

# In The Matter Of The Hotel And Restaurant Employees And Bartenders International Union Local 54

## OPINION

### *New Jersey Casino Control Commission*

*Don M. Thomas*, Acting Chairman  
*Martin B. Danziger*, Commissioner  
*Joel R. Jacobson*, Commissioner  
*Madeline H. McWhinney*, Commissioner  
*Carl Zeitz*, Commissioner

### *Appearances*

For The Casino Control Commission:

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*Timothy J. O'Neill*, Assistant Counsel

For the Division of Gaming Enforcement:

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For Frank Gerace:

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On May 11, 1981, the Division of Gaming Enforcement (Division) filed a letter report with this Commission in which it alleged that three officials of Hotel and Restaurant Workers and Bartenders International Union Local 54 were disqualified under section 86 of the Casino Control Act, N.J.S.A. 5:12-86. The Division therefore urged the Commission to

impose the sanctions provided by section 93 of the Act, *N.J.S.A. 5:12-93*, against Local 54. The Commission scheduled a hearing. Local 54 then filed suit in the Federal District Court for the District of New Jersey seeking, *inter alia*, to enjoin the enforcement of sections 86 and 93 of the Act against it. See, *Hotel and Restaurant Employees and Bartenders International Union Local 54 v. Danzinger [sic], et al.*, 536 F. Supp. 317 (D.N.J. 1982). At the request of the Court, the Commission adjourned the hearing pending disposition of Local 54's motion for a preliminary injunction. Following the denial of that motion, the hearing before the Commission was again scheduled. On April 30, 1982, prior to the commencement of the hearing, the Division filed a second letter report in which it cited two additional employees of Local 54 as suffering from section 86 disqualification and again urged that the section 93 sanctions be imposed against the Union. The Commission thereafter held the hearing, during which it considered the issues raised in both the May 11, 1981, and April 30, 1982, letter reports.

Before proceeding to the resolution of those issues, we will briefly describe the statutory provisions involved. Section 93 of the Act provides that a labor union which seeks to represent persons licensed or registered under the Act and employed at a casino hotel must register annually with the Commission. *N.J.S.A. 5:12-93(a)*. Local 54 represents approximately 14,000 waiters, kitchen workers, bartenders, porters and other hotel workers, the large majority of whom are employed in the casino hotels in Atlantic City and are licensed by or registered with the Commission. Thus, the Union is required to register under section 93, and it has done so.

Section 93 also empowers the Commission to preclude any union which is required to register from receiving dues from any persons licensed or registered under the Act and employed in a casino hotel, and from administering pension or welfare funds, if any officer, agent, or principal employee of the union is disqualified under section 86, unless the Commission waives the disqualification "consistent with the public policy of this act and upon a finding that the interests of justice so require." *N.J.S.A. 5:12-93(b)*.

Section 86 of the Act enumerates various disqualifying criteria, which apply not only to officers, agents and principal employees of labor unions, but also to all persons who must be licensed or registered in connection with the ownership, financing, management and operation of casinos and casino hotels. Only two of the section 86 criteria are relevant to the present case. Section 86(c) disqualifies persons convicted of certain enumerated

crimes under either New Jersey law or of any equivalent offenses in any other jurisdiction. *N.J.S.A.* 5:12-86(c). Section 86(f) provides for the disqualification of any person who is "an associate of a career offender or a member of [sic] a career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations." *N.J.S.A.* 5:12-86(f). This section defines a career offender as "any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this [sic] state," and defines a career offender cartel as "any group of persons who operate together as career offenders."

In its initial letter report of May 11, 1981, the Division alleged that Local 54's secretary-treasurer, Robert Lumio, and a member of its Executive Board, Frank Materio, were disqualified under section 86(c) by reason of criminal convictions, and that Lumio, Materio, and the Union's president, Frank Gerace, were disqualified under section 86(f) by reason of their association with certain career offenders or career offender cartel members. Robert Lumio died prior to the hearing before the Commission, and thus his qualifications were no longer in issue. During the hearing it was established that the statute under which Frank Materio was convicted was later declared unconstitutional and that he has been granted a presidential pardon. The Commission therefore ruled that it would not find Materio disqualified under section 86(c) based on this conviction.

Thus, with respect to Gerace and Materio, the questions which remain for consideration are (1) whether they are associated with a career offender or a career offender cartel member, and, if so, (2) whether the association is of such a nature as to create a reasonable belief that it is inimical to the policy of the Act and to gaming operations.

In its second letter report, dated April 30, 1982, the Division alleged that two Union employees, Eli Kirkland and Karlos LaSane, had been convicted of crimes enumerated in section 86(c). During their testimony Kirkland and LaSane described themselves as "business agents" and "organizers" for the Union (T248; T287; D1; D8), and the Union contended that they are not officers, agents, or principal employees within the meaning of section 93. Kirkland and LaSane admitted to their convictions, and certified copies of the convictions were accepted into evidence. It is clear that some of the crimes involved are among those enumerated in section 86(c). However, the Union urged the Commission to waive the section 86(c) disqualification of Kirkland and LaSane and presented evidence of their rehabilitation and of their value to the Union's membership

and the community at large. Thus, with respect to these individuals, the issues before us are (1) whether they are officers, agents, or principal employees of Local 54, and, if so, (2) whether the Commission should waive their section 86(c) disqualification consistent with the policy of the Act and in the interests of justice as permitted by section 93(b).

Prior to the hearing the Commission ruled that the burden of proof of section 86 disqualification was on the Division. The quantum of proof required is a preponderance of the evidence. *In the Matter of the Application of Resorts International for a Casino License*, Docket No. 79-CL-1 (1979), at 12.<sup>1</sup> In determining whether the Division has met its burden we will first deal with the evidence against Gerace and Materio and then turn our attention to Kirkland and LaSane.

### *Gerace and Materio*

#### *Organized Crime*

The Division alleges that Gerace and Materio are associated with career offenders or members of a career offender cartel, and thus it has the burden of establishing the identity of the career offenders and the existence of a career offender cartel.

The Division presented extensive evidence designed to prove that certain persons are career offenders or career offender cartel members. Counsel for Local 54 and Gerace, who was separately represented, repeatedly indicated that they had no intention of litigating the point. *See, e.g.*, T455; Brief at 15.<sup>2</sup> However, during summations, counsel for Local 54 questioned whether the Division had met its burden on this threshold issue (T2464). We find that it has.

There was substantial evidence adduced during the course of the hearing regarding the existence and structure of organized crime in the Philadelphia metropolitan area and the southern portion of New Jersey, including Atlantic City. Much of this evidence was introduced through the testimony of John Tamm and James Maher, special agents with the Federal Bureau of Investigation, and Gino Lazzari, an agent with the Pennsylvania Crime Commission, all of whom have extensive experience in investigating organized crime (T429; 1002-1003; 1268). They indicated that

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<sup>1</sup> Opinion *reprinted in*, 6 SETON HALL LEGIS. J. 105 (Summer 1982).

<sup>2</sup> T—refers to the transcript. D—refers to the Division's exhibits. R—refers to Local 54's exhibits. C—refers to the Commission's exhibits.

their familiarity with the structure of organized crime and the individuals involved therein was based upon their own investigations, intra-agency communications, contacts with other law enforcement agencies, conversations with confidential informants, authorized wiretaps and discussions with purported members of organized crime (T440; 462; 481; 1003; 1014).

These witnesses described an organization of men who routinely engage in a variety of illegal activities including gambling, loansharking, labor racketeering, extortion, murder, arson, pornography, and narcotics trafficking (T430; 452; 1015).

This organization is referred to by its members as *La Cosa Nostra* which, roughly translated, means "this thing of ours" (T429). *La Cosa Nostra* consists of a number of groups commonly called "families," which are generally identified by the name of a significant figure in that family (T451). Generally, each family limits its activities to a particular geographic area (T442). Furthermore, each family adheres to a basic hierarchical structure. The boss is the head of the family (T1006), and the underboss is the second in command (T449; 1007). The *consiglieri* or counsellor advises the boss and assists him in resolving intra-family disputes (T449; 1007; D54, at 62-64). Beneath the family leadership are units known as regimes which are headed by a *capo* (T450; 1007). Each regime consists of initiated members of the organization called soldiers (T450; 1007).

The primary family which operates in the Philadelphia-South Jersey area is known as the Bruno family, so named for Angelo Bruno, who reputedly headed the family for a number of years until he was murdered in March 1980 (T449; 451; D15). Following Bruno's death it was reported that his underboss, Philip Testa, assumed control of the family (T1027; D18; D54, at 34). Testa had a lengthy criminal record (D18). He was killed in a bomb blast in March 1981 (T1028).

Agents Tamm (T544) and Lazzari (T1028) testified that Nicodemo Scarfo now heads the Bruno family. *See also*, R8, at 37-38. Scarfo has a lengthy history of criminal involvement. In March 1950, he pled guilty to setting up an illegal lottery and conspiracy (D97). In February 1964, he pled guilty to involuntary manslaughter after being charged with murder (D96). In June 1971, he was held in contempt for refusing to testify before the New Jersey State Commission of Investigation and was committed to Yardville Correction Center (D92). In July 1976, he was incarcerated for refusing to answer questions before a State grand jury investigating allegations of obstruction of justice in a criminal prosecution (D93). Lastly, he was convicted of possession of a firearm by a convicted felon in 1981

(D95). In sentencing Scarfo to prison for two years for this last conviction, the court concluded: "Mr. Scarfo is surrounded by violence" (D60, at 92, part 2).

There was evidence presented during the hearing of Scarfo's recent involvement in both loansharking and illegal gambling endeavors (T487-88; D14; D60, at 38-42, part 1).

On November 4, 1977, the FBI, using a court-authorized wiretap, recorded a conversation at the Tyrone Denittis Talent Agency among Nicodemo Scarfo, Philip Testa, Harry Riccobene, and Frank Narducci (T534; D54). Both Riccobene and Narducci have extensive criminal records (D21; D43) and are alleged to have been associates of Scarfo and Testa (T515; 1039). During the recorded conversation the participants referred repeatedly to "*La Cosa Nostra*" (D54, at 56), "boss" (D54, at 40, 43, 54), "underboss" (D54, at 34) and "*consiglieri*" (D54, at 35, 36, 62), and clearly indicated that they are members of the Bruno crime family.

Scarfo further evidenced his criminal nature by attempting to recruit members for his criminal group. Joseph Salerno testified to Scarfo's efforts to persuade him to become "a gangster" (T678). Salerno is presently participating in the federal witness protection program and his testimony will be discussed at considerable length below.

In December 1979, a telephone list was seized from Scarfo following his arrest for the murder of Vincent Falcone (T906-08). This list contained the telephone numbers of numerous individuals who have criminal records and have been associated with organized criminal activity (D9; D16), including Ralph Puppo (T505-506, 1029; D60, at 45-46, part 1), Philip Testa (D18; D19; D109), Lawrence Merlino (T1030), Salvatore Merlino (T1028; D59, at 15), Alfred Iezzi (T1030; D58, at 44), Nicholas Russo (T1031), Frank Narducci (T1032; D20; D21), Anthony Ferrante (D24; D25), Antonio Caponigro (T525; D31; D32; D59, at 45), Ralph Napoli (T522-523; 1033; D29), Anthony Casella (T1035; D58, at 45), Frank Monti (T1035; D40; D58, at 48), Salvatore Testa (T1036), Salvatore Profaci (D48), Lawrence Centore (D51; D60, at 100, part 1), Louis Pacella (T527; D50), and Frank Serpico (T530; D49).

We find that Scarfo is a career offender and an active member of a career offender cartel.

Numerous other individuals were identified as being members of *La Cosa Nostra* or associates of Scarfo during the course of the hearing. However, we will focus specifically on only four of these men as relevant to the matter at hand.

Nicholas Virgilio has been twice convicted of murder (D117-120), and has been identified as a member of the Philadelphia-based crime family (T1039). He is a close associate of Scarfo (T943; 1225). We find that Virgilio is a career offender and a member of a career offender cartel.

Philip Leonetti, who is Scarfo's nephew, was identified as a member of his crime syndicate (T676-7; 1041-42). Leonetti and Vincent Bancheri are partners in a concrete business called Scarf, Inc. (D121). Joseph Salerno testified that he was told by Bancheri that "Nick Scarfo was really the boss, but they couldn't have him in the corporation" (T667). The Scarf, Inc. office is located at 28 North Georgia Avenue, Atlantic City, which adjoins 26 North Georgia Avenue, the residence of Scarfo (T675-6; D64).

