STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

INTERBLOCK USA, LLC, Petitioner, and SHUFFLE MASTER, INC., Intervenor, vs. DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING, Respondent.	Case No. 11-1075RX

SUMMARY FINAL ORDER

Pursuant to section 120.57(1)(h), Florida Statutes, Petitioner and Intervenor have established that, based on the pleadings and affidavits, no genuine issue as to any material fact exists, and they are entitled as a matter of law to the entry of this Summary Final Order.

APPEARANCES

For Petitioner: John M. Lockwood, Esquire
Matthew J. Feil, Esquire
Gunster, Yoakley & Stewart, P.A.
215 South Monroe Street, Suite 601
Tallahassee, Florida 32301

For Intervenor: Marc W. Dunbar, Esquire
Joshua D. Aubuchon, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 South Monroe Street, Second Floor
Tallahassee, Florida 32301

For Respondent: Charles T. ("Chip") Collette
Assistant General Counsel
Joseph M. Helton, Jr.
Chief Attorney
Division of Pari-Mutuel Wagering
1940 North Monroe Street, Suite 40
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue is whether the word, "internal," in Florida Administrative Code Rule 61D-14.041(1) is an invalid exercise of delegated legislative authority because Respondent exceeded its grant of rulemaking authority or because this word enlarges, modifies, or contravenes the law implemented, in violation of sections 120.56(3) and 120.52(8)(b) and (c). In sum, Petitioner and Intervenor challenge rule 61D-14.041(1) only to the extent that this rule requires that each slot machine contain an internal random number generator.

PRELIMINARY STATEMENT

By Petition Challenging Validity of Rule 61D-14.041, Florida Administrative Code, Petitioner sought a final order determining the invalidity of the cited rule. The Petition focuses mainly on the requirement that slot machines contain random number generators and cites the statutory definition of a

slot machine, at section 551.102(8), which includes a device governed by chance or by skill, or by both. The Petition alleges that Respondent lacked the authority to adopt the challenged rule, under section 120.52(8)(b); that the challenged rule enlarges, modifies, or contravenes the law implemented, under section 120.52(8)(c); that the challenged rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in Respondent, under section 120.52(8)(d); and that the challenged rule is arbitrary or capricious, under section 120.52(8)(e).

In its Answer filed March 2, 2011, Respondent denied, among other things, the allegations that Petitioner's slot machines meet the applicable legal definition of slot machines and asserted that the issue of whether the challenged rule is an invalid exercise of delegated legislative authority is a question of law and ultimate fact. Respondent affirmatively claimed that Petitioner lacked standing because it does not have a slot machine licensed for use in Florida, and the only gaming device that Petitioner has discussed with Respondent is a roulette machine that cannot qualify for licensure in Florida as a slot machine.

On March 3, 2011, the Administrative Law Judge to whom the case was originally assigned conducted a prehearing conference and, on the next day, set the final hearing for April 1, 2011.

On March 7, 2011, Petitioner filed a Motion for Summary Final Order (SFO Motion). The SFO Motion claims that Petitioner has standing to challenge the rule because Petitioner is a licensed slot machine manufacturer required to comply with Respondent's rules. In the SFO Motion, Petitioner argues only two grounds for invalidity of the rule: that Respondent lacks the authority to adopt the rule and that the rule enlarges, modifies, or contravenes the law implemented. Although the SFO Motion mentions the internal random number generator, it continues to seek an order invalidating the entire rule, not merely the word, "internal," as it appears in the rule.

On March 11, 2011, Intervenor filed a Petition to Intervene. The Petition to Intervene alleges that Intervenor is a slot machine manufacturer and is substantially affected because it must comply with Florida Administrative Code Rule 61D-14.041. The Petition to Intervene states that Petitioner and Respondent did not object to intervention. Possibly, this is because it is impossible to learn from the Petition to Intervene whether Intervenor supported or opposed the challenged rule. On March 11, 2011, the undersigned Administrative Law Judge granted the Petition to Intervene and, with some doubt, aligned Intervenor with Petitioner.

