SJC-13031
SJC-13060

TED DeCOSMO[1] vs. BLUE TARP REDEVELOPMENT, LLC.[2]

A. RICHARD SCHUSTER[3] & another[4] vs. WYNN RESORTS HOLDINGS, LLC, & others.[5,6]

Hampden. Suffolk. April 7, 2021. - June 23, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Gaming. Regulation. Administrative Law, Regulations, Agency's interpretation of regulation.

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[1] Individually and on behalf of all others similarly situated.

[2] Doing business as MGM Springfield, LLC.

[3] Individually and on behalf of all others similarly situated.

[4] Robert Ranson, individually and on behalf of all others similarly situated.

[5] Wynn MA, LLC; and Wynn Resorts, Ltd.

[6] These cases were consolidated at oral argument. The arguments of the parties in both cases have been considered together, but the final dispositions are written separately in order to properly address the procedural differences between the two cases.

Civil action commenced in the Superior Court Department on July 29, 2019.

A motion to dismiss was heard by John S. Ferrara, J.

The Supreme Judicial Court granted an application for direct appellate review.

Certification of a question of law to the Supreme Judicial Court by the United States District Court for the District of Massachusetts.

Joshua N. Garick for A. Richard Schuster & another.
Wayne F. Dennison for the defendants.
Jeffrey S. Morneau, for Ted DeCosmo, was present but did not argue.
Matt Cameron, for Stop Predatory Gambling Foundation, amicus curiae, submitted a brief.
David S. Mackey & Melissa C. Allison, Special Assistant Attorneys General, for Massachusetts Gaming Commission, amicus curiae, submitted a brief.

KAFKER, J. According to the wise gambling proverb, "If you must play, decide upon three things at the start: the rules of the game, the stakes, and the quitting time." The gamblers challenging the rules of the game and the stakes here (plaintiffs) were blackjack players at the Encore Boston Harbor Casino, operated by Wynn Resorts Holdings, LLC, Wynn MA, LLC, and Wynn Resorts, Ltd. (Encore); and the MGM Springfield casino, operated by Blue Tarp Redevelopment, LLC (MGM). They played at tables requiring smaller bets and paying out a winning "blackjack" at six dollars for every five dollars bet (6:5), rather than three dollars for every two dollars bet (3:2) as at

the more expensive tables. The plaintiffs sat down at tables with the basic rules and 6:5 payouts printed on the felt of the table, were dealt blackjacks, and won.

With the advice of counsel, they now contend that they are entitled to 3:2, not 6:5, payouts, because the Massachusetts Gaming Commission's (commission's) blackjack rules, particularly rule 7(d), do not clearly authorize payouts of 6:5 except with games played by dealing rules different from those used at the plaintiffs' tables. Unfortunately, rule 7(d) is at least somewhat ambiguous. In response to the plaintiffs' claims, the commission has consistently interpreted rule 7(d) to authorize the 6:5 payout option at issue.

In a case brought by A. Richard Schuster and Robert Ranson, on behalf of themselves and all others similarly situated, a Federal District Court judge nonetheless denied Encore's motion to dismiss and certified a question of law to this court. In a separate case brought by Ted DeCosmo, on behalf of himself and all others similarly situated, a Superior Court judge agreed with the casinos and the commission and allowed MGM's motion to dismiss. We conclude that the plaintiffs understood the rules and the stakes, and that deference is due to the commission's

interpretation. Therefore, the plaintiffs lose this last bet. They should have quit while they were ahead.[7]

1. Gaming and blackjack in Massachusetts. Commercial gambling is illegal in Massachusetts except where expressly authorized by the Commonwealth. See G. L. c. 271, § 2; G. L. c. 23K. "Only those table games and their rules authorized by the [c]ommission and posted on the [c]ommission's website . . . may be offered for play in a gaming establishment." 205 Code Mass. Regs. § 147.02 (2018). New games or game variations may not be offered until they are approved by the commission in accordance with the process set out in the regulations, which requires independent certified testing, field trials, public comment, and review. 205 Code Mass. Regs. §§ 147.02, 147.04 (2018).

Blackjack is a card game in which players total the value of their cards and attempt to get more points than the dealer without going over a combined value of twenty-one. Initially, all players and the dealer are dealt two cards. If a player's first two cards include one ace and one card with a value of ten (which includes a ten, jack, queen, or king), that player has been dealt a blackjack.

[7] We acknowledge the amicus briefs submitted in Schuster and Ranson's case by the Massachusetts Gaming Commission and the Stop Predatory Gambling Foundation.

The commission has written and published detailed rules of blackjack, which govern game play, equipment, wagers, and payouts. The rules expressly refer to "blackjack" and "the 6 to 5 blackjack variation" (6:5 variation). The 6:5 variation is not the 6:5 option at issue in these cases. The major differences between standard blackjack and the 6:5 variation are as follows: standard blackjack uses six or eight decks of cards that are dealt face up from a dealing shoe, whereas the 6:5 variation uses one or two decks that are dealt face down from the dealer's hand. In standard blackjack, blackjacks receive 3:2 payouts, whereas in the 6:5 variation, blackjacks receive 6:5 payouts.[8] The payouts in standard blackjack are more favorable for the player, but the higher number of decks are more favorable for the house. The same is not true of the 6:5 variation: the payouts are less favorable for the player, but using fewer decks increases the player's advantage.