Leonetti's criminal record consists of several arrests, two of which were for murder, and a single conviction for a disorderly persons offense in 1975 (D47). Salerno testified, and we find, that Leonetti arranged a usurious loan to him using assets derived from Scarfo (T487-88; D14; D60, at 38-42, part 1). We find that Philip Leonetti is closely associated with Scarfo and has engaged with him in a criminal enterprise.

Salvatore Merlino reportedly holds the position of underboss in the Bruno-Scarfo crime family (T1028). According to Salerno, Salvatore Merlino has assisted Scarfo in his illegal gambling operation (T487-488; D14; D60, at 38-42). Lawrence Merlino has been identified as an initiated member of *La Cosa Nostra* and a close associate of Scarfo (T700-701; 710; 949; 976; 1043). We find it unnecessary to make specific findings with regard to the Merlino's status as career offenders or as members of a career offender cartel, although their names will come up again in this opinion.

We now turn to the more difficult issue—whether the Division has proven that Gerace and Materio are associated with a career offender or a career offender cartel member "in such a manner which creates a reasonable belief that the association is inimical to the policy of [the] act and to gaming operations." *N.J.S.A.* 5:12-86(f). In this respect the hearing focused on the relationships of Gerace and Materio to Scarfo. We now turn to the evidence concerning the existence and nature of their relationships.

### *Relationship of Gerace and Materio to Scarfo*

The evidence presented by the Division on this issue is diverse and does not lend itself to neat categorization, which is understandable considering the nature of the issue. We must consider each of the areas raised by

the Division and the evidence adduced by all the parties to determine whether the Division has proven a section 86(f) disqualification of Gerace and Materio. We will begin with two pieces of documentary evidence taken from Scarfo when he was arrested for murder on December 23, 1979.

On December 16, 1979, Vincent Falcone was murdered. Scarfo, Leonetti and Lawrence Merlino were arrested and charged with the murder. They were tried and found not guilty.

As previously noted, at the time of Scarfo's arrest a telephone list (D16) was taken from his person (T906). A duplicate thereof was taken from a dresser drawer in his apartment at 26-28 North Georgia Avenue (T908).

Law enforcement officials determined that many of the names on the list were aliases and many of the telephone numbers were in code. After deciphering the code they determined that generally, but not invariably, the coded numbers related to associates of Scarfo or of organized crime or of organizations associated with Scarfo. Many of the uncoded numbers related to reputable persons, such as dentists and lawyers, not deemed to be associates of Scarfo (T920-922; 974; D9; D10).

There were five persons on the list who are or were employed by Local 54. Frank Gerace was listed under the name "Percy" and his telephone number was in code. Frank Materio was listed by his proper name and his business and home numbers were listed in an uncoded fashion. Robert Lumio, who served as secretary-treasurer of Local 54 from September 1979 until his death in June 1981, was listed as "Bob L," with an uncoded number. Frank Lentino, a business agent for Local 54 (T1665) and, since June 1981, office manager of its Camden office, was listed as "Frank Gray," with coded phone numbers for his home and a Teamsters local for which he once worked. Susan Holland, the branch manager of William L. Meyers, Inc., administrator of the health and welfare funds for Local 54, and a "collector" for the Local's severance fund (T924; 1732; 1904), was listed as "Percy girl," with a coded number. In addition, Gerace's mother, who also lives at 26-28 North Georgia Avenue, was listed as "Percy Mom," with a coded number.

It can be inferred that the persons on the list are those whom Scarfo had occasion to speak with or anticipated that he might have occasion to speak with on the telephone. In view of the constant attention he receives from the police, it can further be inferred that he kept certain numbers in code because he did not want evidence of his association with those persons to fall into the hands of the authorities. The appearance of five



Local 54 employees on the list is evidence of Scarfo's interest in the Union and access to its leaders, and his encoding of the Gerace and Holland entries evidences a desire to mask his association with them.

The other document in question is another piece of paper taken from Scarfo's dresser drawer after his arrest for the Falcone murder (D62). The writing on this paper is less than clear, but, according to the Division and according to our own reading of the exhibit, it contains the words: "KIS - POTS - GON ALL OUT BACK TO 54 ST. BEFORE FEB" (T936). The Division alleges that the note refers to Thomas Kissick, Ernest Potts and Thomas "Goony" Walsh, and their removal as union officials when Local 491 merged with Local 54 in September 1980.

Thomas Kissick was the head of Local 491, a bartenders local which originally merged into Local 54 (T1824) sometime around 1975 (R8, at 37). Thereafter Kissick became secretary-treasurer of Local 54 (T927). According to Warren Borish, an attorney for Local 54, as casinos became a possibility in Atlantic City, Kissick petitioned the International Union to again split Local 491 from Local 54 so that he could again have his own bartenders union (T1824), and in August 1979, Local 491 was in fact split from Local 54 (T1825; R8, at 42).

Kissick was appointed acting president (R8, at 42) or acting secretary-treasurer (T937) of the new Local 491. The International appointed Ernest Potts, an International trustee, and Thomas "Goony" Walsh, an International organizer, to run the day-to-day affairs of the Local (T927; 1825; 1859-1860; R8, at 42). The International also directed the creation of a joint board to oversee 491 and 54 and Gerace became the chief executive officer of that joint board (T1825-1826).

In September 1980, after one year in existence, 491 again merged into 54. According to Borish, this merger resulted from 491's inability to survive on the dues it was collecting and the desire of the International to avoid having to register under section 93 of the Casino Control Act as a result of the existence of the joint board (T1826-1827). At any rate, as a consequence of the merger, Kissick, Potts, and Walsh were out of their union jobs (T937).

We find that the words on D62 refer to the ouster of Kissick, Potts, and Walsh from their union positions when 491 remerged with 54. It is true that there is no indication what the letters "st." on the paper mean, and that the paper says "before feb." and the remerger and consequent removal of Kissick, Potts, and Walsh did not occur until September 1980. However, the words on the paper are sufficiently clear to support the interpretation given by the Division. The fact that Scarfo had the paper in

his possession indicates that he has an interest in the affairs of these unions and in keeping up to date on who is running them, and that he was supplied with advance notice of the remerger of 491 and 54.

During the hearing, the Division attempted to obtain a handwriting exemplar from Scarfo in order to determine if D62 is written in his hand. The Commission ordered Scarfo to produce the exemplar, and upon his failure to do so certified to the Superior Court facts underlying his contempt of the Commission. *See, N.J.S.A. 5:12-107(c)*. However, we do not think it is of particular importance whether the words on the paper are in Scarfo's handwriting. The significant fact is that he had the paper in his possession.

The events surrounding the Falcone murder arrests yield still further evidence of the relationship of Gerace and Materio to Scarfo and his associates. Shortly after their arrest, Scarfo, Leonetti, and Merlino were released on \$92,000 cash bail (T1158). The bail was supplied by Toro Construction Company (\$45,000), Scarf, Inc. (\$20,000), Catherine Scarfo, Scarfo's mother and a resident at and the owner of 26-28 North Georgia Avenue (\$7000), and Lillian Gerace, Gerace's mother and another resident at 26-28 North Georgia Avenue (\$20,000) (D68).

The Division presented documentary evidence establishing that half of Lillian Gerace's contribution to the bail was supplied by Frank Gerace.

On December 28, 1979, Gerace withdrew \$10,000 from his \$18,316.74 savings account (D69) and transferred it to his checking account (D70). On the same day he wrote a \$10,000 check to Lillian Gerace (D71; D72), and she obtained a \$10,000 treasurer's check payable to Catherine Scarfo (D73), thus completing the transfer of \$10,000 from Frank Gerace's savings account to the \$92,000 bail pool (T1197-1206; 1890).

Shortly after Scarfo, Leonetti, and Merlino were released on the cash bail, Frank Materio put up his house as property bail for Leonetti and Merlino in order that part of the cash bail could be released (T1608; D68). Despite having done so, Materio testified before the Commission that he knew Leonetti only by sight and had never spoken to him, and that he did not know Merlino (T1605; 1626).

Materio did admit that he had a relationship with Scarfo. He said that he had met Scarfo in a bar approximately twenty-five years ago (T1604), but had only seen him six or seven times in the prior five years (T1604), had never spoken to him on the phone, and had no idea why he was on his telephone list (T1612). Materio also testified that he knew

Catherine Scarfo and that occasionally he had played cards with Nicodemo's late father, Dan (T1648).

Materio claimed that Lumio approached him on behalf of Catherine Scarfo and he agreed to use his home as bail as a favor to her (T1628), despite the fact that it is his only real property (T1627) and despite the further fact that his wife was "dead against it" (T1744).

We find Materio's explanation unconvincing. We cannot believe that he would put up his house, over the objection of his wife, as bail for people he barely knew. Even if he thought he was putting up bail for Scarfo, or as a favor to Catherine Scarfo, we cannot believe he would do so if his relationship with these people was as casual as he claims. In the ordinary course a person would not put up his house, or \$10,000 of the \$18,000 in his savings account, as bail unless motivated by some strong sense of obligation or loyalty.

The telephone list, the "KIS-POTS-GON" document, and the providing of bail, taken together, are persuasive evidence that Gerace and Materio have a more than casual relationship with Scarfo and his associates, and that Scarfo has an interest in the affairs of Local 54. However, there is further evidence in this regard which must be considered, much of which is based on the testimony of Joseph Salerno.

Salerno was the principal witness against Scarfo, Leonetti, and Merlino at their trial for the murder of Vincent Falcone, and is now in the federal protected witness program. He testified before the Commission, and before the United States Senate (R8), about his experiences while a resident at 26-28 North Georgia Avenue, and in particular about the contact he observed between Scarfo and his associates and Gerace, Materio, and other Local 54 officials.

Salerno was a plumber operating a small business in Brigantine, New Jersey (T665-666). In 1978, he encountered financial problems and went to Philip Leonetti, whom he had met on a job site, for help (T668-669). Leonetti loaned Salerno \$10,000 which he said he had gotten from Scarfo (T871), and charged him interest of \$250 per week until the principal was repaid (T669-670). Salerno wound up paying Leonetti \$19,000 in principal and interest and going into bankruptcy (T670).

Salerno also had marital problems and in June 1979, he moved out of his home and Leonetti allowed him to stay at a house in Margate owned by Salvatore Merlino (T671). He later moved to an apartment in Ventnor for two weeks and then into an apartment at 26-28 North Georgia Avenue (T672). He resided on those premises from sometime in September (T672) until December 17 or 18, 1979 (T677).

While residing at 26-28 North Georgia Avenue, Salerno had frequent contact with Scarfo, Leonetti, Lawrence Merlino, and Lumio who was then secretary-treasurer of Local 54 and also a resident at 26-28 North Georgia Avenue.

Scarfo bragged to Salerno about having killed a man with a knife (T682) and claimed that his criminal organization was "going to own Atlantic City some day" (T683). He also tried to recruit Salerno into his crime family. He talked to Salerno about their having the same "blood line," asked him if he could "stand up" if he saw "something happen" in front of him, and several times asked him if he "would like to be a gangster" (T678; 681-683). Salerno admitted to the Commission that he was intrigued by the idea of being involved in organized crime, and that he told Scarfo that he would like to be "a gangster" (T852).

Salerno admitted to Scarfo that he had two guns, and, at Scarfo's request, he gave the guns to him (T689-693). It was one of these guns with which, according to Salerno, Leonetti murdered Falcone in the presence of himself, Scarfo, and Merlino (T693-694). The day after the murder, Salerno left 26-28 North Georgia Avenue and soon thereafter he told his story to the police (T701).

Salerno testified that he met Gerace in the office of Scarf, Inc. soon after moving to 26-28 North Georgia Avenue (T706). He estimated that he saw Gerace in Scarfo's company eleven or twelve times during the course of his stay at the North Georgia Avenue property from September through mid-December 1979 (T707).

Salerno estimated that three or four of these meetings occurred at the office of Scarf, Inc. (T829); one occurred at the My Way Lounge, a bar owned by convicted extortionist and reputed Scarfo associate Saul Kane (T829-830); three or four occurred outside the premises of 26-28 North Georgia Avenue (T831), and two or three occurred in Scarfo's apartment (T831). The meetings in Scarfo's apartment occurred while Scarfo, Salerno and others, such as Lumio, Leonetti, and Lawrence Merlino, were having dinner (T707). Gerace was not part of the dinner group (T865), but he would stop by long enough to have a glass of wine (T832; 864). Gerace and Scarfo would walk off from the others and talk privately (T708). Salerno said he saw Gerace and Scarfo have these private conversations about six times, but he was never able to overhear what was said (T709).

