

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. PETERSBURG KENNEL CLUB,)
)
 Petitioner,)
)
vs.)
) Case No. 97-2080RP
DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF PARI-MUTUEL)
WAGERING,)
)
 Respondent.)
_____)

FINAL ORDER

In lieu of a formal administrative hearing, this case came before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH), on proposed final orders based upon the evidentiary record created in DOAH Case Nos. 97-0031, 97-0376, and 97-1667.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether proposed Florida Administrative Code Rule 61D-11.026 is valid.

PRELIMINARY STATEMENT

On April 30, 1997, the Petitioner, the St. Petersburg Kennel Club, Inc., d/b/a Derby Lane, filed a Petition for Administrative Determination of the Invalidity of Proposed Rule challenging proposed Florida Administrative Code Rule 61D-11.026. The parties waived the statutory 30-day deadline under Section 120.56(1)(c), Florida Statutes (Supp. 1996), and requested that final hearing be scheduled on June 25, 1997. Notice of Final Hearing was issued on May 20, 1997.

On June 2, 1997, the Respondent, the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the Division), filed an agreed Motion for Judicial Notice of Prior Administrative Proceeding asking for official recognition of the evidence admitted at final hearing in DOAH Case Nos. 97-0031, 97-0376, and 97-1667. An Order Taking Official Recognition was entered on June 3, 1997.

On June 20, 1997, the parties filed a Joint Prehearing Stipulation and Joint Motion to File Proposed Recommended Orders in Lieu of Formal Hearing in 30 days. The Joint Stipulation added Excerpts from The New Complete Hoyle Revised, published

December 1991, to the evidence.

An Order Cancelling Final Hearing and Establishing PFO Deadline was entered on June 26, 1997.

FINDINGS OF FACT

Rule 61D-11.002(2)(a) and the Incipient Policy

1. During the 1996 Session of the Florida Legislature, pari-mutuel permit holders were authorized, for the first time, to operate cardrooms at their facilities on days when live racing is being conducted, effective January 1, 1997. Only certain card games were authorized, and games have to be approved by the Respondent, the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the Division). Chapter 96-364, Laws of Florida (1996).

2. When the Division first began implementing the new cardroom statute, it anticipated that it would be receiving requests for card games as they appeared in Hoyle's Modern Encyclopedia of Card Games, by Walter B. Gibson, published by Doubleday and Company, Inc., April 1974 1st Edition (Hoyle's).

3. Hoyle's includes many games besides poker; in addition to a special section on poker, it includes special sections on pinochle and solitaire; the evidence is not clear as to the other kinds of card games in Hoyle's.

4. Initially, the Division promulgated Florida Administrative Code Rule 61D-11.002(2)(a) which provides:

(2)(a) All card games in Hoyle's Modern Encyclopedia

of Card Games, by Walter B. Gibson, published by Doubleday and Company, Inc., April 1974 1st Edition hereinafter (Hoyle's) incorporated herein by reference, that are authorized by and played in a manner consistent with Section 849.085(2)(a) and Section 849.086, Florida Statutes, and the rules promulgated thereunder, shall be approved by the division. All other card games shall be approved by the division if the type of card games and the rules of the card games, as specified in BPR Form 16-001, meet the requirements of Section 849.085(2)(a) and Section 849.086, Florida Statutes, and the rules promulgated thereunder.

5. The Division soon noticed that it was receiving requests for the approval of games alleged to be "poker," but which deviated from the standard features of poker. In November 1996, the Division began to develop a policy for the review of such games and began to require card games to use standard poker card and hand ranking and afford players the opportunity to bluff after seeing their hands.

Requests and Denials Prior to Proposed Rule

6. On or about November 8, 1996, the Petitioner, the St. Petersburg Kennel Club, submitted a request for approval for Big Poker 21. The Division denied approval on December 3, 1996.

7. On or about December 19, 1996, the Petitioner submitted a request for approval for Sure 2 Win. The Division denied approval on January 2, 1997.

8. On or about January 23, 1997, the Petitioner submitted a request for approval for Florida Twenty-One. The Division denied approval on February 14, 1997.