Rule 7(d) contains the only direct reference to playing by standard blackjack rules with a 6:5 payout:

> "If the licensee chooses the option to pay a blackjack at odd [sic] of 6 to 5 and doesn't use the 6 to 5 variation, then Section 7(c) is void. If the licensee uses this

[8] To illustrate, if a player wins a one hundred dollar wager in standard blackjack, the 3:2 payout is $150. If a player wins a one hundred dollar wager in the 6:5 variation, the 6:5 payout is $120.

option on 6 or 8 deck games, this variation's rules must be displayed on the layout in plain sight."[9]

2. Facts and procedural history. a. Schuster matter (SJC-13060). Encore does not offer the 6:5 variation. Encore does, however, offer a version of blackjack that uses eight decks of cards dealt face up (as in standard blackjack) and that pays 6:5 for a blackjack (as in the 6:5 variation). We will refer to this game as 6:5 payout blackjack. Tables offering 6:5 payout blackjack displayed the following rules: "Blackjack pays 6 to 5. Dealer must draw to 16 and soft 17[10] and stand on hard 17's and all 18's. Insurance pays 2 to 1." Encore offers 6:5 payout blackjack on the main casino floor, which is open to the general public. Encore also offers standard blackjack (with a 3:2 payout) on the upper level of the casino, which is reserved for Encore's "high rollers."

Schuster and Ranson played 6:5 payout blackjack at Encore, were dealt one or more blackjacks, and received 6:5 payouts. On July 15, 2019, Schuster commenced a proposed class action suit in the Superior Court, which Encore removed to the United States District Court for the District of Massachusetts. The District

[9] Section 7(c) refers to an even-money payout option for insurance wagers, which are explained in note 13, infra.

[10] A "soft 17" is a hand containing an ace with a total point value of seventeen when the ace is counted as eleven in value.

Court judge denied Encore's motion to dismiss as to the blackjack dispute. See Schuster v. Encore Boston Harbor, 471 F. Supp. 3d 411, 426 (D. Mass. 2020). After reviewing "the language of [rule] 7(d) in context," a preliminary decision from the commission's investigation and enforcement bureau (IEB) that Encore was in compliance with the rules, and a transcript of the commission's discussion of that decision, the District Court judge concluded that Schuster "made a plausible claim as to Encore's potential violation of the [commission]'s rules regarding the appropriate payout odds on 'a blackjack,' or, in the alternative, Encore's failure to comply with the notice requirements of [rule] 7(d) regarding even-money insurance wagers." Id. at 422. After the complaint was thereafter amended to add Ranson as a plaintiff, the judge, upon the joint motion of the parties, then certified the following question to this court:

> "Did the February 11, 2019 version of the Rules of Blackjack that were published by the [commission] and posted on its website in accordance with [205 Code Mass. Regs. § 147.02] permit a Massachusetts casino to pay 6:5 odds to a player who was dealt a winning Blackjack hand, while not otherwise playing by the '6 to 5 Blackjack Variation' rules that were articulated in Rule 6a of the February 11, 2019 version of the Rules of Blackjack?"

b. DeCosmo matter (SJC-13031). Like Encore, MGM offered 6:5 payout blackjack and publicized the 6:5 payout on the felt.[11] DeCosmo played 6:5 payout blackjack at MGM, was dealt a blackjack, and received a 6:5 payout. On July 29, 2019, he brought a proposed class action in the Superior Court. MGM's motion to dismiss was granted, and DeCosmo appealed. We thereafter granted MGM's application for direct appellate review.

c. Commission revisions. In the time since these cases were commenced, the commission has revised both the blackjack rules and the applicable blackjack table regulations. This case therefore only applies to the limited period of time between the commencement of these cases in July 2019 and the revision of the rules in October 2020.

3. Discussion. a. Standard of review. As to the DeCosmo matter, this court reviews an order on a motion to dismiss de novo. See, e.g., Dunn v. Genzyme Corp., 486 Mass. 713, 717 (2021). The Schuster matter came to us as a certified question of law. See S.J.C. Rule 1:03, as appearing in 382 Mass. 700 (1981). Although the procedural postures of these cases are different, the legal questions therein and our analysis of them are essentially identical. Therefore, we address them together.

[11] This court does not have information as to what else was printed on the felt at MGM.

b. Game authorization. These cases require us to interpret the commission's rules of blackjack and equipment regulations. As an initial matter, the plaintiffs contend that the regulations carry more legal weight than the rules of blackjack, and thus any conflict between the regulations and the rules should be resolved in favor of the regulations. We disagree. In these cases, the blackjack rules and regulations carry equal weight, as they are proposed and approved through similarly rigorous processes.