Additionally, Salerno said that on at least three occasions when he was in the Scarf, Inc. office he accepted telephone calls from Gerace for Scarfo (T717). On the one occasion when Scarfo was at home, Salerno relayed the message to him and Scarfo told him to tell Gerace that he

would return the call (T717-718). Scarfo then went to a telephone booth on the corner to make a call (T718). Besides the three calls he had taken, Salerno said he saw messages for Scarfo from Gerace taken by others (T719).

In his testimony before the Senate, Salerno said that Gerace and Scarfo had daily contact directly involving the operation of the Union (R8, at 99). However, when cross-examined about this statement before the Commission, he admitted that he never overheard any conversation between Gerace and Scarfo and never heard them say anything to each other about Local 54, and had merely assumed that they discussed Union business (T795).

Counsel for the Union and Gerace have made much of this change in Salerno's testimony, and have urged that we reject his entire testimony. However, we can understand how Salerno came to assume that Scarfo and Gerace were conferring about Union business, and we note that when he was cross-examined on this topic before us he readily admitted that he had not actually heard Gerace and Scarfo discuss the Union.

It is clear from Salerno's testimony that he concluded that Scarfo talked to Gerace about Local 54 because of the frequent and surreptitious nature of their conversations, and because of certain statements he had heard Scarfo make about unions and Local 54 in particular.

For example, Salerno testified that Scarfo told him: "Don't ever worry about the unions, we own the unions" (T684). Salerno's testimony also established that Scarfo is a braggart and a liar (T892), and certainly this assertion by Scarfo could not be the basis for a finding that he and his associates "own the unions." However, his claim that they do is evidence of his desire to bring unions within the sphere of influence of his criminal organization, and helps to explain Salerno's conclusion that Scarfo talked to Gerace about Local 54 business.

Salerno also related an incident when he and Scarfo were in Scarfo's apartment and Lumio stopped in and began reading a newspaper article which linked Scarfo to Local 54 (T714-715). At one point Lumio began to laugh because the article disclosed that he had been convicted of a crime several years earlier (T715). Apparently, Lumio found it humorous that his father might finally come to know of the conviction. This provoked Scarfo, who started to scream and curse at Lumio (T716). Salerno quoted Scarfo as saying:

Let me tell you something, I got you your job and I got that other big fat j-o [Gerace (T839)] downstairs his job and don't you forget it. [T715]

When he heard this, Lumio “just humbled himself kind of and shook his head up and down and just listened and left.” (T715).

Salerno identified the newspaper as the Philadelphia Bulletin and approximated the date of the article as between early November and mid-December 1979 (T847). Subsequent investigation by the Division revealed that a Bulletin article dated December 2, 1982, had discussed the allegation that Local 54 was connected with organized crime, and had noted Lumio’s 1974 conviction (D122).

We reject the Division’s argument that Scarfo’s hearsay statement provides the basis for a finding that Scarfo “engineered Gerace’s ascension to the presidency of Local 54.” However, we find that Scarfo did make the statement and that based upon the circumstances and Lumio’s behavior, Lumio did evince his acceptance of the statement. We thus find in this testimony further evidence of Scarfo’s desire to influence and control Local 54 and Lumio’s belief that Scarfo was in some way responsible for Lumio’s position with the Union. This evidence also provides further explanation for Salerno’s assumption that Scarfo discussed the Local’s business with Gerace.

Salerno also testified to an incident which occurred when he and Leonetti visited a building at 200 Texas Avenue, Atlantic City, which Local 54 had purchased and planned to renovate as its new headquarters (T720). Salerno said that when they arrived they met “Frank Monterino, or something like that” (T721). The Division later established that Salerno was referring to Frank Materio (D65).

Salerno stated that Materio showed him around the building (T721), after which they then rejoined Leonetti, who was conversing with Lumio (T772). Leonetti was insisting that he and Salerno get the plumbing work at the Local instead of a Vineland plumber named Falaska (T722). Leonetti told Lumio that he would inflate the bill and divide the overpayment among the two of them and Salerno (T723). Materio was within earshot of the entire conversation (T723). However, Salerno never submitted a bid on the plumbing work because he was busy on other jobs (T723; 881), and the work was done by Falaska (T839-840).

Materio testified that he never saw Leonetti at Local 54 headquarters (T1605) and that he has never met Salerno (T1610), and he denied that the incident described by Salerno ever took place (T1610).

We accept Salerno’s testimony that this incident occurred, and find that Leonetti, a close associate of Scarfo, attempted, albeit unsuccessfully, to influence the affairs of Local 54. We also accept Salerno’s testimony that Materio was in a position to overhear the Leonetti proposal, and reject

Materio's contrary testimony. Further, we find the fact that Leonetti would make this illicit proposal in front of Materio an indication that the association between them is not as casual as Materio would have us believe. Finally, we find that this incident is still further evidence of the interest of Scarfo and his associates in the affairs of Local 54 and a further explanation of Salerno's assumption that Scarfo and Gerace talked about the Union.

Considering all of the evidence discussed to this point—the telephone list, the “KIS-POTS-GQN” note, the bail, the Gerace-Scarfo contact and the various incidents testified to by Salerno—a clear picture emerges of a group of criminals who have an interest in unions and especially in Local 54, who covet Local 54 as a vehicle for the spread of their criminal enterprise and seek to exercise influence and control over it, and who have frequent contact with its leaders. As for Gerace and Materio, the evidence shows that they have a long-standing relationship with Scarfo and a sense of obligation to him, and that he has access to them. Whether all of this adds up to the type of association proscribed by section 86(f) is a question we need not decide, because there is considerable evidence yet to be considered concerning the Union's dealings with Scarfo associates and the role of Gerace and Materio in those dealings.

#### *Dealings of Local 54 with Scarfo Associates*

The dealings in question fall into two categories: the appointment to Union office or employment of persons tied to Scarfo, and business dealings of the Union with persons or firms tied to Scarfo.

We will deal first with the appointments, starting with a discussion of Gerace's position in the Union and his authority to make appointments, then discussing his role in appointing Materio to his Union position, and finally considering the actions of Gerace and Materio in appointing other persons tied to Scarfo to positions with the Union.

Frank Gerace did not testify before the Commission, and the record is sparse on the subject of his background. It appears that he held some elective office in Local 508, which became Local 54 in about 1974, and that he then assumed the vice presidency of Local 54 (T954-958; 1867). Further, it appears that in 1976 he was elected vice president of Local 54 while Jack Brown was elected president. Sometime later in 1976 Gerace assumed the presidency when Brown left to become an organizer with the International (T958). In the beginning of 1978 Brown returned and resumed the top post, but he left again in the Fall of 1978 to take a job with the Resorts International Hotel Casino (T958). At that time, Gerace

again assumed the presidency (T959). He was elected president in 1979 and 1982 (T1867).

As chief executive officer, Gerace is authorized by the by-laws of the Local (C3) "to hire and discharge Business Agents, Organizers, Assistants and all other agents, subject to approval by a majority of the Executive Board." Art. IX, § 1. Furthermore, Article VI provides in pertinent part:

[V]acancies in all offices shall be filled for the unexpired term by appointment of the President, subject to the approval of the Executive Board.

Turning to Materio, a letter dated February 2, 1978, from the International to Jack Brown (then president of Local 54) indicates that Brown had solicited financial assistance from the International in order to hire additional employees for the Local (C3, letter of 2/2/78). The International acceded to Brown's request and three "local organizers" were hired by Local 54 on July 3, 1978. One of the three was Frank Materio. Then vice president Gerace moved to accept Materio and the others as organizers (C3, minutes of 6/30/78). On January 16, 1979, the Executive Board approved President Gerace's appointment of Materio to the Executive Board as trustee (C3, minutes of 1/16/79).

We turn now to the appointments of the other Scarfo-connected individuals.

#### Robert Lumio

As previously explained, in August 1979 part of Local 54 splintered away and became Local 491 and Thomas Kissick, secretary-treasurer of Local 54, resigned to join Local 491 (C3, minutes of 8/13/79). To fill the vacated office of secretary-treasurer, Gerace appointed Robert Lumio (D56). Lumio occupied that position until his death by natural causes in June 1981.

We have already explained that Lumio lived at 26-28 North Georgia Avenue and have discussed Salerno's testimony about Lumio's ties to Scarfo. In addition, we note that Lumio characterized himself as being friendly with Scarfo, Leonetti, and Lawrence Merlino (D61). He was a proposed alibi witness for Leonetti following his arrest in 1977 for the murder of Guiseppi "Pepe" Leva (D67), and again for Leonetti, Merlino, and Scarfo following their arrest in 1979 for the murder of Vincent Falcone (D61).

Frank Materio testified that he put up his house for bail for Leonetti and Merlino as a result of a request made by Lumio on behalf of Catherine Scarfo (T1608).



On April 4, 1979, an agent of the State Commission of Investigation (SCI) saw Lumio and Nicholas Virgilio exchange a kiss in front of 26-28 North Georgia Avenue (T941-942). On April 7, the agent saw Lumio and Scarfo leave North Georgia Avenue in a car and later return (T942-943). On April 11, he saw Lumio with Scarfo and Leonetti (T943-945). On November 16, 1979, he saw Lumio with Scarfo and Leonetti at the Scarf, Inc. office (T947). Lumio was at the police station when Scarfo was released on bail after his arrest for the Falcone murder (T984) and attended a subsequent celebration at the Scarf, Inc. office (T987). On January 22, 1980, the Philadelphia police photographed Lumio in the company of Virgilio at the funeral of the mother of Saul Kane (T1221; D75). In short, Lumio's ties to Scarfo, Virgilio, Leonetti, and Merlino were manifest.

#### Albert Daidone

According to his testimony before the State Commission of Investigation, Albert Daidone became a member of Local 170, a bartenders Local in Camden, in about 1965 (D126, at 25-26). In 1978, he was elected vice president of that Local, running on a ticket headed by Ralph Natale (D126, at 26).

In January 1979, Natale was convicted of arson, racketeering, and mail fraud, and in February 1979, he was convicted on drug charges. He is serving a twelve year sentence on the former charges and a consecutive fifteen year sentence on the latter (T1389; D104; D126, at 144; R8, at 25). He was described by FBI agents testifying before this Commission and the SCI as a major distributor of illegal drugs and the head of an arson-for-hire ring (T1389-1390; D126, at 144), and also as a "very close associate" of Angelo Bruno (D126, at 142). Charles Allen, a government informant and participant in the federal witness protection program, testified before the United States Senate about Natale's organized crime activities (R8) and before the SCI about his involvement with Rittenhouse Associates, a union dental plan administrator with organized crime ties, and with Larry Smith, the head of Rittenhouse (D126).

Daidone told the SCI that he is a friend of Natale (D126, at 32), Smith (D126, at 29-30) and convicted drug dealer (D105-107) Raymond Martorano (D126, at 33). He said it was his custom to see Martorano three or four times a week, and sometimes to act as his driver and to accompany him when he looked for locations to place vending machines (D126, at 34). He also said that he stayed with Martorano every day after Angelo Bruno was murdered, but he denied that he had acted as his bodyguard

(D126, at 33-34). Daidone also admitted knowing Angelo Bruno (D126, at 36), Philip Testa (D126, at 37) and Frank Vadino (D126, at 35). He said that he had read in the newspapers that all of the above-named individuals were connected with organized crime, but that he had no other information in this regard (D126, at 32-38).

When Natale went to prison in February 1979, Daidone continued to serve as an officer of Local 170. However, the Union then became Local 33. According to Daidone's SCI testimony, the new name was intended to "change the image of the union" (D126, at 31). At any rate, in early 1981, Local 33 merged into Local 54 (T1352-1353; C3, minutes of 11/4/80).

When Local 33 merged into Local 54, it became necessary for Local 54 to open a satellite office in Camden. At the Executive Board meeting of December 29, 1980, Frank Materio moved to authorize the Local 54 officers to appoint several individuals to staff the Camden office, including Daidone in the position of business agent (C3, minutes of 12/29/80). Materio told the Commission that at that time he knew nothing about Daidone and made this motion at the behest of Gerace (T1681-1685). Less than four months later, Gerace appointed Daidone to the Executive Board of Local 54 (C3, minutes of 4/28/81). Within another two months, Gerace appointed Daidone vice president of Local 54, following the death of Robert Lumio (C3, minutes of 6/8/81).