9. All three games are played in a non-banking manner.

(The house is not a player in games played in a non-banking manner, a requirement for approval.) The Division initially simply advised the Petitioner that its proposed games were not authorized. Subsequently, in discovery depositions in this case, the Division advised the Petitioner more specifically, as follows: approval of Big Poker 21 was denied because Big Poker 21 fails to adhere to standard poker-hand rankings and does not allow for the possibility of bluffing, calling or raising; approval of Florida Twenty-One was denied because Florida Twenty-One fails to adhere to standard poker-hand rankings; and approval of Sure 2 Win was denied because in the five-card portion of Sure 2 Win, the players have no opportunity to wager or bluff after viewing the cards and simply win or lose on the hand dealt.

10. The Division has approved 35 out of 39 card games submitted by cardroom operators. The four denied include Sure 2 Win, Big Poker 21, Florida Twenty-One, and Pompano 22. Pompano 22 is very similar to Florida Twenty-One.

11. The card games, Hollywood 2-3 Flash and Hollywood 4-3 Flash, were approved by the Division on January 10, 1997. The Petitioner contends that, under the Division's incipient policy and proposed rule, these games should not have been approved because they "do not provide for bluffing." However, both afford players the opportunity to check or bet after seeing their first cards (the first two in 2-3 Flash or the first four in 4-3 Flash).

12. The card game, Three-Card Stud, also was approved by the Division on January 10, 1997. The Petitioner contends that, under the Division's incipient policy and proposed rule, this game should not have been approved because it does not follow the standard poker hand rankings. However, the hand rankings are consistent with the standard poker-hand-ranking system, just adapted for a three-card hand.

The Proposed Rule

13. Notice of a rule workshop regarding the definition of poker was published in December 1996, and a workshop was held in January, 1997.

14. The Division distributed a hand-out on poker at the January workshop, but the evidence is not clear as to the content of the hand-out. It appears to have been a list of seven issues for discussion, including: whether there have to be one or more betting intervals in a poker game; whether the players of poker have to be able to wager on the quality of his/her hand by either folding, calling, passing, or raising; and whether a poker game must use the standard poker hand rankings.

15. On March 18, 1997, the Division proposed Florida Administrative Code Rule 61D-11.026:

Poker is defined as a non-banking game played with cards, comprised of two or more players who play for wagers, and which shall contain the following elements: (1) conformity to the traditional, standardized poker hand ranking system where the value of the ranking is determined by the relative probability of drawing a particular hand; (2) conformity to the traditional,

standardized poker card ranking system (e.g., K>Q>J>10 etc.); and (3) the opportunity to bluff, through at least one betting round, after players have viewed their cards. Poker does not include any game whose object is to reach a certain accumulated number by adding up the face value of the cards.

Specific Authority 849.085(2)(a),
849.086(2)(a),(4),(12), 550.0251(12) FS, Law
Implemented 849.086 FS. History-New.

Standard Poker

16. Standard poker is a non-banking game played with cards or tiles that generally include the following features: at least part of the player's hand is known only to the player and is solely under the player's control; there are two or more players; there is a pot created by wagers which constitutes the prize for winning; there is a standard ranking of hands which is not arbitrary and which is based on the mathematical expectation or difficulty of achieving a particular combination of cards; there is a standard ranking of cards from lowest to highest; there is opportunity for each player to bet on the cards which comprise the player's hand; and there are one or more betting rounds.

17. The fundamental element that differentiates poker from all other forms of gambling is the bluff: the possibility that a player can win the game with a hand that ranks lower than another player's.

18. The game of poker is an American invention whose rules have been fairly standardized for almost a century.

19. There is no mention of poker in Hoyle's 1776 text. The

rules of poker developed during the 19th century. The first reference to rules for a game resembling poker is in Hoyle's 1857 text. Although draw and stud poker did not exist in 1857, the hand rankings were the same then as they are today, only without the straight or straight flush. The straight was introduced into the ranking system below the flush at the turn of this century.

20. Draw poker and five-card stud developed during the Civil War, although straight poker was clearly the most important form of poker at that time. The ranking system that is in use today was firmly established by 1885.

