STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HARTMAN AND TYNER, INC., d/b/a MARDI GRAS GAMING,	)	
Petitioner,	)	
vs.	)	Case No. 08-1310RP
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,	)	
Respondent,	)	
and	)	
GULFSTREAM PARK RACING ASSOCIATION, INC.,	)	
Intervenor.	)	

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on April 10, 2008, in Tallahassee, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John M. Lockwood, Esquire
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For Respondent: Charles T. "Chip" Collette, Esquire
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For Intervenor: Cynthia S. Tunnicliff, Esquire
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STATEMENT OF THE ISSUE

Whether the Respondent's Proposed Rule 61D-11.012(5)(d) constitutes an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(c) and (e), Florida Statutes, as set forth in the Petition Challenging the Validity of Proposed Rule 61D-11.012(5)(d) filed March 14, 2008.

PRELIMINARY STATEMENT

On March 14, 2008, Hartman and Tyner, Inc., d/b/a/ Mardi Gras Gaming ("Hartman and Tyner"), filed a Petition Challenging the Validity of Proposed Rule 61D-11.012(5)(d), which originated with the Division of Pari-Mutuel Wagering of the Department of Business and Professional Regulation, ("Division"). Proposed Rule 61D-11.012(5)(d) limits the hours of operation of a cardroom at a pari-mutuel facility to a cumulative 12 hours per day regardless of the number of pari-mutuel wagering permitholders and cardroom licensees operating at the pari-mutuel facility. In the Petition, Hartman and Tyner asserted

that Proposed Rule 61D-11.012(5)(d) is an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(d) and (e), Florida Statutes, because it enlarges, modifies, or contravenes Section 849.086(7)(b), Florida Statutes, the law purportedly implemented by the proposed rule, and because it is arbitrary or capricious.

On March 19, 2008, Gulfstream Park Racing Association, Inc., ("Gulfstream Park") filed a Petition to Intervene, asserting that it was substantially affected by the proposed rule. Gulfstream Park sought to intervene on the side of the Division. Hartman and Tyner objected to the Petition to Intervene, arguing that Gulfstream Park did not have standing to intervene in this proceeding, as required by Florida Administrative Code Rule 28-106.205. The Petition to Intervene was granted in an Order entered March 24, 2008.

Pursuant to notice, the final hearing in this case was held on April 10, 2008. At the final hearing, Hartman and Tyner offered into evidence the transcript of the deposition of Joseph M. Helton, Jr., taken April 7, 2008. The deposition transcript was received into evidence as Petitioner's Exhibit 1. The Division presented Mr. Helton's testimony at the hearing, but did not offer any exhibits into evidence. Prior to the hearing, however, the Division filed three requests for official recognition; Hartman and Tyner objected to each of the requests.

The requests were granted in part and denied in part, as set forth in the Order entered April 22, 2008. The parties submitted a Pre-Hearing Stipulation containing a number of agreed facts, which have been incorporated into the Findings of Fact herein.

The transcript of the proceedings was filed with the Division of Administrative Hearings on April 16, 2008, and the parties timely filed Proposed Final Orders, which have been considered in the preparation of this Final Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the Agreed Facts included in the parties' Pre-Hearing Stipulation, and on the entire record of this proceeding, the following findings of fact are made:

The Parties

1. The Division is authorized to administer cardrooms; to regulate the operation of cardrooms; and to adopt rules governing the operation of cardrooms. See § 849.086(4), Fla. Stat. (2007).[1]

2. Hartman and Tyner owns a pari-mutuel facility doing business as Mardi Gras Racetrack and Gaming Center, located at 831 North Federal Highway, Hallandale Beach, Florida 33009.

3. Hartman and Tyner holds two pari-mutuel permits to conduct greyhound racing at this pari-mutuel facility, the BET Miami permit and the Mardi Gras permit.

4. Pursuant to these permits, the Division issued Hartman and Tyner two current licenses to conduct pari-mutuel wagering at this pari-mutuel facility: License #141, which was issued under the BET Miami permit; and License #144, which was issued under the Mardi Gras permit.