Daidone remained vice president of Local 54 until his removal in September 1982, during the hearing before the Commission. Counsel for Local 54 explained that Gerace removed Daidone from office due to his indictment, along with Martorano, for conspiracy and extortion, and subsequent indictment for the murder of an official of the Philadelphia roofers' union.

### Joseph Erace

Gerace informed the Executive Board at its meeting of March 9, 1981, that Joseph Erace, a business agent, was among three new staff members at Local 54 (D55). On December 14, 1981, Gerace appointed Erace to the Executive Board to complete the unexpired term of a deceased Board member (C3, minutes of 12/14/81).

Donna Savarese, a wine consultant and lounge manager at the Tropicana Casino Hotel, testified that on February 6, 1982, Erace approached her and stated: "I've got a friend I'd like to introduce you to" (T1114). Savarese accompanied Erace to a table where he introduced her to several people, including Scarfo, whom he referred to as "my friend Nick Scarfo" (T1114).

Later, Savarese was again approached by Erace and he questioned her about a member of the Tropicana security staff who had been following him and his party, which included Scarfo. Erace remarked that if this surveillance continued, his "friends will take care of him" (T1116). Savarese understood Erace to be referring to Scarfo and his associates as his "friends" (T1116).

Roger Brown, lieutenant of security at the Tropicana, testified that he had been advised that Scarfo, Leonetti, and Merlino would be dining at one of the Tropicana's restaurants on February 6, 1982, and that he was directed to keep them under surveillance. During the course of the evening, Brown saw Erace conversing with the three in the hotel lobby for approximately fifteen minutes (T1188). He said that when they approached they were all "friendly," but that the conversation became "business like" and "serious" (T1189).

#### Frank Lentino

It is unclear exactly when Frank Lentino first became employed with Local 54. Materio testified that Lentino had worked as a business agent for Local 54 for approximately a year and a half (T1665). On June 8, 1981, Gerace appointed Lentino as Camden County office manager (C3, minutes of 6/8/81).

Lentino was a proposed alibi witness for Scarfo in connection with the Falcone murder (D66). Also, Lentino appears on the Scarfo telephone list under the name Frank Gray, with a coded number (T1034; D9).

There are thus six present or former employees of Local 54, *i.e.*, Gerace, Materio, Lumio, Daidone, Lentino, and Erace, who are connected to Scarfo and other members of the Bruno crime family. Of these six, all but Lentino now serve or have served as Union officers. Materio was appointed to his Union office by Gerace, as were Lumio and Erace. Lentino was appointed Camden County office manager by Gerace. Daidone was appointed business agent on Materio's motion and was appointed an Executive Board member and vice president by Gerace.

We turn now to Local 54's business dealings with persons connected with Scarfo.

#### Toro Construction

At the January 16, 1979 Local 54 Executive Board meeting, the board approved an expenditure of \$105,000 for renovations of the new union headquarters and authorized the officers to "seek the best union contrac-

tors'' for the job (C3, minutes of 1/16/79). Toro Construction Company became the general contractor for the renovations (T1673). The job was done in March, April, or May 1979 (T893).

As previously noted, Toro contributed \$45,000 in cash to the bail for Scarfo, Leonetti, and Merlino following their arrest for the Falcone murder (T1159-1160; R8, at 48; D68).

At the March 9, 1981 meeting of the Union Executive Board, a motion was made by Materio and passed by the Board to approve payment of \$10,956.22 to Toro (C3, minutes of 3/9/81). It is clear from Materio's testimony before the Commission that when he made this motion he had no idea whether Toro had done work justifying this payment, but that he merely moved to pay the bill because it was on the table before him (T1667-1669). It is not clear if this bill was related to the original renovation work.

Local 54 presented testimony of John Rich, a business agent for Local 33 of the Bricklayers Union and president of the Building Trades Council of Atlantic City, that to the best of his knowledge Toro is a legitimate company, and was one of four or five union contractors he recommended to Gerace for the headquarters renovation. There is no evidence before the Commission of any irregularity in the way Toro obtained contracts or performed work for Local 54. However, Toro is one more connection between Scarfo and the Union.

#### Rick Casale

Rick Casale is a roofing contractor who was described by an SCI agent who testified before the Commission as a "very close associate" of Scarfo (T938-939), and whose name was on Scarfo's telephone list (D9). He was also described by Salerno as a frequent visitor to 26-28 North Georgia Avenue (T848-849). Casale did the roofing work on the renovation of Local 54 headquarters (T939). There is no evidence that there were any irregularities in the way the work was done or paid for. However, Casale represents one more connection between Scarfo and Local 54.

#### Vincent Sausto

Vincent Sausto, whose name was also on the Scarfo telephone list (D9), is an insurance broker and real estate agent who handles insurance policies for Scarfo and his relatives. Sausto has been seen with Scarfo and on the premises of Scarf, Inc. "on numerous occasions," and has admitted being a "social acquaintance" of Scarfo (T939-940). Sausto received

part of the real estate commission on the sale of the Local 54 headquarters building (T939-940). The building was sold for \$175,000. The commission was \$14,500, of which Sausto received \$5,800. The remainder of the commission went to Phillip Guber, the owner of the real estate agency for which Sausto worked, and to a Mrs. Lashman, the listing broker (T978; 996). The commission on the Local 54 building was one of only two real estate commissions earned by Sausto in the year 1979 (T989). Of course, the commission was paid by the seller of the building, a Mr. Jack Apple (T978). However, it appears that Sausto was the agent who represented Local 54 in the purchase of the headquarters property, and he represents one more tie to Scarfo.

### Affiliated Leasing

In March 1979, Affiliated Leasing Systems, Inc. leased a car to Phillip Leonetti. As a result of a "lead" from Leonetti, Affiliated sold a car to Virgilio. On December 18, 1979, Robert Wayne, an account executive with Affiliated and his superior, a Mr. Goldblatt, went to the offices of Scarf, Inc. to deliver the Virgilio vehicle. Leonetti, Scarfo, and three or four other persons were present at the Scarf, Inc. office (T1463-1464). Someone suggested to Wayne that he contact Local 54 with regard to the possible leasing of other vehicles (T1466). Wayne testified before the SCI that it was Scarfo who made this suggestion (T1472-1473). In interviews with the SCI, the FBI, and the Division, Wayne also identified Scarfo as having made the suggestion (T1474-1475; 1497). However, in his testimony before the Commission, Wayne said that "for the longest period of time" he believed it was Scarfo who made the suggestion (T1467), but that he had discussed the matter with Goldblatt, and Goldblatt had told him that he had been sitting next to Scarfo and that Scarfo had said nothing (T1485). Therefore, at the time of his testimony before the Commission, Wayne was no longer sure who had made the suggestion (T1467; 1484). But, he did contact Lumio, and as a result, Affiliated leased two vehicles to Local 54 (T1468-1470). Shortly before Wayne's testimony the Union returned the vehicles "on the advice of counsel" (T1476).

We find that it was Scarfo who suggested to Wayne that he call Lumio about the possibility of renting cars to Local 54. In addition, the mere fact that the discussion took place in the presence of Scarfo, at the Scarf, Inc. office is sufficient to find this one more indication of Scarfo's interest and involvement in the affairs of Local 54, notwithstanding Wayne's testimony that the lease agreements between Affiliated and Local

54 were entirely legitimate (T1482-1483). Nevertheless, this is one more instance of Scarfo's involvement in the affairs of Local 54.

#### Frank D'Addario

Frank D'Addario is a partner in Claridge Associates, which in turn is a partner in Claridge Limited, which owns the Claridge Hotel and Casino. D'Addario is also one of the two members of Claridge Management Corporation, which, for a time, managed the Claridge. During that time D'Addario met with Frank Gerace and asked him about the unfavorable newspaper publicity involving Local 54 (T1062; 1072). Gerace responded that, because of his mother's friendship with Scarfo's mother, allegations were being made that Scarfo had influence over the Union (T1062-1063). D'Addario was later introduced to Scarfo at a boxing match at the Claridge, and said to him: "Say hello to my friend, Frank, if you see him" (T1060-1061). Scarfo responded that he had heard of D'Addario "either through or from" Gerace (T1063).

The Division asks us to take Scarfo's statement that he had heard of D'Addario through or from Gerace as an indication that Gerace discusses Union business with Scarfo. However, to do so, we would have to accept Scarfo's hearsay statement as true. We can make a finding on the basis of hearsay evidence if it is legally competent evidence under one of the exceptions to the hearsay rule, N.J.R. EVID. 63, or, failing that, if it is nonetheless "the sort of evidence upon which responsible persons are accustomed to rely in the conduct of their [sic] serious affairs." *N.J.S.A. 5:12-107(a)(6)*. See, *In the Matter of the Application of Seymour Alter for Licensure as a Casino Key Employee*, Docket No. 79-EA-60 (1980), at 4-7. Scarfo's statement does not fall within any exception to the hearsay rule, and the Division does not suggest that it does. Nor do we think that an off-hand social comment by Nicodemo Scarfo is the type of evidence upon which responsible people would rely in the conduct of their serious affairs. We therefore decline to rely on Scarfo's statement as establishing that he, in fact, heard about D'Addario through or from Gerace. However, we do find that Scarfo made the statement, and we see it as an indication of his willingness to use his relationship with Gerace to give the impression that they do discuss Gerace's business affairs.

In summary, the "business associations" evidence establishes that the commission for the sale of the Union building was paid in part to a Scarfo associate; the \$170,000 renovation of the building was done by a company which put up \$45,000 in bail for Scarfo, Leonetti, and Merlino; the roofing work was done by a Scarfo associate; and Scarfo was aware of

the Union's need for vehicles and recommended that the leasing company used by Leonetti and Virgilio contact the Union. When these four business connections are considered together with the fact that six persons with ties to Scarfo were officials of the Union, the inference that there is more at work here than coincidence becomes irresistible. However, before attempting to reach any broader conclusions, we must consider one additional evidentiary item urged by the Division, *i.e.*, Gerace's failure to testify, and also give further consideration to the evidence offered by Local 54.

### *Failure of Gerace to Testify*

Frank Gerace was called as a witness by the Division and refused to testify, invoking his Fifth Amendment privilege against self-incrimination (T2368-2371), and the Division asks us to make a variety of findings based on Gerace's silence.

Of course, the Fifth Amendment guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Thus, Gerace had a right to invoke the Fifth Amendment and the Commission cannot impose any "penalty" because of his exercise of that right.

However, the Division argues that the drawing of evidentiary inferences from Gerace's silence would not constitute a "penalty." The Division relies on *Duratron Corp. v. Republic Stuyvestant [sic] Corp., et al.*, 95 N.J. Super. 527 (App. Div.), *cert. denied*, 50 N.J. 404 (1967), a civil action seeking damages for fraud, in which it was held that the finder of fact could draw an adverse inference from the refusal of a defendant to testify. The court explained that the defendant "risked only the probative strengthening of a civil claim against himself with an ultimate hazard of nothing more than a money judgment against him," and also that even this consequence did not flow automatically from his invocation of the Fifth Amendment, but lay within the discretion of the factfinder. The court concluded that this was not such a momentous "penalty" as to run afoul of the Constitution, and explained:

The permissible drawing by the factfinder of an inference of inability truthfully to deny a civil claim from a defendant's failure to testify as to relevant facts within his personal knowledge which might refute the evidence adduced against him, is a logical, traditional and valuable tool in the process of fair adjudi-

cation. It subserves private justice. We conclude that it does not impair the privilege against self-incrimination. [95 N.J. Super. at 533]

Similar reasoning has been applied in cases involving consequences other than money judgments. In *Baxter v. Palmigiano*, 425 U.S. 308 (1976), involving an inmate who refused to testify at a prison disciplinary proceeding, the Court applied "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. . . ." 425 U.S. at 318. In *Diebold v. Civil Service Commission, Etc.*, 611 F.2d 697 (8th Cir. 1979), the court applied the same rule to an administrative proceeding in which a public employee, who was suspended because of pending criminal charges, sought reinstatement in his job.