21. The standard poker-hand rankings of today, given in order from highest to lowest, are as follows: five of a kind (possible only when wild cards are used), straight flush (royal flush is highest), four of a kind, full house, flush, straight, three of a kind, two pair, pair, high card.

22. The standard poker-card rankings of today, in order from highest to lowest, are as follows: A, K, Q, J, 10, 9, 8, 7, 6, 5, 4, 3, 2, with the ace sometimes low instead of high.

Petitioner's Expert

23. On July 19, 1996, the Petitioner's expert, Steven Fox, submitted to the Division a set of suggested revisions to the Division's proposed cardroom rules. Fox stated that the games of poker in Hoyle's are inappropriate for commercial cardroom use and that it was better for the State to develop its own generic standard of poker: "Attached are some of my own [generic

standard of poker] on commercial poker games and a generic definition of poker for reference."

24. As applied to commercial poker games, the features of poker that Fox suggested the Division use as a guideline "to evaluate whether a game should be classified as poker" include: (a) usually played with cards; (b) cards are ranked from designated lowest or worst to highest or best; (c) there is a ranking system which assigns relative value to each player's combination of cards, where the ranking system is not arbitrary and is based on the mathematical expectation for receiving each combination; (d) each player can participate in the action based upon cards solely under his control . . . and knowledge of other players' habits or styles; (e) at least some of the cards under a player's control are known only to him; (f) each player has the opportunity to bet on the cards which comprise his hand and there may be more than one betting round; and (g) players bet against the relative holdings of other players.

25. In his July 1996 materials, Fox suggested that the Division consider the traditional poker ranking system of cards from lowest or worst to highest or best, as follows: 2, 3, 4, 5, 6, 7, 8, 9, 10, Jack, Queen, King, Ace. "The Ace shall be treated as a one in low poker and in low straight sequences (A, 2, 3, 4, 5). Otherwise it will be assumed to be valued higher than all the other cards in assuming standard 52 card deck." This is the exact same card ranking system listed in Hoyle's.

26. In his July 1996 materials, Fox suggested that the Division consider the traditional poker-ranking system of hands in descending order of value as: five aces (includes the joker when available), straight flush, four of a kind, full house, flush, straight, three of a kind, two pair, one pair, no pair (high card). This is the same hand-ranking system listed in Hoyle's.

27. At final hearing in DOAH Case Nos. 97-0031, 97-0376, and 97-1667 on April 11, 1997, Fox testified that it is "extremely difficult to pin down what exactly is poker"; that poker hand rankings are arbitrary and established by agreement of the players, i.e., "whatever the players want"; and that, because of the \$10 pot limitation, games in Florida lend themselves more to "home-style" or "showdown" games. When questioned on cross-examination about these apparent contradictions, Fox asserted that his definition as submitted to the Division in July 1996, was "something that I used in more of the casino versions of poker, and I use this as a suggestion so that people can understand a casino version of poker."

28. But, nowhere in Fox's July 1996 materials, does he state, suggest, or infer that his definition of poker is a "casino version" of poker or that his definition would be inappropriate for use in Florida because of the \$10 pot limitation. To the contrary, it was Fox's desire that the Division incorporate his suggested definition of poker into its

regulations. At the time he submitted his suggested definition of poker to the Division in July 1996, Fox was fully aware of the \$10 pot limitation in Florida.

29. Fox was paid by the Petitioner to provide expert testimony on its behalf at the hearing on April 11, 1997. Fox was not paid for his proposed revisions and definition of poker submitted to the Division in July 1996.

Dealer's Choice Games in Hoyle's

30. Included among the poker games described in Hoyle's are many dealer's choice poker games. According to Hoyle's, these games "run the gamut from mere variants of standard games to those that are wild beyond belief." Some of these games—including Jacks High, Lalapalooza, Low Poker, One Card Poker, Place Poker, Second Hand Low, Tens High, Two Card Poker, and Zebra Poker—vary from the standard poker-hand rankings. Others—including High Spade Split, Jacks High, Tens High, and Zebra Poker—vary from the standard poker-card rankings. Some—including Cold Hands, Cold Hands Poker with a Draw, Blind Poker, and Show Down Poker—do not afford players the opportunity to bluff after seeing their hands.