The plaintiffs rely on Northbridge v. Natick, 394 Mass. 70, 76 (1985), in which this court stated that "internal guidelines" and "policy statements" set by an agency "without going through the procedures required for the promulgation of a regulation . . . do not have the legal force of a statute or regulation" (quotation and citation omitted). See Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen., 454 Mass. 174, 186 (2009) (Biogen) ("courts give the force of law only to formal agency regulations" even though "agencies must abide by their own internally promulgated policies" [citation omitted]). However, the blackjack rules differ significantly from the internal guidelines and policies discussed in Northbridge and Biogen. The blackjack rules are promulgated not only to guide the commission's activities and enforcement, but also to regulate licensees' activity. See McGuiness v. Department of Correction,

465 Mass. 660, 662 n.4 (2013) ("having promulgated a rule or regulation," agency "is bound to respect and enforce the rule as long as it remains extant" [citation omitted]); 205 Code Mass. Regs. § 147.02 (rules govern which games licensee may offer). Table game rules undergo a thorough approval process more similar to the promulgation of regulations than a simple internal policy. See Northbridge, supra; G. L. c. 30A, §§ 2-5 (requirements for regulations); 205 Code Mass. Regs. § 147.04 (requirements for table game rules). In fact, the blackjack rules, although not true regulations, largely match the statutory definition of a regulation in the administrative procedure statute. G. L. c. 30A, § 1 (defining regulation as "the whole or any part of every rule, regulation, standard or other requirement of general application and future effect . . . adopted by an agency to implement or interpret the law enforced or administered by it").[12] Therefore, we read the regulations and the blackjack rules together, as we would different sections of regulations, and we interpret both "in the same manner as a statute, and according to traditional rules of construction." Massachusetts Fine Wines & Spirits, LLC v. Alcoholic Beverages Control Comm'n, 482 Mass. 683, 687 (2019) (Fine Wines), quoting

[12] General Laws c. 30A, § 1, contains certain exceptions inapplicable to the blackjack rules.

Warcewicz v. Department of Envtl. Protection, 410 Mass. 548, 550 (1991).

Thus, "[a]s with any question of statutory interpretation, our starting point is the . . . text." Commonwealth v. Vega, 449 Mass. 227, 230 (2007). "[L]anguage should be given effect consistent with its plain meaning. If the language is clear and unambiguous, it must be interpreted as written" (quotation and citation omitted). Boss v. Leverett, 484 Mass. 553, 557 (2020). Where the plain text of the rules and regulations is ambiguous, an agency's reasonable interpretation of them is generally entitled to deference. Carey v. Commissioner of Correction, 479 Mass. 367, 371 (2018).

i. Blackjack rules and regulations. Rule 7(d) is an interpretative challenge. It expressly states that the licensee may "choose[] the option to pay a blackjack at odd [sic] of 6 to 5" and does not need to "use the 6 to 5 variation" to do so. The rule's text therefore plainly contemplates the possibility of a licensee using 6:5 payout blackjack in some authorized way. It also appears from the second sentence of rule 7(d) that 6:5 payout blackjack is permissible if the rules are displayed on the layout in plain sight. As we discuss at length infra, the key rules of the game were displayed or, in the case of rules regarding dealing procedures, obvious to a player at the table. There is no indication that the casinos attempted to deceive

players as to the rules of the game or the stakes they were playing.

Unfortunately, the rest of rule 7(d) is confusing. Its cross reference to rule 7(c), declaring it void, seems unnecessary because, as the plaintiffs correctly point out, an even-money payout for insurance wagers is a mathematical impossibility when playing with 6:5 odds.[13] Further garbling its

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[13] Insurance wagers may occur when the player is dealt a blackjack and the dealer's face up card is an ace. In these circumstances, pursuant to rule 9, a player may place an insurance wager, which is a bet that the dealer will also have a blackjack. Winning insurance wagers are paid at odds of 2:1. Under rule 7(c), if a player has a blackjack, he or she may opt for an even-money payout (to be paid at odds of 1:1 on the blackjack wager) instead of making an insurance wager. This option essentially shortcuts the result of an insurance wager in standard blackjack: if the player has blackjack and places an insurance wager, whether the dealer has blackjack or not, the player is paid the same amount of money. When playing with 6:5 odds, the player may place an insurance wager, but it is not mathematically possible to achieve this even-money result, because the player would receive less for his or her blackjack wager.

The illustration of a one hundred dollar wager and a fifty dollar insurance bet is helpful to understand even-money payouts. When playing with a 3:2 payout (as one must for even money), assume the player places a one hundred dollar original wager, and a fifty dollar insurance wager. If the dealer has blackjack, the player neither wins nor loses any money on the one hundred dollar wager, but the fifty dollar insurance bet wins and is paid at odds of 2:1. The player is paid one hundred dollars on the insurance bet, and nothing on the original bet; therefore, the player receives one hundred dollars -- a 1:1 payout or "even money" to the original wager. If the dealer does not have blackjack, the player loses the fifty dollar insurance bet but wins the original one hundred dollar wager and is paid at 3:2 -- $150. The total payout is $150, but the player has lost the fifty dollars spent on the insurance wager,

meaning, rule 7(d) describes 6:5 payout blackjack as both an "option" and a "variation," thereby somewhat confusing it with the 6:5 variation.