However, Local 54 and Gerace raise several arguments against the drawing of adverse inferences from Gerace's refusal to testify. First, Local 54 appears to argue that the rule permitting an adverse inference against a party who fails or refuses to testify is inapplicable here because Local 54 and the Division are the only parties to this action. However, even assuming that Gerace is not a party, *cf. N.J.A.C. 1:1-1.4*, there is authority to support the drawing of inferences adverse to Local 54 on the basis of Gerace's failure to testify as a nonparty witness. *See, Brinks, Inc. v. City of New York*, 539 F. Supp. 1139 (S.D.N.Y. 1982).

In addition, counsel for Gerace asserts that he advised his client not to testify before the Commission because he is currently a subject of a federal grand jury investigation. However, the pendency of a grand jury probe would not preclude the drawing of an evidentiary inference from Gerace's silence. *Cf., Whippany Paper Board Co. v. Alfano*, 176 N.J. Super. 363 (App. Div. 1980).

Counsel for Gerace voices the additional argument that the Division has "unclean hands" in this matter because it could procure Gerace's testimony by requesting that the Commission grant him testimonial immunity. *See, N.J.S.A. 5:12-67*. The Division responds that it has decided not to seek immunity for Gerace as an accommodation to other law enforcement agencies which are "concerned about maintaining the viability of any future criminal prosecution of Gerace" (Reply brief at 10). Regardless of the merits of this controversy, we do not perceive the granting of immunity as being a prerequisite to the drawing of an adverse inference from Gerace's failure to testify.

Finally, Local 54 and Gerace state that the present action, instituted by the Attorney General's Office, of which the Division is a part, is



punitive in nature; is based on alleged involvement with organized crime, and has potentially grave consequences for Gerace, Materio, and the Union itself. Thus, the Union and Gerace argue, the drawing of any adverse inference from Gerace's invocation of the Fifth Amendment would amount to the imposition of an impermissible "penalty."

It is clear that this is a civil action, and it is also clear that there is nothing punitive about it. We know of no authority precluding the discretionary drawing of an adverse inference based on the invocation of the Fifth Amendment in a civil action. However, we choose not to draw any inference from Gerace's refusal to testify. The inference flowing from the failure or refusal to testify is permissible, not mandatory. Viewing the record as a whole, we find it unnecessary to draw any inference from Gerace's refusal to speak, and elect to attach no probative significance thereto.

Finally, the evidence presented by Local 54 deserves further consideration.

#### *Testimony on Behalf of Local 54*

Local 54 presented sixteen witnesses on its behalf. A number of people from the labor movement testified that both Gerace and Local 54 were effective and honest employee representatives. They included: Joseph J. Menardy, a business manager with Local 334 of the International Electrical Workers; Charles Marciante, president of the New Jersey AFL-CIO; John S. Rich, a business manager for Local 33 of the Bricklayers Union and president of the Building Trades Council of the Atlantic and Cape May Counties area; and James Gratton, a business manager with the Electricians Union for Monmouth and Ocean Counties and president of the Building Trades Council for the same areas. Rich testified: "I would say he's [Gerace] one of the more dedicated labor union leaders that I know. . . . And I don't think that Frank would do anything wrong intentionally" (T2211).

Similarly, several individuals associated with management testified that Gerace was a tough negotiator and that his paramount concern always seemed to be the welfare and interests of the union members. These witnesses included: William A. Whiteside, Jr., an attorney with Rothschild, O'Brien and Frankel; Donald Buzney, Director of Labor Relations at Bally's Park Place Casino Hotel; William G. Rosenthal, an attorney with Shaw and Rosenthal; William J. Downey, Executive Director of the Casino Hotel Association; Martin L. Blatt, an attorney practicing in Atlantic City, and Frederick A. Schenck, Senior Vice President of Administra-

tion at Resorts International. Rosenthal testified that “. . . he [Gerace] is a responsible labor leader who is interested in the welfare of his members and his constituents [sic] who has an interest in the industry and has demonstrated that responsibility throughout our dealings” (T2237).

Three union members testified on behalf of Gerace and Materio. Jane Illingworth, Mickey Fairfield, and Michael C. Tenuto testified that both men are accessible to the Union membership, earnest in their desire to serve the membership and honest and straightforward in running the Union. When asked whether he thought Scarfo had any influence on the operations of the Union, Tenuto stated: “. . . I don’t think nobody [sic] runs the union except really the members because we call the shots for what we want and he [Gerace] backs us up with [sic] the tee” (T2258).

Vincent Pasquale, a Catholic priest and director of the Alcoholic Council Service, and Paul Longo, president of the Atlantic City chapter of UNICO, testified that Gerace has an excellent reputation for honesty and integrity.

Finally, Warren Borish testified that he has represented labor unions for approximately ten years (T1808) and has worked closely with Gerace for at least the past five or six years (T1810). Borish described Local 54 as an aggressive, independent, knowledgeable, and successful labor organization (T1811). Further, he characterized Gerace as a “very independent person” who “does what he thinks is best for the interests of the membership” (T1816). Borish contended: “. . . I’ve seen absolutely nothing over five or six years with relationships with this Local that would indicate that anybody, including Mr. Scarfo or any other person, has any influence over Local 54 or any of its officers” (T1816).

The testimony of Local 54’s witnesses is essentially uncontradicted. We have no reason to doubt the sincerity of their testimony that, to the best of their knowledge, Gerace is a knowledgeable and hardworking union leader and Local 54 is an effective representative of its members. We likewise accept the testimony of those witnesses who said that they had not discerned the presence of any Scarfo influence in the affairs of the Local.

However, none of this precludes a finding that Gerace and Materio are associated with Scarfo in the manner described in section 86(f). Such an association would of necessity be clandestine and none of these witnesses would be in a position to detect its existence. We will weigh the testimony of Local 54’s witnesses along with all of the other evidence in reaching our conclusion as to the qualifications of Gerace and Materio. It is to that conclusion that we now turn.

*Conclusion as to Association of Gerace  
and Materio with Scarfo et al.*

The Commission is now called upon to apply a seldom used but vitally important part of the Casino Control Act, section 86(f). Before doing so we think some general comments on the nature of the casino industry and our role as regulators of that industry are in order.

It can hardly be gainsaid that legalized gaming is not only potentially harmful to the public but extremely sensitive and vulnerable to improper influence. *Niglio v. New Jersey Racing Commission*, 158 N.J. Super. 182, 188 (App. Div. 1978); *see also*, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, *The Development of the Law of Gambling: 1776-1976* (1977). Indeed, the FBI has long maintained that gambling is the "lifeblood of organized crime." *See*, Testimony of Frederick Fehl, Acting Asst. Dir., FBI, before the federal *Commission on the Review of the National Policy Toward Gambling*, Hearings in Washington, D.C., May 10, 1976.

Thus, New Jersey has allowed casino gaming only under an extraordinary, pervasive, and intensive system of statutory and administrative controls. *See, Bally Manufacturing Corp., v. N.J. Casino Control Commission*, 85 N.J. 325, *appeal dismissed*, 102 S. Ct. 77 (1981); *In re Martin*, 90 N.J. 295 (1982). A review of the legislative history makes it clear that section 86(f) is an essential component of that system.

In 1977, the Attorney General and the Treasurer of New Jersey, at the Governor's request, assembled a group of senior staff personnel to make recommendations on casino gambling legislation and related topics. That staff policy group concluded that "the uniqueness of the industry, taken with its potential societal consequences and its checkered history in other jurisdictions, compels a state regulatory interest in virtually every aspect of casino and related operations." *Second Interim Report of the Staff Policy Group on Casino Gambling*, (1977) at 2. The report went on to emphasize that the state interests to be served by a comprehensive regulatory scheme included more than the traditional law enforcement interest. *Id.*

Moreover, prior to the enactment of the Casino Control Act, the State Commission of Investigation specifically advised the Governor and members of the Legislature that the nature of the casino industry made it a "vulnerable target for criminal intrusion." *Report and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey*, (1977) at III. The SCI emphasized that only the "most

stringent of gambling control laws can thwart the infiltration of casino and related services and suppliers by organized crime." *Id.* at II.

Significantly, the SCI noted that its experience regarding organized crime strongly suggested that there were:

few better vehicles utilized by organized crime to gain a stranglehold on an entire industry than labor racketeering. Organized crime control of certain unions often requires the legitimate businessmen who employ the services of the union members to pay extra homage to the representatives of the underworld. Moreover, the ready source of cash which union coffers provide can be employed as financing of all sorts of legitimate or illicit ventures. Because of the gravity of the public interest in this particular area, the Commission is of the view that the representatives of labor organizations involving casino employees should be required to register and subjected to qualification criteria. [*Report and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey, Id.* at 2.]

Accordingly, the State Commission of Investigation recommended regulation over labor unions affiliated with Atlantic City casino hotel facilities. *Id.* It is not surprising that the New Jersey Legislature heeded that advice. Indeed, in enacting the Racketeer Influence and Corrupt Organizations (RICO) Act, 18 U.S.C.A. 1961 *et seq.*, in 1970, Congress also recognized the explosiveness of the combination of labor racketeering and gambling.

The record in this hearing is replete with examples of organized crime infiltration of labor unions. We have previously mentioned the situation of Local 170 under Ralph Natale. We will turn to another such situation, that of Teamsters Local 326, shortly. The transcript of the United States Senate hearing on organized crime involvement in unions (R8) refers to many more examples. Of course, the problem of organized crime infiltration of labor unions becomes all the more acute in the case of a union which represents workers in the gambling industry.

In addition, we cannot overlook the fundamental policy of the Act to foster public trust and confidence in the integrity of the casino industry and related operations, and in the efficacy of the regulatory process.

At the very heart of the public policy set forth in the Casino Control Act is the assurance of "the public confidence and trust in the credibility and integrity of the regulatory process and of casino operations." *N.J.S.A.* 5:12-1(b)(6). Directly related to this purpose is the legislative declaration that "the regulatory provisions . . . are designed to extend strict State

regulation to all persons . . . practices and associations related to" casinos and that "comprehensive law-enforcement supervision . . . is further designed to contribute to the public confidence and trust in the efficacy and integrity of the regulatory process." *Id.*

Hence, it is the expressed policy of the State of New Jersey to regulate and control all aspects of the casino industry with the "utmost strictness" to the end that public confidence and trust in the honesty and integrity of the State's regulatory machinery can be sustained. *Knight v. City of Margate*, 86 N.J. 374, 392 (1981).

With this background in mind we must apply section 86(f) to the facts as we find them in this case.

Section 86(f) provides for disqualification upon the finding of an association with a career offender or career offender cartel member "in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations."

There is no doubt that Gerace and Materio have an association with Scarfo, *et al.* The issue before us is whether that association has been shown to be inimical to the policy of the Act and to gaming operations. Viewing the record as a whole, we must conclude that it has.

We have been presented with a clear picture of a dedicated group of lawbreakers, headed by Scarfo, who follow the activities of Local 54, have a longstanding relationship with and easy and frequent access to its leaders, and seek to exploit that relationship in order to advance their criminal activities. We have also seen a consistent pattern of the Union staffing its hierarchy with persons associated with Scarfo and doing business with persons and firms with ties to Scarfo. The evidence presented during this hearing simply cannot be explained away as a matter of chance or coincidence, or as the result of Gerace's mother being a friend of Scarfo's mother or Materio having played an occasional game of cards with Scarfo's late father.

In other words, the appointments and business associations, when viewed in the light of the evidence concerning Scarfo's interest in the Union and access to its leaders, lead ineluctably to the conclusion that there is a "Scarfo effect" at work in this Union. It is true that no direct evidence was presented during these proceedings that any of the appointments or business associations resulted from Scarfo's influence and that in a few instances, such as Toro Construction, there is some contrary evidence. However, the sheer number of instances renders it impossible to

ascribe them to coincidence or to anything other than Scarfo's influence over Gerace and Materio.

We are also aware that the record is silent as to whether any of the Scarfo-related appointees have acted illegally or otherwise improperly in the conduct of the Local's affairs, or that any of the business associations were other than legitimate. However, once the influence of a career criminal such as Scarfo has been shown, we need not wait for its inevitable detrimental effect on the Union and ultimately on the casino industry to become manifest before we can act. The fact of influence by a person such as Scarfo is inimical to the policy of the Act and gaming operations.