31. There also are other homestyle, dealer's choice "poker" games, not listed in Hoyle's, which do not conform to the Division's definition of poker. These include 727 and 333, in which the object is to obtain a certain numerical total by adding the point values of cards.

The New Complete Hoyle Revised

32. The New Complete Hoyle Revised was published in December 1991. Excerpts are included in the evidence in this proceeding. It appears that the excerpts begin on page 26 with a section called Variations of Poker. The excerpts appear to follow material on standard Poker which are not in evidence.

33. The section called Variations of Poker begins with a subsection called Optional Laws, which in turn seems to composed of sections called Special Hands, Popular Wild Cards, Double-Ace Flushes, Stripped Deck, and Royalties. The next subsection, starting on page 28, is called Poker Variations. It states:

There is an indeterminate number of games based on Poker, and many of these games have several different names. Most of them were originally devised, or are devised from time to time, to break the monotony of a regular Poker game (or, at least, what seems to the average player to be monotony.) The variations which have proved most popular over a period of time are described in the following pages.

In most of these games, the standard poker hands as listed on page 6 have value in the showdown and determine the winner. When any of the standard poker hands are not counted, or when any of the optional hands (page 26) are counted, that fact is noted in the description of the variation. In some cases, each hand in the showdown consists of fewer than five cards; though a player be dealt as many as ten cards, he must select his best five for the showdown.

The games described on pages 28 through 36 include some of the games included in the Dealer's Choice section of Hoyle's. At the same time, it also includes a "game" called Dealer's Choice. Under Dealer's Choice, the New Complete Hoyle Revised states in part:

In the usual informal Poker game, the dealer may choose which form or variation of Poker will be played. Sometimes he is not limited to forms of Poker, but may select such games as Fan Tan, Red Dog, or any other game suitable to the number of players at the table.

Also included are the games Red and Black and Up and Down the River (or Put and Take). In Red and Black:

The rules follow Draw Poker except in the rank of the cards. Instead of determining the winner by poker hands, each player in the showdown counts the point value of his hand. All red cards count plus, and all black cards count minus; each ace counts 1 point, each face card 10 points, and each other card its index value. The hand with the highest plus total in the showdown wins the pot; or the game is played high-low, with the greatest plus hand dividing the pot with the greatest minus (or, if there is no minus hand, with the lowest plus).

34. In Up and Down the River (or Put and Take):

Dealer gives each player five cards, face up, one at a time. He then turns up five cards to the center, one at a time, as "put" cards. As each card is turned, each player having a card of the same rank in his hand must put in the pot as many chips as the rank of the cards, counting a king as 13, queen 12, jack 11, ace 1 and other cards their index numbers. If a player has two or more cards in his hand of the rank turned, he must put up individually for each. When the five "put" cards have been turned, the dealer turns up five "take" cards and this time each player takes from the pot the number of chips equivalent to the rank of the card for each card of similar rank in his hand.

* * *

This is played as a banking game, the dealer taking any excess remaining in the pot and supplying any deficiency; but there is no advantage to the dealer.

Petitioner's Proposed "Poker" Games

35. The Petitioner's proposed "poker" games called Big Poker 21 and Florida Twenty-One do not conform to the standard

poker card ranking system. Face cards are all given exactly the same rank or value; each is worth 10 points, while aces are worth 1 or 11 points.

36. The object of both Big Poker 21 and Florida Twenty-One is to total 21 points, or as close to 21 points as possible, by adding the point values of cards. Players accumulate cards by drawing cards face up until a certain point value is reached, whereupon they "stand."

37. Big Poker 21 and Florida Twenty-One both allow for an automatic win if the player's first two cards total 21 points. An ace-king, ace-queen, ace-jack, and ace-10 each total 21 and are automatic winners. There are no automatic wins in poker.

38. Big Poker 21 and Florida Twenty-One both restrict the player's ability to draw cards. This restriction is based on the point total. A player who accumulates 20 points is not allowed to draw any more cards. The game of poker does not restrict a player's ability to draw cards simply because the player has attained a particular hand.