Rule 7(d) is also an outlier in rules mostly devoted to standard blackjack and the 6:5 variation. The plaintiffs argue that to conclude that rule 7(d) authorizes 6:5 payout blackjack would run contrary to and nullify portions of the rest of the blackjack rules and regulations. See, e.g., Vega, 449 Mass. at 230. The rules do not, as the plaintiffs imply, directly state that 6:5 payouts are impermissible when playing by standard blackjack rules, but they do include mandatory, encompassing language that expressly requires payout of 3:2 odds for blackjacks and only includes express exceptions for the 6:5 variation. Rule 3(e), for example, states that "standard blackjack . . . shall be paid at odds of 3 to 2, or at odds of 6 to 5 for the 6 to 5 blackjack variation." Rule 7(a) states that if a player has blackjack, the dealer "shall . . . pay the blackjack at odds of 3 to 2," and rule 7(b) states that "the player having blackjack shall be paid at odds of 3 to 2." Likewise, the regulations' blackjack layout requirements only directly authorize displaying 6:5 odds for the 6:5 variation.

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and so, again, the player receives one hundred dollars, "even money" to the original wager. This outcome is not possible when playing with a 6:5 payout because the player would only receive $120 if the dealer does not have blackjack.

205 Code Mass. Regs. § 146.13(14) (2018)[14] ("Blackjack pays 6 to 5" shall appear on layout "[i]f a gaming licensee offers the 6 to 5 blackjack variation"). Apart from this provision specific to the 6:5 variation, the regulations state that "Blackjack pays 3 to 2" "shall appear on the blackjack layout." 205 Code Mass. Regs. § 146.13(3) (2018).[15]

These rules mandating either 3:2 payouts or the 6:5 variation are in apparent conflict with rule 7(d)'s express reference to the "option" to offer 6:5 payout blackjack. Where provisions appear to conflict with each other, we must first "endeavor to harmonize" them (citation omitted). Donis v. American Waste Serv., LLC, 485 Mass. 257, 260 (2020). We must avoid an interpretation that renders any provision entirely superfluous. See, e.g., Wheatley v. Massachusetts Insurers Insolvency Fund, 456 Mass. 594, 601 (2010), S.C., 465 Mass. 297 (2013); Vega, 449 Mass. at 231.

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[14] Unless otherwise noted, we refer to the version of 205 Code Mass. Regs. § 146.13 operative at all relevant times for these lawsuits, prior to the amendments in 2021.

[15] The regulations also contain a provision for "blackjack rule variations," which requires a display that correlates only to a 1:1 payout blackjack variation. See 205 Code Mass. Regs. § 146.13(4) (2018) ("If a gaming licensee offers blackjack rule variations, the blackjack layout shall have imprinted on it . . . Blackjack pays 1 to 1 . . ."). Although the use of the plural "variations" indicates that there might be multiple variations to blackjack, this regulation only authorizes display of 1:1 payouts, implying that the drafters did not consider 6:5 payout blackjack an authorized variation.

Concluding, as the plaintiffs contend we should, that rule 7(d) just stands for the mathematical reality that even-money payouts are impossible when playing the 6:5 variation both runs contrary to the plain text of the rule and renders most of the rule "inoperative" or superfluous (citation omitted). Vega, 449 Mass. at 231. See Boss, 484 Mass. at 557. However, Encore and MGM's contention that rule 7(d) is an express authorization of 6:5 payout blackjack or a direct exception to the rest of the blackjack rules is not entirely clear from the text.

As explained supra, the rest of the rules and regulations do not expressly prohibit 6:5 payout blackjack, but they do set forth general requirements for blackjack that appear to conflict with the "option" referenced in rule 7(d). See Retirement Bd. of Stoneham v. Contributory Retirement Appeal Bd., 476 Mass. 130, 138 (2016), quoting Hashimi v. Kalil, 388 Mass. 607, 609 (1983) ("The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation"). Likewise, the language of rule 7(d) does not exempt 6:5 payout blackjack from other requirements in the rules, but the statement that a licensee may "choose[]" to offer the "option" or "variation" of 6:5 payout blackjack appears permissive even in the face of the other rules. See RCA Dev., Inc. v. Zoning Bd. of Appeals of Brockton, 482 Mass. 156, 160–161 (2019) (use of permissive language reflects "intent to grant discretion or permission to . . .

authorize an act" [citation omitted]). See also McDonough's Case, 448 Mass. 79, 84 (2006) (where wording creates exception, exception exists even though at odds with over-all provision).