Briefly reviewing the evidence with specific reference to Gerace, Scarfo kept Gerace's name, and those of his mother and "girl" on his telephone list in code. Gerace covertly put up \$10,000 in bail for Scarfo, Leonetti, and Merlino. In three and one-half months at 26-28 North Georgia Avenue, Salerno observed frequent contact between Gerace and Scarfo, including private conferences and a call returned from a telephone booth. Gerace appointed Materio, Lumio, Daidone, Erace, and Lentino to their Union posts. As president of the Union he was surely involved in the various business dealings with Scarfo associates. In short, it is clear to us his association with Scarfo is of such a nature as to create a reasonable belief that it is inimical to the policy of the Casino Control Act and to gaming operations. Such an association flies in the face of the stated statutory and policy considerations and cannot be accepted.

As to Materio, his name was on Scarfo's telephone list, although he claimed to have no idea why. He put up his house as bail for Leonetti and Merlino, although he claimed he barely knew them. He testified that he put up his house as a favor to Catherine Scarfo, but offered no reasonable explanation of why he would take such action on her behalf. He proposed that the Union pay Toro Construction over \$10,000 but had no idea if Toro had done any work justifying the payment. He moved before the Executive Board to authorize the appointment of Daidone to the Union staff, but claimed that when he did so he knew nothing about Daidone. Leonetti made his proposal to inflate the bill for the plumbing at the Union headquarters in front of Materio, and Materio said nothing. The minutes of the Executive Board meetings show that Materio, to give a few examples, moved to accept the appointment of Lumio as secretary-treasurer (C3, minutes of 8/13/79), nominated Lumio to run for election as secretary-treasurer (C3, minutes of 10/1/79), seconded the nomination of Gerace to run for president (C3, minutes of 10/1/79), moved to authorize the officers to appoint Daidone as business agent (D125, minutes of 12/

29/80), moved to accept the appointment of Daidone to the Executive Board (C3, minutes of 4/28/81), moved to accept the appointments of Daidone as vice president and Lentino as office manager (C3, minutes of 6/8/81), moved to approve the appointment of Erace to the Executive Board (C3, minutes of 12/14/81), and nominated Erace for election to the Executive Board (C3, minutes of 6/7/82).

In Materio's case we do not have evidence of direct, frequent contact with Scarfo, *et al.* However, the nature of their relationship is revealed by the telephone list, the bail, and the incident involving the plumbing at the Union headquarters. When Materio's actions as an Executive Board member are viewed in light of this relationship, we must conclude that an association inimical to the policy of the Act and to gaming operations exists.

We therefore find that Frank Gerace and Frank Materio are disqualified under section 86(f).

There is one other alleged association which the Division urges as a section 86(f) disqualifier, *i.e.*, that between Gerace and Eugene Boffa, to which we will now turn.

#### *Association of Gerace and Boffa*

Eugene Boffa was, for some years, engaged, through a variety of corporations, in the labor leasing business. He would, for a fee, provide a business, such as a trucking company or a hotel, with all of its workers. The workers would be employed by Boffa and he would handle the collective bargaining, labor disputes, payment of wages, and benefits, etc.

Labor leasing can be a legitimate business, but it was not in Boffa's case. He employed workers from Teamsters Local 326 in Delaware (T1270), and made regular payments to the Local's president, Frank Sheeran, in exchange for which Sheeran did a variety of things favorable to Boffa and inimical to his Union's members. In short, Boffa was buying labor peace (T1275-1277). As a result of their activities, Boffa and Sheeran were convicted on a variety of federal criminal charges (D86). Boffa was sentenced to twenty years in prison and Sheeran was sentenced to eighteen years (T1282). It seems clear that Boffa is a career offender.

The Division placed in evidence transcripts of two taped conversations, one between Charles Allen and Sheeran (D81) and the other between Allen and Boffa (D84). Both were made while Allen was carrying a recorder placed on his person by the FBI.

The taped conversation between Allen and Sheeran occurred on December 1, 1978. They discussed labor leasing arrangements involving,

*inter alia*, hotels (D81, at 4-6). The only reference of direct relevance to this case is the following:

FS: Yeah, I want, I just, I gotta meet this guy from Local 54, Frank Recia is his name?

CA: Yeah.

FS: You know him?

CA: Yeah.

FS: Frank—I can't pronounce his name. I got a name, here. I got to meet Ralphie tomorrow at 12 o'clock. [D81, at 5]

It seems reasonable to conclude that the "guy from Local 54" is Gerace, who at that time was president of the Local. It also seems clear that "Ralphie" is Natale, who was then secretary-treasurer of Local 33. Sheeran and Natale were corrupt labor leaders. However, the fact that Sheeran was going to meet Gerace does not justify an inference that they were meeting for a venal purpose. The tape gives no indication of Sheeran's purpose in meeting "Frank Recia," and therefore this tape is not of great significance.

On the Allen-Boffa tape there is a clearer and potentially more damaging reference to Gerace. The transcript of the tape reads:

EB: [Unintelligible] You know, I don't bother like, even with Atlantic City—I'll give you an example—this guy is hot shit there—the union guy down there. He was a nice guy so come—I said, OK "Here, buy yourself something."

CA: What union? Teamsters?

EB: Uh, no. The other guy, uh Frankie Gerace.

CA: Oh. You want somethin' done with him?

EB: No, he's alright.

CA: Okay, Okay.

EB: I said, "Here, buy yourself something" [Unintelligible] I says, "this has nothing to do with this, alright?" So he tells them that I gave him something, see. So he says, "Hey, don't give them nothin'." "It goes to us." "Hey," I said, "I don't give a shit. I haven't given him anything." It's just like if you came into me and, uh, I threw you a tip or something. I'm not, uh, I'm not paying you off. I'm not saying I give it to you, I don't want to give it to them. It had nothing to do with them. He didn't use his head. So, now I can't give him nothing even if I want to.

CA: Hmm. And he told them. Who, who did he tell?

EB: He told Frank. [D84, at 22-23]



The Division presented other evidence indicating that Boffa had a labor leasing agreement with Penthouse International to supply workers to the Holiday Inn in Atlantic City, and that the Holiday Inn was a signatory to the non-casino hotel contract with Local 54. On the basis of this evidence and the above-quoted conversation, the Division asks us to find that Boffa made a payment to Gerace "for the purpose of purchasing labor peace at the Penthouse Holiday Inn project, and that this payoff may have manifested a corrupt agreement between Gerace and Boffa to enrich themselves, possibly at the expense of Local 54 employees" (Brief at 48). If the Commission did make such a finding, it would be dispositive on the issue of Gerace's disqualification, as it would evidence not only an association with a career offender, but an association for a corrupt purpose, which would certainly satisfy the "inimical" requirement of section 86(f). In addition, if Boffa was supplying workers to the Holiday Inn and Gerace was representing those workers, any payment by Boffa to Gerace, regardless of its purpose, would be a misdemeanor under 29 U.S.C.A. 186. Commission of this misdemeanor, even without prosecution, might also disqualify Gerace under sections 86(g) and 86(c)(4) of the Act.

However, in our opinion the Division's interpretation of the facts is not supportable. The first question in this regard is whether the record justifies a finding that Boffa in fact gave money or some other thing of value to Gerace. Certainly Boffa seems to be saying that he gave Gerace money. Allen told the Senate that "Eugene Buffalino [sic] . . . mentioned that he gave a gift, meaning money to Frank Gerace, and that Frank Sheeran, the man I work for, got mad at him . . ." (R8, at 85). Thus, Allen apparently understood Boffa to be saying that he gave money to Gerace. However, the question is whether Boffa's statement to Allen can form the basis for finding as fact that a payment was made.

Boffa's statement is obviously hearsay, and thus can support a finding of fact only if it fits within one of the exceptions to the hearsay rule or if the Commission finds it to be reliable evidence under section 107(a)(6) of the Act.

Only one of the exceptions to the hearsay rule has any possible relevance here, namely, N.J.R. EVID. 63(10), which provides:

A statement is admissible if at the time it was made it was so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to a civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in

the community that a reasonable man in his position would not have made the statement unless he believed it to be true . . . .

Bearing in mind that we are dealing here with a transcript of a conversation between a career criminal and a career criminal-turned-informer, in our view it is not clear that Boffa made a declaration against interest within the meaning of the above-quoted evidence rule. Boffa would probably not have believed that his statement to Allen would subject him to pecuniary or proprietary loss, subject him to civil or criminal liability, or expose him to "hatred, ridicule or social disapproval in the community."

The question then becomes whether Boffa's statement is nonetheless reliable within the parameters of section 107(a)(6). Again, this was a conversation between two career criminals. One of the participants, Allen, was lying throughout the conversation because he had an ulterior motive, namely cooperating with the FBI. There is no way of knowing what motive Boffa may have had in talking to Allen. In our view, responsible persons conducting serious affairs would not rely on the statements made by Boffa to Allen on this tape.

Even if we were to find that a payment was made, other factual determinations would have to be made. For instance, it would have to be determined whether, as the Division urges, the payment was a payoff for labor peace. Boffa clearly seems to be saying to Allen that he was not paying off Gerace. The Division is apparently asking the Commission to accept Boffa's statement that he gave money to Gerace but to reject his statement that it was not a payoff. We are not aware of any basis to support this kind of selective acceptance of Boffa's comments.

Furthermore, the Division's argument is premised on the assumption that Boffa supplied workers to the Holiday Inn at a time when the Holiday Inn was a Local 54 shop. There is evidence in the record from which it could be found that a company controlled by Boffa, American Labor Services, did supply workers to the Holiday Inn, but it is questionable whether the record would support a finding that American Labor Services used Local 54 employees.

FBI agent Tamm testified that he did not know if there was ever a collective bargaining agreement between American Labor Services and Local 54, but that he assumed there was because of the statement in the Allen-Sheeran tape that Sheeran was going to "meet this guy from Local 54, Frank Recia" (T1356-1357; T1362; D81 at 5). However, during cross-examination Tamm agreed that the Allen-Sheeran tape indicated that

whatever payoffs were being made, at the Holiday Inn or elsewhere, were being made to Sheeran (T1335).

The Division correctly points out that the Local 54 Executive Board minutes of 9/12/77, 10/3/77, 12/5/77, 2/13/78, 4/3/78, 9/5/78, 3/5/79, and 4/4/79, contain references to arbitration and contract matters concerning the Holiday Inn, and that the minutes of 9/10/79 contain a reference to an agreement with Penthouse regarding welfare benefits. It thus seems clear that there was a collective bargaining agreement between Local 54 and the Holiday Inn, and specifically between Local 54 and Penthouse as the owner of the Holiday Inn. However, the question is whether the relationship between the Holiday Inn and Local 54 continued during the time that American Labor Services supplied employees to the hotel. On this question the deposition of Gerald Adler, a former Penthouse employee, is the only evidence.

Adler said that he attended a meeting some time around April or May of 1978, at which Boffa proposed a labor leasing agreement between American Labor Services and Penthouse (D124 at 87-89). Adler identified a memo which he wrote after that meeting. The memo is dated May 1, 1978, and states that: "Boffa will: Negotiate details of labor contracts; notify union and association that we withdraw; negotiate new contracts with operating engineers and casino workers; do background checks; maintain labor pool" (D124 at 96-97). The record does not contain any explanation of the phrase "notify union and association that we withdraw," although this might indicate that the Holiday Inn was withdrawing from the industry-wide contract with Local 54.

Adler's deposition establishes that Penthouse did enter into a contract with American Labor Services, but does not establish when the contract commenced or when it ended. He was shown an unsigned contract dated July 9, 1978, and said that it "could have been" a contract submitted by Boffa (D124 at 97-98). He also identified a letter which he sent to Boffa suggesting changes in the contract Boffa had proposed. The letter is simply dated "October." Adler could not understand the date because he left Penthouse's employ in late September (D124 at 102). He "supposed" that the letter was sent some time in July, August, or September 1978 (D124 at 103). Adler said that he did not remember when American Labor Services actually started supplying workers at the Holiday Inn, but that he had "a feeling they would have waited until something was signed before starting" (D124 at 102). Finally, Adler said that "several months" after he left Penthouse he heard that they had "dropped" American Labor Services (D124 at 133-134).

It thus appears that Boffa supplied workers to the Holiday Inn for some relatively brief period of time during the latter half of 1978. However, it seems to us speculative to conclude that Boffa's company utilized Local 54 workers.