On March 14, 2011, Respondent filed a memorandum in opposition to Petitioner's SFO Motion and an Amended Answer,

which denied Petitioner's allegations that it is a slot machine manufacturer. The memorandum notes that a SFO is inappropriate due to the existence of material disputed facts--"most critically being the fact that the Division denies that any of Interblock's gaming machines could ever be legally authorized in Florida."

On March 18, 2011, the Administrative Law Judge conducted a telephone conference with the parties. During the telephone conference, Intervenor confirmed that it was challenging the rule, Petitioner and Intervenor stated that the rule challenge is only to the word "internal" in Florida Administrative Code Rule 61D-14.041(1), and Petitioner and Intervenor restricted their grounds for invalidity to the two stated in the SFO Motion: lack of authority and enlargement, modification, or contravention of the law implemented. At the urging of the Administrative Law Judge, Petitioner and Intervenor filed, later the same day, a Joint Case Stipulation, which confirmed most of the concessions that they made during the unreported telephone conference.

For its part, during the March 18 telephone conference, Respondent briefly argued that the grounds cited for the invalidity of the rule required supporting evidence, but the Administrative Law Judge rejected this argument during the conference, at least as to certain grounds. During the

telephone conference, Respondent argued mainly that Petitioner lacked standing. Respondent stated that it had agreed to Intervenor's intervention only if it took the case as it found it--including the standing of Petitioner--even though Respondent conceded that Intervenor manufactured devices that either qualified as slot machines in Florida or were closer to qualifying than Petitioner's devices. The Administrative Law Judge did not rule at the conclusion of the telephone conference, but promised to issue a timely order, given that the evidentiary hearing was set for two weeks later.

At this time, due to the amendment of the answer, the pleadings did not establish that Petitioner manufactured what might generally be called slot machines--without regard to whether these devices qualified for licensure in Florida as slot machines. Also, Respondent's characterization of Intervenor's devices, as described in the preceding paragraph, seemed insufficiently definitive to provide a factual basis for summary relief as to the threshold issue of standing, as the parties describe it, or jurisdiction, as the Administrative Law Judge describes it, as discussed below.

However, no material factual dispute exists as to the questions of law involving whether the cited statutes authorize Respondent to adopt the word, "internal," in Florida Administrative Code Rule 61D-14.041(1), or whether the adoption

of the word, "internal," in the rule enlarges, modifies or contravenes the cited statutes. The Administrative Law Judge thus entered, on March 22, 2011, an Order on Petitioner's Motion for Summary Final Order. A partial summary final order, this Order determined that Respondent lacks the statutory authority to adopt the word, "internal" in rule 61D-14.041(1), and the word enlarges, modifies, or contravenes the law implemented. The result of this summary final order would be to invalidate the requirement in rule 61D-14.041(1) for internal random number generators in slot machines, provided Petitioner or Intervenor proves that it is substantially affected by the rule, either by affidavit or at an evidentiary hearing. (The March 22 Order is substantially restated below in this Summary Final Order.)

On March 30, 2011, Respondent filed a Notice Regarding April 1, 2011 Hearing. In the Notice, Respondent asserts that the evidentiary hearing on standing would serve no purpose because the March 22 Order described above also relieved Petitioner of the necessity of responding to Respondent's pending discovery requests, which were predicated on a theory of standing/jurisdiction that the Administrative Law Judge did not share with Respondent.

The next day, Petitioner filed Petitioner's Response to Respondent's Notice Regarding April 1, 2011, Hearing. Disputing Respondent's arguments, Petitioner nonetheless shared

Respondent's conclusion that the evidentiary hearing would serve no purpose, as Petitioner contended that the undisputed facts already in the record established that Petitioner was substantially affected by the rule.