Complete harmonization of these conflicting provisions is thus difficult to achieve. The text of rule 7(d) contemplates 6:5 payout blackjack as a legitimate option for licensees. However, the lack of clarity in the way rule 7(d) itself is written, the fact that its reference to 6:5 payout blackjack is an outlier in the rules, and the apparent conflict between rule 7(d)'s permissive language and the mandatory language in other parts of the rules leave the reader with some ambiguity as to the meaning of rule 7(d). Given this ambiguity, we turn to the doctrine of administrative deference.

ii. Administrative deference. The practice of deferring to an agency's reasonable interpretation of its own ambiguous regulations, commonly known in Federal courts as Auer deference, is long standing in both Massachusetts and Federal case law.[16] See, e.g., Auer v. Robbins, 519 U.S. 452, 462 (1997); Craft Beer Guild, LLC v. Alcoholic Beverages Control Comm'n, 481 Mass. 506, 527 (2019); Finkelstein v. Board of Registration in Optometry,

[16] As discussed supra, the blackjack rules, although not true regulations, are functionally analogous to regulations. Therefore, we treat the commission's interpretation of the rules with the same deference we would its interpretation of its own regulations.

370 Mass. 476, 478 (1976). In deciding whether deference is due to an agency's interpretation, both this court and the United States Supreme Court consider whether (1) the regulatory language is plain or ambiguous;[17] (2) the agency's interpretation is reasonable;[18] (3) the interpretation is the agency's official or authoritative position;[19] (4) the interpretation draws on the agency's technical and substantive expertise;[20] and (5) the agency's interpretation is based on fair and considered judgment.[21] In the instant cases, all of these considerations

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[17] See Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019) ("possibility of deference can arise only if a regulation is genuinely ambiguous"); Finkelstein, 370 Mass. at 478 (guiding "principle is one of deference, not abdication, and courts will not hesitate to overrule agency interpretations of rules when those interpretations are . . . inconsistent with the plain terms of the rule itself").

[18] See Kisor, 139 S. Ct. at 2415 (requiring agency's reading to be reasonable); Warcewicz, 410 Mass. at 550-552 (rejecting unreasonable interpretation of regulation).

[19] See Kisor, 139 S. Ct. at 2416 (requiring agency's interpretation to be authoritative or official position rather than any more ad hoc statement); Costa v. Fall River Hous. Auth., 453 Mass. 614, 620 n.9 (2009) (addressing which of agency's conflicting interpretations should be considered official and therefore receive deference).

[20] See Kisor, 139 S. Ct. at 2417 (requiring agency's interpretation to implicate its substantive expertise); Dental Serv. of Mass., Inc. v. Commissioner of Revenue, 479 Mass. 304, 310 n.12 (2018) (giving weight to agency's relevant substantive expertise and specialized knowledge).

[21] See Kisor, 139 S. Ct. at 2417-2418 (requiring agency's interpretation to be product of its "fair and considered judgment" [citation omitted]); Mullally v. Waste Mgt. of Mass.,

support the application of deference to the commission's interpretation.

A. Regulation's text plain or ambiguous. If the regulation is plain and unambiguous, it should be interpreted according to its terms. See, e.g., Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019); Fine Wines, 482 Mass. at 687 ("First, we look to the text of the regulation, and will apply the clear meaning of unambiguous words unless doing so would lead to an absurd result"); Carey, 479 Mass. at 369-370 (interpretation must be consistent with plain text); Goldberg v. Board of Health of Granby, 444 Mass. 627, 636 (2005), citing Christensen v. Harris County, 529 U.S. 576, 588 (2000) (deference to agency interpretation not appropriate where meaning of regulation unambiguous). Courts can perform this function without the assistance of, or deference to, the agency. Indeed, the Supreme Court will not even consider the issue of deference unless the regulation is what the Court describes as "genuinely ambiguous," "[a]nd before concluding that a rule is genuinely ambiguous, a court must exhaust all the traditional tools of construction" (quotation and citation omitted). Kisor, supra at 2414-2415.[22]

Inc., 452 Mass. 526, 533 & n.13 (2008) (contrasting deference owed to long-standing interpretations with those developed shortly before and in response to litigation).

[22] Although we consider many of the same factors as the Supreme Court in deciding whether to defer to an agency's

As explained supra, the regulatory regime at issue in these cases is ambiguous, thereby implicating the issue of administrative deference. We have attempted to interpret the rules, but we have concluded that it is difficult to entirely harmonize the apparent conflict in the provisions. Thus, we decide that rule 7(d) is ambiguous, requiring consideration of administrative interpretation and deference.