Even if it is assumed that American Labor Services had a collective bargaining agreement with Local 54 during the time that it supplied workers to the Holiday Inn, and also assumed that Boffa made a payment to Gerace, the Division's argument requires the further assumption that the payment occurred during the time that American Labor Services was supplying workers to the Holiday Inn. However, as previously explained, the record does not definitely establish the time during which the contract between American Labor Services and Penthouse was in effect or the time of the alleged payment to Gerace. The contract between American Labor Services and Penthouse was probably in effect for some brief period during the second half of 1978. The taped conversation between Boffa and Allen occurred on February 2, 1979. Thus a payment may have been made during the time that the contract was in effect, but again the Commission is left to speculate.

We, therefore, do not think this evidence provides a basis for disqualifying Gerace.

#### *Kirkland and LaSane*

The first question with respect to Kirkland and LaSane is whether they are officers, agents, or principal employees of Local 54 within the meaning of section 93.

*N.J.A.C. 19:41-12.1* defines "agent" as:

any person, whether compensated or not, who is authorized or allowed to represent a labor organization in any employment matter relating to employees licensed under the act and employed by a casino hotel or casino licensee, or who undertakes on behalf of the labor organization to promote, facilitate or otherwise influence the relations between the labor organization and the casino hotel or casino licensee.

Eli Kirkland has been employed by Local 54 for approximately two and one half years (T215) and receives a salary of \$400 a week (T216). He handles grievances emanating from union members employed in kitchen and maintenance positions in the nine operating casino hotels (T216; 218). Kirkland testified that he attends hearings with union members and attempts to resolve their differences with management (T216).

When asked what the title of his job was, Kirkland answered, "I guess you could call me like an agent" (T248). Kirkland identified himself as an "agent" on his Labor Organization Individual Disclosure Form filed with the Commission (D8).

Karlos LaSane has been employed with Local 54 since May 4, 1981 and receives \$410 a week in salary (T287-288). LaSane represents union members employed at Bally's Park Place and Caesars Boardwalk Regency at grievance hearings. Mr. LaSane testified that he attends grievance hearings, speaks on behalf of union members and attempts to resolve whatever problems exist between the employees and management (T290).

LaSane contended that he receives an average of fifteen calls a day from Union members "seeking information on filing grievances, interpretation of the contract and what Management is doing or not doing in respect to the Collective Bargaining Agreement" (C4). He added that he places "an average of five calls a day to Management trying to resolve grievances without hearings to the benefit of [Union] members . . ." (C4). LaSane described his responsibilities as essentially the same as Kirkland's (T291).

Furthermore, LaSane has been informally designated by Gerace as Local 54's affirmative action officer (T327). In this capacity, LaSane handles discrimination complaints which emanate from any of the casino hotels (T337-338). LaSane testified that he has familiarized himself with the rules and regulations pertinent to affirmative action (T327) and has acquainted himself with agencies and organizations which may complement his efforts in resolving discrimination complaints (T328; 338).

LaSane identified himself as an "agent" on his Labor Organization Individual Disclosure Form (D1).

We find that Kirkland and LaSane are both "agents" within the meaning of *N.J.A.C.* 19:41-12.1. It is clear to us that both represent Union members working within the casino industry in employment matters. Although the Division contends that they are also "principal employees," we will not decide this issue.

Since Kirkland and LaSane are agents, we must determine whether either is disqualified pursuant to section 86.

Kirkland has a criminal record which consists of five convictions. We note that Kirkland filed his Labor Organization Individual Disclosure Form with the Commission on June 19, 1981. Consequently, section 86(c)(1) containing a list of disqualifying offenses from the New Jersey Code of Criminal Justice, ch. 95, 1978 N.J. Laws 482 (codified at *N.J.S.A.* 2C:1 to :98 (West 1982)) is controlling. *See, In the Matter of the Applica-*

*tion of Robert A. Ferrin for Licensure as a Casino Employee*, Docket No. 79-EA-207 (1981) at 10-12.

On May 7, 1964, Kirkland was convicted in United States District Court for the District of New Jersey of unlawfully selling a narcotic drug, namely 168 milligrams of cocaine, in violation of 26 U.S.C.A. 4704(a) and 7237(a) (D3). This offense is comparable to a high misdemeanor under N.J.S.A. 24:21-19(b)(1). *See*, N.J.S.A. 24:21-6(c)(4). Accordingly, we find that this offense is a listed disqualifying offense pursuant to section 86(c)(3) of the Act.

On November 1, 1968, Kirkland was convicted of possession of narcotics in violation of N.J.S.A. 24:21-20 (D4). This offense is not listed as a disqualifying offense in sections 86(c)(1), or (3).

On July 8, 1969, Kirkland was convicted of grand larceny contrary to the provisions of N.J.S.A. 2A:119-2 (D5). Although this offense is listed in section 86(c)(2), we find insufficient support in the record to conclude that it is a disqualifying offense pursuant to section 86(c)(1).

In 1975, Kirkland was indicted on six counts for sale of lottery tickets, possession of lottery paraphernalia and engaging as a lottery clerk in violation of N.J.S.A. 2A:121-1 and 3 (D6). The record of the criminal proceeding indicates that Kirkland was found guilty and sentenced to "a term of not less than two and no more than three years on each count, sentence to run concurrently . . ." (D6). We are unable to tell with certainty from this record the offenses for which he was convicted or much of the factual circumstances surrounding these offenses. Section 86(c)(2) indicates that the commission of any offense under N.J.S.A. 2A:121-1 *et seq.* constitutes a disqualifying offense, but we are unable to find that these offenses are disqualifying pursuant to section 86(c)(1).

Lastly, on September 15, 1976, Kirkland pled guilty to possession of lottery slips and permitting a lottery on his premises in violation of N.J.S.A. 2A:121-3(b) and (c) (D7). Again, the record will not permit us to convert these offenses to comparable offenses listed in section 86(c)(1).

Since Kirkland has four convictions for offenses which are not specifically disqualifying, we would ordinarily undertake an "inimical" analysis pursuant to section 86(c)(4) which considers whether these offenses indicate that Kirkland's licensure would be inimical to the Act [sic] or to casino operations. Such analysis would consider a number of factors including the nature of the offense, the surrounding events, the remoteness of the offense, and the offender's conduct since that offense. *In the Matter of the Application of Resorts International for a Casino License*, Docket

No. 79-CL-1 (1979) at 15.<sup>3</sup> However, in light of our subsequent discussion and conclusion, we think it is unnecessary to reach specific findings in this regard.

Section 93(b) provides that "[t]he commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require."

Furthermore, section 86(c)(4) states:

. . . the automatic disqualification provisions of this subsection shall not apply with regard to any conviction which did not occur within the 10-year period immediately preceding application for licensure and which the applicant demonstrates by clear and convincing evidence does not justify automatic disqualification. . . .

Kirkland was released from prison sometime in 1978 (T225; 257). The record indicates that since that time he has been wholly free from any criminal involvement. Kirkland is now fifty years of age (T254; D8).

Carroll Edmonson, executive director of the Atlantic City Human Relations Commission, testified that he has known Kirkland for approximately four years (T370) and has found him to be an honest and forthright individual (T37).

Donald Young, an officer in the National Society of Volunteers of America, also testified on behalf of Kirkland. The Volunteers of America operate several half-way houses which attempt to help ex-offenders become assimilated into society (T385). Mr. Young stated that he had known Kirkland for a little less than a year (T390), but in that short span Kirkland had been instrumental in assisting several ex-offenders procure employment in the casino industry (T386). Young stated that he had a high opinion of Kirkland and felt that he was an excellent example for the young men who have just been released from prison and are attempting to rebuild their lives (T387).

Lastly, Arrawanna Allen, an affirmative action specialist with the City of Atlantic City, indicated that she has worked with Kirkland on several occasions and always found him to be courteous and professional in their dealings (R2).

The Commission was impressed by Kirkland, and found him to be a man who wished to put his criminal experiences behind him and live a

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<sup>3</sup> Opinion reprinted at 6 SETON HALL LEGIS. J. 105, 113-14 (Summer 1982).

better life. His testimony was entirely credible. We are persuaded that he has rehabilitated himself and should be permitted to continue to work in his current position. Accordingly, we find that there is clear and convincing evidence that Kirkland's automatically disqualifying conviction which occurred more than 10 years before he filed his application does not justify disqualification under section 86(c)(4). We further resolve to waive Kirkland's other offenses pursuant to section 93(b).

The Division also alleges that Kirkland should be disqualified on the basis of a nondisclosure pursuant to section 86(b). Kirkland disclosed only his 1969 larceny conviction and his 1975 lottery conviction in response to question 10 on his Labor Organization Individual Disclosure Form, which requests an applicant to report all criminal convictions (D8). Kirkland explained that Lumio had instructed him, when he gave him the form, to put down his most recent convictions (T243). Kirkland testified that he did not intend to mislead anyone by his failure to include his other convictions (T244). We note that question 10 on the registration form provides space for only two answers. However, a full page is provided at the end of the form for the purpose of supplementing incomplete answers. *See*, D8 at 11.

It is well settled that nondisclosure of criminal offenses on an application form will support disqualification pursuant to section 86(b) when the nondisclosure is intentional or evinces a conscious disregard for the regulatory process. *In the Matter of the Application of Resorts International Hotel, Inc., for a Casino License*, Docket No. 79-CL-1 (1979), at 13.<sup>4</sup>

We believe that the nondisclosures were inadvertent. We also note that Kirkland revealed two of his most recent and most serious offenses. Kirkland indicated that he was not attempting to conceal his undisclosed convictions. We think this testimony was candid and honest and we have already found him to be a thoroughly credible witness and see no reason to disturb that conclusion here.

Lastly, the Division asserts that Kirkland is a career offender and should be disqualified on the basis of section 86(f). In view of our discussion above, we think little need be said with regard to this issue beyond the simple conclusion that we do not believe that Kirkland should be disqualified as a career offender. Accordingly, with regard to Kirkland, we find no valid basis for his disqualification.

LaSane was convicted in United States District Court for the District of New Jersey on May 21, 1973, of interference with commerce (extor-

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<sup>4</sup> *Id.* at 112-13.



tion), aiding and abetting and conspiracy in violation of 18 U.S.C.A. 1951 (D2). He was a Commissioner of the City of Atlantic City, specifically the Director of Parks and Public Property, from May 21, 1968 until the time of his indictment (D2). According to the indictment, LaSane obstructed and delayed the construction of public projects, purchases of goods, property and services, and the licensing of firms which sought to do business with the City of Atlantic City in order to obtain monies from contractors, engineers, property owners, suppliers, and licensees "by the wrongful use of fear and under color of official right" (D2). LaSane served one year and twenty-one days for this offense (T329).

The Division contends that this offense disqualifies LaSane pursuant to sections 86(c)(1), (c)(4) and (e). However, during the course of the hearing it came to light that the Division had apparently taken a different position on the matter in considering another application submitted by LaSane (C2). LaSane had previously submitted an application for a casino hotel employee license. The application was filed with the Commission on April 7, 1981 (C1). LaSane disclosed his conviction on this application form just as he did on his Labor Organization Individual Disclosure Form (D1).

Some background is necessary to fully understand what occurred. On February 15, 1982, amendments to the Casino Control Act became effective which eliminated the licensure requirement for casino hotel employees and established a registration requirement in its stead. Casino Control Act, ch. 110, 1977 N.J. Laws 339. By virtue of these amendments, upon petition by a casino licensee or temporary casino permittee, a person could begin employment as a casino hotel employee after he has filed an application for casino hotel employee registration. *See, N.J.S.A. 5:12-91(f)*. Under the registration system the evaluation of the suitability of a casino hotel employee occurs after he is eligible for employment, rather than before, as under the licensure system.

The amendments to the Act further provided that any person who had a completed application for a casino hotel employee license pending before the Commission would be considered registered. *N.J.S.A. 5:12-91(f)*. LaSane therefore became registered with the Commission and eligible for employment on the effective date of the amendments.

In an internal memorandum dated March 24, 1982, the Division indicated that it had reviewed LaSane's qualifications and determined that there was no cause to disturb his status as a casino hotel employee registrant (C2).

The Division's position that LaSane is qualified as a hotel registrant was not taken as part of the hearing on the instant matter. That position was merely expressed in an internal Division memorandum. None of the parties took any action in reliance on the Division's position with regard to LaSane's suitability as a hotel registrant or would in any way be prejudiced by allowing the Division to take a different position as to LaSane's fitness to serve as a union agent. We find that the Division memorandum listing LaSane as a satisfactory registrant has no bearing on the matter before us. Accordingly, we now consider whether LaSane's conviction will disqualify him pursuant to the provisions of the Act.