5. Pursuant to Section 849.086(5), Florida Statutes, Hartman and Tyner applied for, and the Division issued on June 28, 2007, two cardroom licenses allowing the operation of a cardroom with a maximum of 40 tables during the 2007/2008 season at its pari-mutuel facility. One cardroom license was issued in conjunction with the BET Miami permit, and the other cardroom license was issued in conjunction with the Mardi Gras permit.

6. Hartman and Tyner computes the monthly gross receipts separately for the BET cardroom license and for the Mardi Gras cardroom license in calculating the 10 percent monthly tax imposed by Section 849.086(13)(a), Florida Statutes, and for purposes of the four percent monthly greyhound purse supplement imposed by Section 849.086(13)(b), Florida Statutes.

7. Gulfstream Park holds two pari-mutuel permits to conduct thoroughbred and quarter horse racing at a pari-mutuel facility located in Broward County, Florida.

8. Pursuant to Section 849.086(5), Florida Statutes, Gulfstream Park applied for, and the Division issued, a cardroom license in conjunction with its permit to conduct thoroughbred horse racing.

9. Both Hartman and Tyner and Gulfstream Park are subject to regulation by Proposed Rule 61D-11.012(5)(d).

The challenged proposed rule, relevant statutes, and legislative history.

10. Section 849.086, Florida Statutes, which was first enacted in 1996, authorizes a person holding a pari-mutuel wagering permit to obtain a license to operate a cardroom at a pari-mutuel facility and sets forth the conditions under which such cardrooms are to operate.[2]

11. The legislative intent in enacting Section 849.086, Florida Statutes, is set forth as follows:

> (1) LEGISLATIVE INTENT.--It is the intent of the Legislature to provide additional entertainment choices for the residents of and visitors to the state, promote tourism in the state, and provide additional state revenues through the authorization of the playing of certain games in the state at facilities known as cardrooms which are to be located at licensed pari-mutuel facilities. To ensure the public confidence in the integrity of authorized cardroom operations, this act is designed to strictly regulate the facilities, persons, and procedures related to cardroom operations. Furthermore, the Legislature finds that authorized games as herein defined are considered to be pari-mutuel style games and not casino gaming because the participants

play against each other instead of against the house.

12. Section 849.086(2), Florida Statutes, contains the following definitions which are pertinent to this proceeding:

> (c) "Cardroom" means a facility where authorized games are played for money or anything of value and to which the public is invited to participate in such games and charged a fee for participation by the operator of such facility. Authorized games and cardrooms do not constitute casino gaming operations.
>
> * * *
>
> (f) "Cardroom operator" means a licensed pari-mutuel permitholder which holds a valid permit and license issued by the division pursuant to chapter 550 and which also holds a valid cardroom license issued by the division pursuant to this section which authorizes such person to operate a cardroom and to conduct authorized games in such cardroom.

13. Proposed Rule 61D-11.012 sets forth the duties of licensed cardroom operators at pari-mutuel facilities and is one of a number of proposed rules dealing with cardrooms at pari-mutuel facilities included in the Notice of Proposed Rule published by the Division on March 14, 2008, in Volume 34, Number 11, of the Florida Administrative Weekly. These rules were intended to implement changes to Section 849.086, Florida Statutes, enacted during the 2007 legislative session and effective July 1, 2007.

14. Proposed Rule 61D-11.012(5), which contains the subsection that is the subject of this challenge, provides as follows:[3]

> (5) The cardroom operator must display the hours of operation in a conspicuous location in the cardroom subject to the following terms and conditions:
>
> (a) Days and hours of cardroom operation shall be those set forth in the application or renewal of the cardroom operator. Changes to days and hours of cardroom operation shall be submitted to the division at least seven days prior to proposed implementation;
>
> (b) Pursuant to Section 849.086(7)(b), F.S., a cardroom operator may operate a licensed facility any cumulative 12-hour period within the day;
>
> (c) Activities such as the buying or cashing out of chips or tokens, seating customers, or completing tournament buy-insurance or cash-outs may be done one hour prior to or one hour after the cumulative 12-hour designated hours of operation;
>
> (d) The playing of authorized games shall not occur for more than 12 hours within a day, regardless of the number of pari-mutuel permitholders operating at a pari-mutuel facility.