B. Reasonableness. When a regulation is ambiguous, we are prepared to give what we have described as "considerable," "substantial," or "generous" deference to an agency's interpretation of the regulation so long as the interpretation is reasonable. Fine Wines, 482 Mass. at 687 ("generous" deference required for reasonable interpretation of regulation [citation omitted]). J.M. Hollister, LLC v. Architectural Access Bd., 469 Mass. 49, 55 (2014) (describing "considerable deference to the board's interpretation of . . . its own regulation" [citation omitted]). Franklin Office Park Realty Corp. v. Commissioner of the Dep't of Envtl. Protection, 466 Mass. 454, 460 (2013) (court grants "substantial deference" to

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interpretation, the Supreme Court appears to be somewhat more restrictive in its application of deference. We are less hesitant to consider the agency's interpretation, see Kisor, 139 S. Ct. at 2414-2415, and more "generous" in our deference (citation omitted), see Fine Wines, 482 Mass. at 687. See infra for discussion of "considerable" and "generous" deference in Massachusetts case law.

"agency's particular expertise" unless "unreasonable" [citations omitted]). We have emphasized that a party opposing the agency's interpretation bears a "formidable burden" to show that the interpretation is not reasonable (citation omitted). Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 228 (2010). See J.M. Hollister, LLC, supra. That being said, such deference is not "unlimited." Craft Beer Guild, LLC, 481 Mass. at 527.

The commission concludes, based on its interpretation, that rule 7(d) should be given effect as authorizing 6:5 payout blackjack. This interpretation is consistent, rather than inconsistent, with the plain meaning of the language of rule 7(d) itself, which references the use of 6:5 payouts without using the 6:5 variation so long as the rules are displayed. See Boss, 484 Mass. at 557 (language should be given plain meaning); Fine Wines, 482 Mass. at 687; Carey, 479 Mass. at 369-370 (interpretation must be consistent with plain text). The interpretation also lends meaning and purpose to rule 7(d), rather than rendering it largely superfluous, as the plaintiffs' interpretation would. See, e.g., Wheatley, 456 Mass. at 601; Vega, 449 Mass. at 231. Although the commission's failure to explain why 6:5 payout blackjack is not discussed expressly elsewhere in the rules or how the permissive language in rule 7(d) should interact with the blackjack requirements in the rest

of the rules is troublesome, and reflective of the inherent ambiguity of the rule, it is not dispositive. Cf. Biogen, 454 Mass. at 187 (when interpreting statute, agency's interpretation must be "the product of reasoned rule making" to receive deference). As evidenced by our attempt to harmonize the apparent conflict in the rules, the commission's conclusion is reasonable and consistent with the text of the rules and does not lead to an absurd result. See, e.g., Fine Wines, 482 Mass. at 687; Carey, 479 Mass. at 369-370. The interpretation is therefore ordinarily entitled to considerable or generous deference. See Carey, supra; J.M. Hollister, LLC, 469 Mass. at 55.[23] Other factors that we have considered in evaluating whether deference is appropriate also confirm this determination.

C. Agency's authoritative, official position. In evaluating deference, we also consider whether the agency's decision is an official statement made by those authorized to speak for the agency. See Kisor, 139 S. Ct. at 2416. Cf. Sullivan v. Sleepy's LLC, 482 Mass. 227, 232 n.11 (2019) (deferring to "agency's interpretation [of statute] contained in an opinion letter"), citing Swift v. AutoZone, Inc., 441 Mass.

[23] The Supreme Court has not adopted this formulation; it has also emphasized that "not every reasonable agency reading of a genuinely ambiguous rule should receive Auer deference." Kisor, 139 S. Ct. at 2416.

443, 450 (2004) (explaining deference with respect to opinion letter). There is little doubt that the commission's amicus brief represents its "authoritative" or "official" position. Kisor, supra. In the past, both the Supreme Court and this court have accepted an agency's amicus brief as authoritative. See Auer, 519 U.S. at 463–464 (deferring to interpretation advanced in Secretary of Labor's amicus brief); Costa v. Fall River Hous. Auth., 453 Mass. 614, 620 n.9 (2009) (accepting amicus brief's "present explicit statement about the intended meaning of this regulation" over agency's past statements). The amicus brief here details the commission's formal decision and is easily distinguishable from interpretations cited as nonauthoritative. See Kisor, supra at 2416-2417 ("speech of a mid-level official," "informal memorandum," and explicitly nonauthoritative guides are not official interpretations).

D. Implication of substantive expertise. We accord "due weight to the experience, technical competence, and specialized knowledge of the agency" (citation omitted). Ten Local Citizen Group, 457 Mass. at 228. Thus, in evaluating whether deference is appropriate, we have also considered it important that an interpretation be based in some way on this expertise or specialized knowledge.[24] The commission's expertise is clearly

[24] See Dental Serv. of Mass., 479 Mass. at 310 n.12 (giving weight to agency's relevant substantive expertise and

implicated here, as its brief interprets specialized rules of blackjack that are written by the commission and implemented by licensees under the commission's regulation. See G. L. c. 23K, § 4.

E. Fair and considered judgment. Finally, we evaluate whether an agency's interpretation reflects a "fair and considered judgment" to receive deference (citation omitted). Kisor, 139 S. Ct. at 2417. See Mullally v. Waste Mgt. of Mass., Inc., 452 Mass. 526, 533 & n.13 (2008) (discussing weight of interpretation made in shadow of litigation); Goldberg, 444 Mass. at 636 ("arbitrary, whimsical, or capricious" interpretations not due deference [citation omitted]).