On March 31, 2011, the parties and the Administrative Law Judge participated in another telephone conference. Among other things, the Administrative Law Judge advised the parties that he believed the threshold issue is jurisdictional, so the parties' agreements are not binding on, say, an appellate court. The Administrative Law Judge also stated that he did not necessarily disagree with the standing/jurisdictional arguments of Petitioner and Intervenor, but the Administrative Law Judge preferred to obtain affidavits or hearing testimony concerning the status of Petitioner and Intervenor in terms of the manufacture, sale, or distribution of what might broadly be called slot machines in order to make available to an appellate court all of the relevant facts on which jurisdiction may be based. Posed with this choice, all three parties opted for affidavits, so the Administrative Law Judge canceled the April 1 evidentiary hearing, gave Petitioner and Intervenor until April 4, 2011, to file their affidavits, and gave Respondent until April 6, 2011, to file any opposing affidavits or motions.

On April 1, 2011, Petitioner and Intervenor each filed an affidavit. On April 6, 2011, Respondent filed an affidavit of

Milton F. Champion, III, Respondent's Director of the Division of Pari-Mutuel Wagering.

UNDISPUTED FACTS

1. Petitioner is a Nevada limited liability corporation authorized to do business in Florida. Petitioner manufactures and distributes gaming devices and is licensed to do so domestically and internationally. On August 6, 2010, Respondent issued Petitioner a license as a slot machine manufacturer, pursuant to chapter 551, Florida Statutes. However, no gaming device manufactured by Petitioner has ever been licensed as a Florida slot machine or located in a Florida-licensed slot machine facility.

2. Pursuant to Florida law, Petitioner has submitted one of its gaming devices to Gaming Laboratories International (GLI), a licensed, independent testing laboratory, for evaluation for certification as a slot machine for distribution into Florida. By letter dated March 9, 2011, GLI advised Petitioner that an impediment to certification of its gaming device in Florida is the absence of an internal random number generator. The absence of an internal random number generator may not be the sole impediment to certification, which is a precondition for the sale and use of a slot machine in Florida. Multiple licensed slot machine facilities in Broward and Miami-

Dade counties have expressed interest in purchasing Petitioner's gaming devices, if they are certified as slot machines.

3. Intervenor manufactures and distributes slot machines. Intervenor is also licensed as a slot machine manufacturer, pursuant to chapter 551. As such, Intervenor's products are regulated by the rule requiring an internal random number generator in each slot machine. Additionally, Intervenor's slot machines have been certified and lawfully located in licensed slot machine facilities in Florida.

4. GLI has advised Intervenor that an impediment to the certification of Intervenor's slot machine known as Table Master®, for sale and use in Florida, is the requirement of an internal random number generator. Intervenor thus is deprived of revenues from the effect of the rule requiring internal random number generators.

5. With the challenged word underlined, Florida Administrative Code Rule 61D-14.041 provides:

> (1) Each slot machine shall use an <u>internal</u> random number generator (RNG). The RNG shall:
>
> (a) Be statistically independent from any other device;
>
> (b) Conform to the random distribution values specified in the slot machine’s PAR sheet;
>
> (c) Pass statistical tests such as the chi-squared test or random distribution analysis test;
>
> (d) Cycle continuously in the background between games and during game play;

(e) Randomly determine the first seed number;

(f) Use a method of re-scaling that permits all numbers within the lower range to be equally probable if a function of a slot machine requires a random number to be generated with a smaller range than that provided by the slot machine's RNG; and

(g) Re-scale values using a method such as discarding that random number and selecting the next in sequence if a particular random number selected is outside the range of equal distribution of re-scaling values.

(2) A slot machine shall use communication protocols to protect the RNG and random selection process from influence by associated equipment.

(3) Each possible permutation or combination of game elements that produces a winning or losing game outcome shall be available for random selection at the initiation of each play.

(4) The laboratory shall include a copy of each of the certifications required under this rule as part of the formal approval documentation certifying the machine and/or game for play in Florida to the division.

(5) Any misstatements, omissions or errors in the required certification provided by either the laboratory or the manufacturer and/or distributor is a violation of rules governing slot machine gaming.

6. Rule 61D-14.041 cites sections 551.103(1) and 551.122 as the rulemaking authority, and section 551.103(1)(c), (e), (g) as the law implemented.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction. §§ 120.56(1)(c), 120.569, and 120.57(1), Fla. Stat. Section 120.56(1)(a) provides:

> 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 the rule is an invalid exercise of delegated legislative authority.