Subsection(5)(d) was added to Proposed Rule 61D-11.012(5) at the end of February 2008, to "fix the Mardi Gras 24 hour cardroom issue."[4]

15. In the Notice of Proposed Rule for Proposed Rule 61D-11.012, the Division identified its rulemaking authority as

Section 550.0251(12) Florida Statutes, and Section 849.086(4) and (11), Florida Statutes. Sections 550.0251(12) and 849.086(4), Florida Statutes, both give the Division the authority to adopt rules governing, among other things, the operation of cardrooms at pari-mutuel facilities.[5] These grants of rulemaking authority are sufficient to authorize the Division to promulgate Proposed Rule 61D-11.012.

16. The Division stated in the Notice of Proposed Rule that Section 849.086, Florida Statutes, is the law implemented by Proposed Rule 61D-11.012. The only section of Proposed Rule 61D-11.012 challenged by Hartman and Tyner is Section (5)(d), which reflects the Division's interpretation of Section 849.086(7)(b), Florida Statutes.

17. Section 849.086(7)(b), Florida Statutes, provides: "Any horserace, greyhound race, or jai alai permitholder licensed under this section may operate a cardroom at the pari-mutuel facility on any day for a cumulative amount of 12 hours if the permitholder meets the requirements under paragraph (5)(b)."

18. Prior to the 2007 amendment, Section 849.086(7)(b), Florida Statutes (2006), provided in pertinent part:

> A cardroom may be operated at the facility only when the facility is authorized to accept wagers on pari-mutuel events during its authorized meet. A cardroom may operate between the hours of 12 noon and 12 midnight

> on any day a pari-mutuel event is conducted live as a part of its authorized meet. . . . Application to operate a cardroom under this paragraph must be made to the division as part of the annual license application.

This version of the statute was enacted in 2003 and amended the original Section 849.086(7)(b), Florida Statutes (1997), which provided:

> A cardroom may be operated at the facility only when the facility is authorized to accept wagers on pari-mutuel events during its authorized meet. A cardroom may begin operations within 2 hours prior to the post time of the first pari-mutuel event conducted live at the pari-mutuel facility on which wagers are accepted and must cease operations within 2 hours after the conclusion of the last pari-mutuel event conducted live at the pari-mutuel facility on which wagers are accepted.

19. Section 849.086(7)(b), Florida Statutes, requires that a pari-mutuel wagering permitholder must meet "the requirements under paragraph (5)(b)." Section 849.086(5), Florida Statutes, governs the issuance of cardroom licenses and provides that cardrooms may be operated only by persons holding valid cardroom licenses and that these licenses may be issued only to licensed pari-mutuel wagering permitholders. Section 849.086(5)(b), Florida Statutes,[6] provides in pertinent part:

> After the initial cardroom license is granted, the application for the annual license renewal shall be made in conjunction with the applicant's annual application for its pari-mutuel license. If a permitholder has operated a cardroom during any of the

> 3 previous fiscal years and fails to include a renewal request for the operation of the cardroom in its annual application for license renewal, the permitholder may amend its annual application to include operation of the cardroom. In order for a cardroom license to be renewed the applicant must have requested, as part of its pari-mutuel annual license application, to conduct at least 90 percent of the total number of live performances conducted by such permitholder during either the state fiscal year in which its initial cardroom license was issued or the state fiscal year immediately prior thereto. If the application is for a harness permitholder cardroom, the applicant must have requested authorization to conduct a minimum of 140 live performances during the state fiscal year immediately prior thereto. If more than one permitholder is operating at a facility, each permitholder must have applied for a license to conduct a full schedule of live racing.

20. Section 849.086(5)(b), Florida Statutes, was not changed by the 2007 amendments to Section 849.086, Florida Statutes, but, pertinent to this proceeding, the final sentence of the subsection was added by amendment in 2003. The effect of this amendment was described in the 2003 House of Representatives and Senate Staff Analyses as follows: "If more than one permitholder operates at a shared cardroom facility, each permitholder must apply for a license to conduct a full schedule of live racing."