39. There is no possibility of bluffing in Big Poker 21 since players make their bets before they view their cards.

40. Big Poker 21 and Florida Twenty-One are variations of the game of Black Jack, or "Twenty-One," as it is often called. Black Jack developed in the 1850s and was often played in a non-banking manner. It is still sometimes played today in a non-banking manner.

41. The Petitioner's proposed "poker" game called Sure 2 Win includes a five-card hand, or "showdown" portion, which violates the fundamental rule of poker that players have to be able to make a bet after viewing their cards so that bluffing is possible. All participants must participate in the "showdown" portion. In the "showdown" portion of the game, the players wager before viewing their cards, which are then turned up to reveal the winning hand, with no further opportunity to bet.

42. The winner of the showdown portion of Sure 2 Win wins strictly by chance since the player has no control over the deal of the cards, no opportunity to view the cards before making a bet, no opportunity to bluff, no opportunity to draw cards in order to construct a higher ranked hand, and no control over the outcome of the showdown portion.

43. The player who wins in the showdown portion of the game is not eligible to play the seven-card portion of the game. Other players can decide whether to bet on the seven-card portion of the game; however, that decision has absolutely no effect on the outcome of the five-card portion of the game.

CONCLUSIONS OF LAW

44. Under Section 120.56(2), Florida Statutes (Supp. 1996):

The [proposed rule challenge] petition shall state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. The agency then has the burden to prove that the proposed

rule is not an invalid exercise of delegated legislative authority as to the objections raised.

45. Section 120.52(8), Florida Statutes (Supp. 1996), provides:

"Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious;

(f) The rule is not supported by competent substantial evidence; or

(g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

46. Sections 120.52(8) and 120.536(1), Florida Statutes (Supp. 1996), both also provide:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or

generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

47. Section 849.086(4), Florida Statutes (Supp. 1996), provides in pertinent part:

AUTHORITY OF DIVISION.—The Division of Pari-mutuel Wagering of the Department of Business and Professional Regulation shall administer this section and regulate the operation of cardrooms under this section and the rules adopted pursuant thereto, and is hereby authorized to:

(a) Adopt rules, including, but not limited to: the issuance of cardroom and employee licenses for cardroom operations; the operation of a cardroom; recordkeeping and reporting requirements; and the collection of all fees and taxes imposed by this section.

(b) Conduct investigations and monitor the operation of cardrooms and the playing of authorized games therein.

(emphasis added.)

48. Section 550.0251(12), Florida Statutes (Supp. 1996), also provides in pertinent part:

The division shall have full authority and power to make, adopt, amend, or repeal rules relating to cardroom operations, to enforce and to carry out the provisions of s. 849.086, and to regulate the authorized cardroom activities in the state.

49. Section 849.086(2)(a), Florida Statutes (Supp. 1996), defines authorized games as "those games authorized by s. 849.085(2)(a) and which are played in a non-banking manner."

50. Section 849.085(2)(a), Florida Statutes (1995), authorizes "Penny-ante games" and defines them as follows:

"Penny-ante game" means a game or series of games of poker, pinochle, bridge, rummy, canasta, hearts, dominos, or mah-jongg in which the winnings of any

player in a single round, hand, or game do not exceed \$10 in value.

51. It is concluded that Sections 849.086(4) and 550.0251(12), Florida Statutes (Supp. 1996), authorize the adoption of proposed Florida Administrative Code Rule 61D-11.026, and that Florida Administrative Code Rule 61D-11.026 properly implements Sections 849.086(2)(a) and 849.085(2)(a), Florida Statutes (Supp. 1996).

52. It is clear from the evidence that a rule definition of "poker" is necessary. Without one, it could be argued, as the Petitioner has, that Big Poker 21 and Florida Twenty-One--games more similar to Black Jack or 21--and a pure game of chance like the first portion of Sure 2 Win are poker. In addition, it could be argued that all of the "indeterminate number of games based on Poker" contained in Hoyle's and the New Complete Hoyle Revised, including the many that are "wild beyond belief," are poker. Finally, Hoyle's and the New Complete Hoyle Revised also include "dealer's choice" games that are "poker" essentially because the dealer says they are. The New Complete Hoyle Revised acknowledges that some dealer's choice games are not variations of poker at all. As a clearly necessary definition of "poker," proposed Florida Administrative Code Rule 61D-11.026 only implements Sections 849.086(2)(a) and 849.085(2)(a), Florida Statutes (Supp. 1996); it does not enlarge, modify, or contravene those statutes. Cf. Section 120.52(8)(b)-(c), Florida Statutes