To this end, "[a]dministrative interpretation developed during, or shortly before, the litigation in question is entitled to less weight than that of a long-standing administrative interpretation of administrative rules" (citation omitted). Mullally, 452 Mass. at 533 n.13. See Beverly Port Marina, Inc. v. Commissioner of the Dep't of Envtl. Protection,

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specialized knowledge); Franklin Office Park Realty Corp., 466 Mass. at 460 (deferring to agency's "particular expertise"); Friends & Fishers of the Edgartown Great Pond, Inc. v. Department of Envtl. Protection, 446 Mass. 830, 837 (2006) ("We do not intrude lightly within the agency's area of expertise, as long as the regulations are interpreted with reference to their purpose . . ." [quotation and citation omitted]). See also Kisor, 139 S. Ct. at 2417 ("the agency's interpretation must in some way implicate its substantive expertise").

84 Mass. App. Ct. 612, 620–621 (2013), quoting United States Gypsum Co. v. Executive Office of Envtl. Affairs, 69 Mass. App. Ct. 243, 249 n.16 (2007) ("our judicial deference 'may be tempered' when . . . the agency interpretation at issue is not one of long-standing or consistent application"); Crawford v. Cambridge, 25 Mass. App. Ct. 47, 49 (1987) (reasonable interpretation that is "consistently applied" entitled to deference). See also Dinkins v. Massachusetts Parole Bd., 486 Mass. 605, 611 n.7 (2021) (in context of agency applying statute, "consistent, long continued administrative application" may merit "[s]ignificance in interpretation" [citation omitted]). We distinguish considered and consistent interpretations from a "merely convenient litigating position or post hoc rationalization" (quotations, citation, and alteration omitted). Kisor, 139 S. Ct. at 2417.

The interpretation advanced by the commission here is consistent with a past decision by the commission's IEB. Just three days after the first complaint filed in these cases, the IEB "preliminarily found Encore to be in compliance with the [c]ommission's rules and regulations," and decided not to pursue an enforcement action. In a later executive session, the commission determined that it did not take issue with the IEB's analysis and conclusions. Admittedly, the IEB memorandum, like the amicus brief, fails to explain some of the apparent conflict

in the rules and the nature of rule 7(d) as an outlier. The agency's interpretation of this question was not put forward until July 2019, when this litigation had already been initiated, and so it is not necessarily a "long-standing administrative interpretation." Mullally, 452 Mass. at 533 n.13. Nonetheless, it is significant that various bodies of the commission have consistently come to the same conclusion since the first time the commission was notified of the difficulties in interpreting the rules. See id.

Further, in these cases, the fact that the commission is not a party to the litigation supports the notion that its interpretation is fair and considered, as the commission is less likely to offer a self-interested interpretation. See Kisor, 139 S. Ct. 2417 n.6, quoting Auer, 519 U.S. at 462 (where agency not party to litigation and expressed its views only in response to court's request, "no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter"); Mullally, 452 Mass. at 533 n.13 (addressing weight of interpretation made in shadow of litigation). Even if, as one amicus brief suggests, the commission has a financial interest in the tax revenue generated by the casinos, that interest is not relevant here, where the commission is interpreting rules and regulations that are no longer operative. The commission was approached about

submitting an amicus brief by defense counsel, but initially declined to do so to avoid the appearance "that it was anything but neutral when it came to its oversight of the industry." The commission submitted the amicus brief only following this court's solicitation. See Kisor, supra (agency submitting interpretation in response to court's request likely reflects fair and considered judgment). There is nothing to suggest that the commission's interpretation is the product of unfairness, lacks consideration, is "arbitrary, whimsical, or capricious," Goldberg, 444 Mass. at 636, or was developed in the shadow of litigation, see Kisor, supra at 2417 & n.6; Mullally, supra.

In sum, all of the relevant considerations weigh in favor of deference here. As demonstrated by our attempt to harmonize the rules and regulations governing blackjack, rule 7(d) is ambiguous. The commission's official interpretation is consistent with the text, is "reasonable," and "does not lead to an absurd result." Fine Wines, 482 Mass. at 687. See Kisor, 139 S. Ct. 2415-2416 (interpretation must be "reasonable" or "within the zone of ambiguity the court has identified after employing all its interpretive tools" to receive deference); Carey, 479 Mass. at 369-370 (interpretation must be consistent with text of rules to receive deference). The interpretation is also the commission's official position, implicates its substantive expertise, and reflects its fair and considered

judgment. See Kisor, 139 S. Ct. 2416-2418; Rivas v. Chelsea Hous. Auth., 464 Mass. 329, 335 (2013); Costa, 453 Mass. at 620 n.9; Mullally, 452 Mass. at 533 n.13. Thus, we conclude that, per the commission's interpretation, rule 7(d) allows the licensees to offer 6:5 payout blackjack.

c. Blackjack layout. The plaintiffs further argue that the layouts of the Encore's and MGM's 6:5 payout blackjack tables did not comply with the commission's rules and regulations. Rule 7(d) requires that "[i]f the licensee uses this option [to pay 6:5 odds without playing the 6 to 5 variation] on 6 or 8 deck games, this variation's rules must be displayed on the layout in plain sight." Title 205 Code Mass. Regs. § 146.13 further specifies the layout requirements for blackjack and its variations.