21. When introducing the bill that contained the 2007 amendment to Section 849.086(7)(b), Florida Statutes, to the Florida House of Representatives Jobs & Entrepreneurship

Council, Representative Holloway, the sponsor of the House of Representatives bill, explained that the "cardroom bill . . . allows cardrooms to operate during live events, and the hours have changed from 12 hours a day . . . from a, from 12 Noon to 12 Midnight to 12 hours a day cumulative." In response to a question, Representative Holloway stated that the bill did not expand gambling in Florida, "[i]t is just re-arranging current provisions."

22. In a similar vein, Senator Fasano, when he submitted a floor amendment to the Senate bill containing an amendment to Section 849.086(7)(b), Florida Statutes, stated that his amendment "limits the hours of operation of a cardroom to a cumulative amount equal to 12 hours in any day if the permit holder has met the requirements for licensure to operate a cardroom."

23. Based on this legislative history and on the various iterations of the statute, the Division enacted Proposed Rule 61D-11.012(5)(d) to reflect its interpretation of the 2007 amendment to Section 849.086(7)(b), Florida Statutes, as limiting the operation of a cardroom at a pari-mutuel facility to a "cumulative amount of 12 hours." In the Division's view, the Legislature did not intend for the 2007 amendment to expand the number of hours a cardroom could operate but was intended only to allow a cardroom operator greater flexibility in setting

the hours of operation. In promulgating Proposed Rule 61D-11.012(5)(d), the Division made explicit its rejection of an interpretation of the 2007 amendment that would allow two pari-mutuel wagering permitholders licensed to operate a cardroom and sharing a pari-mutuel facility both to operate the cardroom at the pari-mutuel facility for a "cumulative amount of 12 hours" a day. The Division rejects such an interpretation because it could result in the operation of a cardroom at a pari-mutuel facility for 24 hours per day, exceeding what the Division considers the limitation on cardroom operation at a pari-mutuel facility to "a cumulative amount of 12 hours." § 849.086(7)(b), Fla. Stat.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.56, 120.569, and 120.57(1), Florida Statutes.

Standing

25. Section 120.56(1)(a), Florida Statutes, provides that "any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that it is an invalid exercise of delegated legislative authority." The Division does not question Hartman and Tyner's standing to challenge Proposed Rule

61D-11.012(5)(d), and the parties have agreed that Gulfstream Park is regulated by the challenged proposed rule. This is sufficient to establish that its substantial interests would be affected by Proposed Rule 61D-11.012(5)(d), and Gulfstream Park, therefore, has standing to appear as a party-intervenor in this proceeding. See Coalition of Mental Health Professions, v. Department of Business and Professional Regulation, Board of Clinical Social Work, Marriage, and Family Therapy and Mental Health Counseling, et al., 546 So. 2d 27, 28 (Fla. 1st DCA 1989)(fact that members of the Coalition of Mental Health Professions would "be regulated by the proposed rule is alone sufficient to establish that their substantial interests will be affected.").

Validity/invalidity of Proposed Rule 61D-11.012(5)(d).

26. Hartman and Tyner challenges the validity of Proposed Rule 61D-11.012(5)(d) on the grounds that it constitutes an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(c), and (e), Florida Statutes, which provides:

> 8) "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:
>
> * * *

> (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.;
>
> * * *
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational[.]
>
> * * *
>
> 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 or interpret the specific 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 or is within the agency's class of powers and duties, 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 implementing or interpreting the specific powers and duties conferred by the same statute.

See also § 120.536(1), Florida Statutes.