The Division contends that LaSane is disqualified pursuant to section 86(c)(1) since his federal conviction is analogous to listed disqualifying offenses, namely, *N.J.S.A. 2C:5-2* (conspiracy), *N.J.S.A. 2C:20-5* (theft by extortion), *N.J.S.A. 2C:27-2* (bribery in official and political matters), *N.J.S.A. 2C:27-4* (compensation for past official behavior), *N.J.S.A. 2C:27-6* (gifts to public servants), *N.J.S.A. 2C:27-7* (compensating public servant for assisting private interests in relation to matters before him), *N.J.S.A. 2C:30-2* (official misconduct) and *N.J.S.A. 2C:30-3* (speculating or wagering on official action or information). The Division further contends that LaSane is disqualified on the basis of sections 86(c)(4) and 86(e). LaSane filed his Labor Organization Individual Disclosure Form with the Commission in June 1981 (D1).

As previously indicated, LaSane has been convicted of interference with commerce (extortion), aiding and abetting, and conspiracy. We find that the offense for which LaSane was convicted is the equivalent of a violation of *N.J.S.A. 2C:20-5(d)*, which is a disqualifying offense listed in section 86(c)(1). We find that LaSane was acting in his official capacity as a Commissioner of the City of Atlantic City when he committed the acts which constitute the federal offense. We further note the repetitive nature of his criminal acts.

LaSane was convicted of a particularly noxious crime in our view. He had obviously attained a measure of success as a City Commissioner, but he perverted his office and abandoned the trust reposed in him by the voting public.

Carroll Edmonson, mentioned above, testified on behalf of LaSane. Edmonson stated that LaSane has an excellent reputation for honesty and integrity in the community (T373). He added that it was his view that LaSane was thoroughly rehabilitated (T374).

Furthermore, several letters were introduced into evidence on behalf of LaSane (R1; R2; R3; R4; R5; R6; R7). These letters attest to LaSane's

good character, courage, and integrity. The letters were authored by: Gene L. Hudgins (R1), Arrawanna Allen (R2), Isaac S. Cole, Pastor of the Second Baptist Church in Atlantic City (R3), Barbara L. Hudgins (R4), Pierre Hollingsworth, president of the Atlantic City branch of the NAACP (R5), Carroll Edmonson (R6), and Reverend Leroy T. Griffith (R7).

We have listened to LaSane testify before us and have assessed his credibility. We are not convinced that the public policy of the Act or the interests of justice require a waiver of his disqualification.

Considering our conclusion, we believe it is unnecessary to determine whether LaSane's federal conviction is analogous to the host of other listed offenses proposed by the Division. Nor do we deem it necessary to consider disqualification under section 86(c)(4) or 86(e).

### *Conclusion*

For all of the reasons herein stated we find Frank Gerace and Frank Materio are disqualified under section 86(f) and that Karlos LaSane is disqualified under section 86(c). We wish to afford all interested parties a reasonable opportunity to effect the removal of Gerace, Materio, and LaSane as officers, agents, or principal employees of Local 54 before taking remedial steps as provided by section 93(b). We will therefore issue an order providing that, in the event Gerace, Materio, or LaSane is an officer, agent, or principal employee of Local 54 as of October 12, 1982, Local 54 will be thereafter prohibited from receiving dues from any employee licensed or registered under the Casino Control Act and employed by a casino licensee or its agent. Our order will further require the parties to submit briefs by October 5, 1982, addressing the interpretation and applicability to this case of the additional statutory prohibitions against "administ[r]ation of] [sic] any pension or welfare funds." *N.J.S.A.* 5:12-93(b). In the briefs, the parties shall discuss what discretion the Commission may exercise in regard to the remedial provisions of section 93(b), whether the cessation of dues collection and the cessation of administration of pension and welfare funds are alternative remedies, and whether in fact Local 54 is engaged in the administration of pension or welfare funds. On this last point the parties may make whatever written factual submissions they deem appropriate. In its brief, the Division shall make clear what remedial action it will request the Commission to take in the event that Gerace, Materio, or LaSane is an officer, agent, or principal employee of Local 54 as of October 12, 1982.

### Separate Opinion of Commissioner Jacobson

I respectfully disagree with the majority opinion insofar as it finds Frank Gerace, Frank Materio, and Karlos LaSane disqualified under sections 86(c) and (f).

#### *Frank Gerace and Frank Materio*

I agree with the findings of the majority concerning the organized crime involvement of Nicodemo Scarfo, Nicholas Virgilio, and Philip Leonetti, *et al.* The evidence in this respect is conclusive.

It is also apparent that an association between Frank Gerace, Frank Materio, and Nicodemo Scarfo has existed.

The issue to be determined by this Commission is whether this association is "inimical" to the policy of the Casino Control Act and to gaming operations.

In my judgment, the evidence submitted in this proceeding is insufficient to justify such a conclusion.

It is always distressing to observe any degree of association between law-abiding citizens and mob-related felons. It is particularly gnawing when high ranking union officials, charged with the obligation of serving as trustees for the welfare of their members, permit such associations to exist, for any reason.

One would normally expect militant trade union leaders dedicated to the principles of democratic trade unionism to seek close, personal relations with individuals and organizations determined to fight for social and economic justice, not to have associations with mob-related, tyrannical oppressors, motivated by personal greed.

The association of Frank Gerace and Frank Materio and the others whom they have appointed to positions in Local 54 to Scarfo, *et al.* is distressing. However, the evidence concerning their associations does not lead me to conclude that the unseen hand of Scarfo is at work in this Union.

Each of the individuals appointed to positions within the Union has long been at work in the industry and each has emerged from the Union's rank and file membership.

Gerace was a waiter (T1778) and rose through Local 508 to his present position in Local 54. Materio was and still is a bartender (T1599). Lumio (T1779) and Daidone (D126 at 25) were bartenders. Erace was a maitre d' (T1725). There is no probative evidence that Scarfo caused these persons to be appointed to their positions with the Union or has had any influence

over the manner in which they have performed their union duties. Local 54 presented sixteen witnesses, including members of the union employed in casino hotels, other respected union leaders, casino industry representatives, attorneys specializing in labor law and persons active in community affairs, all of whom praised Local 54 and its leadership as active, aggressive, and effective representatives of the membership. This evidence was uncontradicted.

All of these witnesses portrayed Gerace as a vigorous and dedicated union leader (T2186; 2211). He was further characterized as a tough negotiator with extensive knowledge of the casino industry (T2037-2038).

Both Gerace and Materio were described by three members of the Union as always being helpful and receptive to the Union membership and as having unquestioned reputations for honesty.

Father Vincent Pasquale, a Catholic priest and director of the Alcoholic Council Service, testified that Gerace has an untarnished reputation for honesty and integrity.

As for the business associations, John Rich of the Bricklayers Union, who is also president of the Building Trades Council of Atlantic and Cape May Counties, said that Toro Construction is a large and well-run business, and "a contractor that bids legitimately for legitimate jobs" (T2216). *See also*, T2217-2218. Rich also said Toro was one of four of five union contractors he recommended to Gerace for the headquarters renovation job. The job was apparently awarded by bid (T1693), and there is no reason to question the *bona fides* of the building process or of the cost of the renovations.

As to Affiliated Leasing, Robert Wayne testified that the vehicle leases were entirely legitimate.

With regard to the other two business associations, Casale and Sausto, there is likewise no evidence of impropriety.

In summary, there has been no reliable or substantial evidence before this Commission of any influence, any impropriety, or any crime.

In fact the majority so states:

It is true that no direct evidence was presented during these proceedings that any of the appointments or business associations resulted from Scarfo's influence and that in a few instances, such as Toro Construction, there is some contrary evidence. . . .

We are also aware that the record is silent as to whether any of the Scarfo-related appointees have acted illegally or otherwise

improperly in the conduct of the Local's affairs, or that any of the business associations were other than legitimate.<sup>5</sup>

While an association between Gerace, Materio, and Scarfo, *et al.* has been established, there is no proof anywhere in this proceeding that any of the appointees has conducted any Union business in a manner violative of the law, or contrary to the best interests of the membership of Local 54, or that any of the business transactions were in any way improper. Nor is there anything else that would clearly indicate the fact of influence.

Given these facts and these conclusions, by what stretch of logic does the majority determine that any of these associations is "inimical" to the policy of the Casino Control Act or gaming activities in New Jersey?

The conclusion one must reach is that the majority believes that while the Scarfo influence on Local 54 cannot be proved by hard evidence today, there is always the possibility that his association with Gerace and Materio could be "inimical" at some point in the future. If this is the logic of the disqualification order, it is based upon an abandonment of American democratic traditions.

Are we to condemn an innocent individual today, because at some distant future time, he *may* commit an impropriety?

The Casino Control Act states:

An integral and essential element of the regulation and control of [sic] casino facilities by the State rests in the public confidence and trust in the credibility and integrity of the regulatory process. . . . [N.J.S.A. 5:12-1(b)(6)]

If this Commission employs the faulty premise of guilt-by-association, discards the traditional presumption of innocence, and condemns on the testimony of faceless, unexamined informers, we will do more than undermine the credibility and integrity of the regulatory process.

We will do violence to the credibility and integrity of the democratic process.

Finally, I agree with the majority that no inferences can or should be drawn from Gerace's failure to testify. Gerace has a right to remain silent, a right which the Supreme Court has described as an "essential mainstay" of our Constitutional system, *Malloy v. Hogan*, 378 U.S. 1, 7 (1964), and, based on the record before us, I do not think his constitutionally protected silence should be given any evidential significance.

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<sup>5</sup> See *supra* p. 30.

In its reply brief (page 9), the Division argues that Gerace's answers to the following questions would clearly indicate the extent of any Scarfo influence:

Who would know whether or not meetings or phone calls with Scarfo ever took place?

Who would know why such contacts occurred and what was discussed on each occasion?

Who would know whether such contacts had any influence on the policies or actions of Local 54, and whether they presented any danger to the casino gaming industry?

And then the Division reasons:

The answer to all these questions is that Frank Gerace would know, but he refuses to answer questions on these topics, contending that to do so would incriminate him.

The Division is correct in posing these questions but less than persuasive in reaching such a conclusion in its reply brief.

The fact is that Gerace did testify for four days at a deposition conducted by the Division. The deposition testimony was taken under a grant of immunity, and the transcript was sealed. *See, N.J.S.A. 5:12-67.*

Thus, this Commission has had no access to, and therefore has no knowledge of Gerace's deposition testimony. *But, the Division knows how Gerace answered every question posed to him during that deposition* and could easily have procured his testimony for the Commission's consideration by making another request for immunity, which the Commission obviously would have granted. Our ability to afford all parties a full and fair hearing would have been greatly enhanced if the Division had requested immunity and thus, provided us with Gerace's testimony.

### *Karlos LaSane*

I endorse much of the majority's opinion with regard to LaSane. However, I would reach a different conclusion concerning his rehabilitation.

LaSane was convicted on May 21, 1973. This is his only criminal offense in a life spanning fifty years. LaSane testified that he served one year and twenty-one days for the offense and was released sometime in 1975 (T329). He also testified that he successfully completed his parole approximately two years later (T330).

Since that time, LaSane has been free of criminal involvement. LaSane testified that following his release from prison he became employed as a counsellor with the Narcotics Addicts Rehabilitation Center Organization (NARCO) (T322), and that he worked for this organization for four years (T324).

LaSane was then employed by the Atlantic Housing Development Corporation as a field representative (T325). He stated that this program was funded by the federal government and when the funds dried up he became employed with the American Civil Liberties Union (T324).

Following his employment with the ACLU, LaSane collected unemployment (T325). Then, in May 1981, he commenced his present employment with Local 54. Furthermore, as the majority notes, seven members of the Atlantic City community have indicated their support for LaSane and offered their opinion that he is a man of honesty and integrity.

I find that the singularity of the offense, although admittedly a serious crime, the nearly continuous work record since his release, and the contemporaneous, uncontradicted statements made on his behalf, indicate that LaSane does not warrant so harsh a penalty as the majority prescribes. I would find that LaSane is rehabilitated and I would waive his disqualification pursuant to section 93(b).

### *Conclusion*

For all of the above reasons, I find that the Division has not proven that Gerace and Materio are disqualified under section 86(f) or that LaSane is disqualified under section 86(c).

Commissioner Thomas joins Commissioner Jacobson's opinion with regard to Karlos LaSane.