The commission's regulations as a whole are clearly designed to ensure that players have notice of the rules when they sit down to play a game. See 205 Code Mass. Regs. §§ 146.13, 147.02, 147.03 (2018). To this end, the equipment regulations specifically require blackjack tables to display, at a minimum, the following: the payout for blackjack; when the dealer must draw, stand, or hit; and the payout for insurance. 205 Code Mass. Regs. § 146.13(3) ("[t]he following inscriptions shall appear on the blackjack layout"), (14) (layout inscription requirements "[i]f a gaming licensee offers the 6 to 5 blackjack

variation"). The equipment regulations do not have an inscription requirement specific to 6:5 payout blackjack; only rule 7(d) references displaying the rules of 6:5 payout blackjack.

Encore's tables offering 6:5 payout blackjack displayed the following rules: "Blackjack pays 6 to 5. Dealer must draw to 16 and soft 17 and stand on hard 17's and all 18's. Insurance pays 2 to 1."[25]

Encore and MGM contend that rule 7(d)'s requirement that "this variation's rules must be displayed in plain sight" is only a requirement that the selected odds be displayed. This is a clear misreading of the plain text of the rule: payouts are merely one small portion of the blackjack rules of every variation. As the Federal District Court judge correctly noted in her review of the rules, the words "payout" and "rule" are not used interchangeably. Schuster, 471 F. Supp. 3d at 421.

That said, it is clear from the layout requirements set out in the regulations that licensees are not required to imprint every page of the blackjack rules on their tables. Rather, the regulations require a display of the odds, the rules the dealer

[25] Only the Encore table inscriptions appear in the record. DeCosmo alleges that the MGM tables displayed that blackjack pays at odds of 6:5. DeCosmo has made no allegations, and this court does not have information, as to precisely what else was imprinted on MGM's tables. MGM's arguments with regard to the table inscriptions are identical to Encore's.

must follow when competing against players, and the payment of insurance. 205 Code Mass. Regs. § 146.13(3), (14). Encore's tables, although obviously displaying the 6:5 odds referenced in rule 7(d) instead of the 3:2 odds specifically required by the equipment regulations, did abide by these general requirements.[26]

Importantly, the main differences between 6:5 payout blackjack and the 6:5 variation -- the number of decks and whether cards are dealt face up or face down -- are easily observable just by watching the game play, particularly given that the 6:5 variation is dealt by hand, rather than machine. Thus, any player familiar enough with the blackjack rules to know the differences between standard blackjack and the 6:5 variation would have been able to observe the relevant features of 6:5 payout blackjack and know they were not playing the 6:5 variation. Although Encore and MGM chose to operate a house-friendly game, they did not deceive players into believing it would be more player-friendly than it actually was.

Therefore, we conclude that Encore's and MGM's layouts complied with rule 7(d)'s notification requirement that "this

[26] We do not have complete information as to what else was imprinted on MGM's tables. See note 25, supra.

variation's rules must be displayed on the layout in plain sight."[27]

4. Conclusion. a. Schuster matter (SJC-13060). We answer "yes" to the certified question, "Did the February 11, 2019 version of the Rules of Blackjack that were published by the Massachusetts Gaming Commission and posted on its website in accordance with [205 Code Mass. Regs. § 147.02] permit a Massachusetts casino to pay 6:5 odds to a player who was dealt a winning Blackjack hand, while not otherwise playing by the '6 to 5 Blackjack Variation' rules that were articulated in Rule 6a of the February 11, 2019 version of the Rules of Blackjack?"

The Reporter of Decisions is to furnish attested copies of this opinion to the clerk of this court. The clerk in turn will transmit one copy, under the seal of the court, to the clerk of the United States District Court for the District of Massachusetts, as the answer to the question certified, and also will transmit a copy to each party.

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[27] The plaintiffs argue that this provision requires the defendants to post in plain sight that even-money insurance bets were void at 6:5 payout blackjack tables. However, rule 7(d)'s statement about even-money insurance bets merely states a mathematical truth, not a rule. The commission did not require licensees to display any information about even-money insurance bets at 6:5 variation tables. 205 Code Mass. Regs. § 146.13(14). The impossibility of even-money insurance bets is a fact of blackjack played at 6:5 odds, not a free-standing rule.

b. DeCosmo matter (SJC-13031). Because we conclude that the rules authorized MGM to offer 6:5 payout blackjack, we affirm the Superior Court judge's order granting MGM's motion to dismiss.

So ordered.