27. For purposes of this challenge to Proposed Rule 61D-11.012(5)(d), Hartman and Tyner has the burden of going forward and establishing with particularity its "objections to the proposed rule and the reasons that the proposed rule is an

invalid exercise of delegated legislative authority." § 120.56(2)(a), Fla. Stat. The Division then must "prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised." Id. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000)(relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

A. Validity of Proposed Rule 61D-11.012(5)(d) pursuant to Section 120.52(8)(c), Florida Statutes.

28. Hartman and Tyner challenges Proposed Rule 61D-11.012(5)(d) as an invalid exercise of delegated legislative authority on the grounds that it contravenes, modifies, or enlarges Section 849.086(7)(b), Florida Statutes, which provides: "Any horserace, greyhound race, or jai alai permitholder licensed under this section may operate a cardroom at the pari-mutuel facility on any day for a cumulative amount of 12 hours if the permitholder meets the requirements under paragraph (5)(b)." Proposed Rule 61D-11.012(5)(d) provides: "The playing of authorized games shall not occur for more than

12 hours within a day, regardless of the number of pari-mutuel permitholders operating at a pari-mutuel facility."

29. The "flush left" paragraph in Section 120.52(8) and Section 120.536(1), Florida Statutes, require not only that an agency promulgating a rule have a statutory grant of rulemaking authority but that the rulemaking authority granted by statute extend no further than the implementation or interpretation of "the specific powers and duties granted by the same statute." As stated by the court in Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000), agencies have the

> authority to "implement or interpret" specific powers and duties contained in the enabling statute. A rule that is used to implement or carry out a directive will necessarily contain language more detailed than that used in the directive itself. Likewise, the use of the term "interpret" suggests that a rule will be more detailed than the applicable enabling statute. There would be no need for interpretation if all details were contained in the statute itself.

The focus of an agency's rulemaking authority is, therefore, on interpreting the law by providing details that are not contained in the law implemented by a rule.

30. An agency is, however, limited in its rulemaking authority to implementing and interpreting specific laws and may not promulgate a rule simply because the subject matter of the

rule is within the scope of its powers and duties. The court in Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, 794 So. 2d 696, 701 (Fla. 1st DCA 2001), observed that "[u]nder Section 120.52(8)(c), Florida Statutes, "the test is whether a (proposed) rule gives effect to a "specific law to be implemented," and whether the (proposed) rule implements or interprets "specific powers and duties." Pertinent to this proceeding, the Division has a grant of rulemaking authority to promulgate rules governing the operation of cardrooms. See §§ 550.0251(12) and 849.086(4), Fla. Stat. The issue becomes, then, whether Proposed Rule 61D-11.012(5)(d) implements Section 849.086(7)(b), Florida Statutes, which provides certain conditions under which cardrooms must operate.

31. Hartman and Tyner asserts that, in plain and unambiguous language, Section 849.086(7)(b), Florida Statutes, grants a pari-mutuel wagering permitholder licensed to operate a cardroom the right to operate a cardroom on any day for a cumulative amount of time that does not exceed 12 hours a day. Hartman and Tyner further contends that, in a case in which two pari-mutuel wagering permitholders share a pari-mutuel facility and are each licensed to operate a cardroom at the pari-mutuel facility, Section 849.086(7)(b), Florida Statutes, allows each permitholder to operate the cardroom at that facility for 12 hours a day, for a total of 24 hours of operation per day.

32. In promulgating Proposed Rule 61D-11.012(5)(d), the Division makes explicit its interpretation that the effect of the 2007 amendment to Section 849.086(7)(b), Florida Statutes, was to eliminate the restriction on the hours of operation of a cardroom to "between the hours of 12 noon and 12 midnight" in the version of the statute enacted in 2003 and to permit the operation of a cardroom for a "cumulative amount of 12 hours" per day. This interpretation is based primarily on the Division's understanding of the intent of the Legislature in enacting the 2007 amendment to Section 849.086(7)(b), Florida Statutes. The Division's interpretation of Section 849.086(7)(b), Florida Statutes, as expressed in Proposed Rule 61D-11.012(5)(d), further reflects its understanding that the Legislature did not intend the 2007 amendment to Section 849.086(7)(b), Florida Statutes, to allow a cardroom at a pari-mutuel facility to be operated 24 hours a day, even when two pari-mutuel wagering permitholders licensed to operate a cardroom share a pari-mutuel facility.