(Supp. 1996). See also General Telephone Co. of Fla. v. Marks, 500 So. 2d 142, 144 (Fla. 1986); Fairfield Communities v. Fla. Land and Water Adjudicatory Comm'n, 522 So. 2d 1012 (Fla. 1st DCA 1988); Seminole Tribe of Fla. v. Dept. of Business Reg., Div. of Alcoholic Beverages and Tobacco, 496 So. 2d 193 (Fla. 1st DCA 1986); Dept. of Prof. Reg., Bd. of Medical Examiners v. Durrani, 455 So. 2d 515 (Fla. 1st DCA 1984).

53. It also is concluded, as reflected in the findings, that proposed Florida Administrative Code Rule 61D-11.026 is not arbitrary or capricious, and that it is supported by competent substantial evidence. Cf. Section 120.52(8)(e)-(f), Florida Statutes (Supp. 1996). See also Bd. of County Comm'n'rs of Brevard v. Snyder, 627 So. 2d 469, 474 (Fla. 1993) (competent, substantial evidence); Degroot v. Sheffield, 95 So. 2d 912 (Fla. 1957)(competent, substantial evidence); Dravo Basic Materials Co., Inc., v. Dept. of Transp., 602 So. 2d 632, 634 (Fla. 2nd DCA 1992)(arbitrary and capricious); Agrico Chem. Co. v. Dept. of Environmental Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978) (arbitrary and capricious). Although proposed Florida Administrative Code Rule 61D-11.026 would eliminate many dealer's choice games in Hoyle's and the New Complete Hoyle Revised, it incorporates the characteristics of standard poker described in Hoyle's and is supported by expert testimony as to the characteristics of standard poker.

54. Florida Administrative Code Rule 61D-11.002, adopted on

January 7, 1997, required all card games be approved by the Division and provides in pertinent part:

(2)(a) All card games in Hoyle's Modern Encyclopedia of Card Games, by Walter B. Gibson, published by Doubleday and Company, Inc., April 1974 1st Edition hereinafter (Hoyle's) incorporated herein by reference, that are authorized by and played in a manner consistent with Section 849.085(2)(a) and Section 849.086, Florida Statutes, and the rules promulgated thereunder, shall be approved by the division. All other card games shall be approved by the division if the type of card games and the rules of the card games, as specified in BPR Form 16-001, meet the requirements of Section 849.085(2)(a) and Section 849.086, Florida Statutes, and the rules promulgated thereunder.

Florida Administrative Code Rule 61D-11.003(1), also adopted on January 7, 1997, provided in pertinent part:

The ranking of cards in a hand shall be consistent with the rules of Hoyle's or the modified rules of the game as submitted to the Division by the cardroom operator and approved by the Division.

55. As found, it would appear that Florida Administrative Code Rules 61D-11.002(2)(a) and 61D-11.003(1), as written, may have contemplated the approval of all poker games in Hoyle's, so long as they are played in a non-banking manner. However, subsequent experience under the rules led to the Division's incipient policy and to proposed Florida Administrative Code Rule 61D-11.026. Proposed Florida Administrative Code Rule 61D-11.026 is not inconsistent with Florida Administrative Code Rules 61D-11.002(2)(a) and 61D-11.003(1). Rather, it clarifies and refines the earlier rules.

56. Even if the Division's approvals of Hollywood 2-3

Flash, Hollywood 4-3 Flash, and Three-Card Stud on January 10, 1997, were contrary to the Division's incipient policy and raised a question as to how definite and firm the policy was at that time, those approvals did not prevent the Division from proposing Florida Administrative Code Rule 61D-11.026 to make its policy clear. To the contrary, that is what agencies are supposed to do.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, the Petition for Administrative Determination of the Invalidity of Proposed Rule challenging proposed Florida Administrative Code Rule 61D-11.026 is denied, and the proposed rule is declared valid.

DONE AND ORDERED this 19th day of August, 1997, in Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.