardless of the order in which the evidence was presented or which party offered the evidence. Accordingly, we

AFFIRM the district court's denial of judicial review.


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Department 2
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