33. The Division's interpretation of the provisions of Section 849.086(7)(b), Florida Statutes, as expressed in Proposed Rule 61D-11.012(5)(d), focuses on the change allowing operation of a cardroom for a cumulative number of hours. The Division fails, however, to take into account two additional and significant changes from the previous version of

Section 849.086(7)(b), Florida Statutes, included in the 2007 amendment.

34. First, the 2007 amendment eliminated the provision in the 1997 and 2003 versions of Section 849.086(7)(b), Florida Statutes, which limited a cardroom's operation to only those days on which a pari-mutuel wagering permitholder conducted live pari-mutuel events at the pari-mutuel facility. In addition to specifying the times during which a cardroom could be operated, Section 849.086(7)(b), Florida Statutes (1997), limited the operation of a cardroom as follows: "A cardroom may be operated at the facility only when the facility is authorized to accept wagers on pari-mutuel events [conducted live at the pari-mutuel facility] during its authorized meet." Section 849.086(7)(b), Florida Statutes (2003), included the same limitation on the operation of a cardroom to days on which live pari-mutuel events were conducted at the pari-mutuel facility. In contrast to the 1997 and 2003 versions of the statute, Section 849.086(7)(b), Florida Statutes, now allows the operation of a cardroom "on any day," regardless of whether live pari-mutuel events are being conducted.

35. The only connection between the operation of a cardroom and the conduct of live pari-mutuel events currently in effect is found in Section 849.086(5), Florida Statutes, which governs the issuance of cardroom licenses. In order for a pari-

mutuel permitholder to qualify for the renewal of its cardroom license, the permitholder must have included in its application for an annual pari-mutuel license a request to conduct a certain number of live performances at the pari-mutuel facility. See § 849.086(5)(b), Fla. Stat. Section 849.086(5)(b), Florida Statutes, provides that, "[i]f more than one permitholder is operating at a facility, each permitholder must have applied for a license to conduct a full schedule of live racing."[7] There is no requirement in Section 849.086(5), Florida Statutes, limiting a permitholder's operation of a cardroom to only those days on which the permitholder is conducting live pari-mutuel events.

36. Second, the 1997 and 2003 versions of Section 849.086(7)(b), Florida Statutes, specified that "[a] cardroom may operate" only during certain specified hours of the day. (Emphasis added.) The 2007 amendment to Section 849.086(7)(b), Florida Statutes, however, allows a "permitholder" to operate a cardroom "for a cumulative amount of 12 hours" a day, as long as the permitholder is licensed pursuant to Section 849.086 (5), Florida Statutes. (Emphasis added.) It is, therefore, the permitholder that is now restricted to operating a cardroom "for a cumulative amount of 12 hours" per day; the hours a cardroom may operate are no longer restricted.

37. The two changes effected by the 2007 amendment to Section 849.086(7)(b), Florida Statutes, have significantly altered the conditions under which a permitholder may operate a cardroom contained in the 1997 and 2003 versions of the statute. Although the Division is granted the authority to promulgate rules interpreting the statutes it is responsible for implementing, the interpretation must give effect to the law implemented. In promulgating Proposed Rule 61D-11.012(5)(d), the Division has placed a restriction on the operation of cardrooms that is not found in Section 849.086(7)(b), Florida Statutes, or in any provision of Section 849.086, Florida Statutes. And, contrary to the position taken by the Division, there is nothing in the legislative history of the 2007 amendment to Section 849.086(7)(b), Florida Statutes, to support the interpretation reflected in Proposed Rule 61D-11.012(5)(d). Proposed Rule 61D-11.012(5)(d) is, therefore, an invalid exercise of delegated legislative authority because it both modifies and contravenes the provisions of Section 849.086(7)(b), Florida Statutes.

B. Validity of Proposed Rule 61D-11.012(5)(d) pursuant to Section 120.52(8)(e), Florida Statutes.

38. A proposed rule is invalid pursuant to Section 120.52(8)(e), Florida Statutes, if it is arbitrary, defined as "not supported by logic or the necessary facts" or capricious, defined as "adopted without thought or reason or [] irrational."

39. The Division has failed to prove by a preponderance of evidence that its interpretation of the 2007 amendment to Section 849.086(7)(b), Florida Statutes, as reflected in Proposed Rule 61D-11.012(5)(d), is supported by logic or fact. Nothing in Section 849.086(7)(b), Florida Statutes, or in the legislative history of the 2007 amendment to Section 849.086(7)(b), Florida Statutes, supports or gives any basis for the restriction on the operation of cardrooms contained in Proposed Rule 61D-11.012(5)(d). Proposed Rule 61D-11.012(5)(d) is, therefore, an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(e), Florida Statutes, because it is arbitrary.

Attorneys' fees and costs.

40. Section 120.595, Florida Statutes, provides in pertinent part:

> (3) CHALLENGES TO EXISTING AGENCY RULES PURSUANT TO SECTION 120.56(3).--If the court or administrative law judge declares a rule or portion of a rule invalid pursuant to s. 120.56(3), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the court or administrative law judge shall award reasonable costs and reasonable

> attorney's fees against a party if the court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed $15,000.

41. Hartman and Tyner is the prevailing party in this proceeding brought pursuant to Section 120.56(3), Florida Statutes, and is, therefore, entitled to an award of reasonable attorneys' fees and costs, not to exceed $15,000.00, if the Division is unable to prove "that its actions were substantially justified or special circumstances exist which would make the award unjust." § 120.595(3), Fla. Stat. Accordingly, jurisdiction is retained so that an evidentiary hearing may be conducted to determine if Hartman and Tyner is entitled to an award of reasonable attorneys' fees and costs against the Division, and, if so, the amount that should be awarded.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED

1. Proposed Rule 61D-11.012(5)(d) is an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(c) and (e), Florida Statutes.

2. Jurisdiction is retained to determine whether Hartman and Tyner, Inc., d/b/a Mardi Gras Gaming, is entitled to an award of attorneys' fees and costs against the Division of Pari-

Mutuel Wagering, and, if so, the amount of attorneys' fees and costs to be awarded.

3. The parties shall file a joint status report with the Division of Administrative Hearings on or before June 16, 2008, in which they shall provide an estimate of the length of time necessary to conduct an evidentiary hearing on the entitlement to and amount of attorneys' fees and costs and several dates on which the parties are available for hearing.

DONE AND ORDERED this 30th day of May, 2008, in Tallahassee, Leon County, Florida.

PATRICIA M. HART
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of May, 2008.

ENDNOTES

[1]/ All references to the Florida Statutes herein are to the 2007 edition unless otherwise specified.

[2]/ Section 849.086(3), Florida Statutes, provides: "Notwithstanding any other provision of law, it is not a crime for a person to participate in an authorized game at a licensed

cardroom or to operate a cardroom described in this section if such game and cardroom operation are conducted strictly in accordance with the provisions of this section."

[3]/ Deletions from the previous rule have been omitted; additions to the proposed rule are indicated by underscoring.

[4]/ See Exhibit 4 to Petitioner's Exhibit 1.

[5]/ Section 849.086(11), Florida Statutes, which is not pertinent to this proceeding, gives the Division authority to enact rules specifying the information that must be contained in records kept by cardroom licensees.

[6]/ Hartman and Tyner's two cardroom operator licenses were issued under Section 849.086(5), Florida Statutes (2006). The relevant provisions of that statutory section remained unchanged in the 2007 version of the statute.

[7]/ Pertinent to this proceeding, Section 550.002(11), Florida Statutes, defines a "full schedule of live racing" for a greyhound permitholder as

> the conduct of a combination of at least 100 live evening or matinee performances during the preceding year; for a permitholder who has a converted permit or filed an application on or before June 1, 1990, for a converted permit, the conduct of a combination of at least 100 live evening and matinee wagering performances during either of the 2 preceding years.

Section 550.002(11), Florida Statutes, also provides that "[a] live performance must consist of no fewer than eight races or games conducted live for each of a minimum of three performances each week at the permitholder's licensed facility under a single admission charge."

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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 the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a 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.