8. Jurisdiction depends on a claim that a rule or proposed rule is an invalid exercise of delegated legislative authority by a person substantially affected by the challenged rule or proposed rule. The threshold issue in this case is whether Petitioner or Intervenor is substantially affected by the presence of the word, "internal" in rule 61D-14.041(1).

9. Substantial-interest jurisdiction under section 120.569(1) does not require that the party prevail on the merits. Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1082-85 (Fla. 2d DCA 2009); Palm Beach Cnty. Envtl. Coal. v. Dep't of Envtl. Prot., 14 So. 3d 1076 (2009). The teachings of these cases is that a person's substantial interests are determined by an agency, under section 120.569(1) if its substantial interests "could be affected," 18 So. 3d at 1084, or "could reasonably be affected," 14 So. 3d at 1078, by the proposed agency action. The cases agree that the

standing requirement of a substantial interest is a "forward-looking concept [that] cannot 'disappear' based on the ultimate outcome of the proceeding." 18 So. 3d at 1083; 14 So. 3d at 1078.

10. Substantially affected jurisdiction, under section 120.569(1), likewise does not require that a party prevail on the merits--or, here, present to Respondent a certification-ready slot machine, but for the requirement of an internal random number generator. It is sufficient, under the case law, that Petitioner and Intervenor, as slot machine manufacturers and distributors, could be substantially affected or could reasonably be substantially affected by a rule requiring that each slot machine contain an internal random number generator.

11. The proper jurisdictional inquiry is whether the impact of the rule's requirement of an internal random number generator is different in kind upon Petitioner or Intervenor than on all of Florida's citizens. NAACP v. Fla. Bd. of Regents, 863 So. 2d 294, 299 (Fla. 2003). Substantial affect does not require "immediate and actual harm." 863 So. 2d at 300. In NAACP, it was not necessary for any rule challenger to show that he or she had been rejected for admission to a state university due to the adoption of rules eliminating certain affirmative action policies of state universities; prospective candidates for admission were also substantially affected. Id.

12. Under the above-discussed authority, Petitioner and Intervenor are substantially affected by the word, "internal," in Florida Administrative Code Rule 61D-14.041(1). Each is a manufacturer of devices that, with varying degrees of reconfiguration, can satisfy Florida's requirements imposed upon slot machines, as this term is defined, in part, by section 551.102(8). Petitioner and Intervenor are not manufacturers of boats or furniture with an undefined interest in a rule requiring an internal random number generator in each slot machine. Petitioner and Intervenor manufacture gaming devices--in Intervenor's case, as conceded by Respondent, these gaming devices are slot machines. Petitioner and Intervenor are Florida-licensed slot machine manufacturers. When compared to a typical citizen, each of these parties suffers a different kind of harm from the rule requiring an internal random number generator in each slot machine. The standard implied by Respondent in its standing argument is nothing less than immediate and actual harm, which the Florida Supreme Court has rejected for rule challenges.

13. Section 120.56(3)(a) provides:

> A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule. The petitioner has a burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of

delegated legislative authority as to the objections raised.

14. Section 120.52(8) provides in relevant part:

> "Invalid exercise of delegated legislative authority" means action that 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:
>
> * * *
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1; [or]
>
> (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.
>
> * * *
>
> 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 enabling statute.

15. Added in 2008, section 120.52(17) provides: "'Rulemaking authority' means statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term 'rule.'" This definition does not add new restrictions to agency rulemaking authority, but re-emphasizes the existing restrictions cited immediately above. Fla. Elec. Comm'n v. Blair, 52 So. 3d 9 (Fla. 1st DCA 2010).

16. Section 555.103(1) provides:

> The division shall adopt, pursuant to the provisions of ss. 120.536(1) and 120.54, all rules necessary to implement, administer, and regulate slot machine gaming as authorized in this chapter. Such rules must include:
>
> (a) Procedures for applying for a slot machine license and renewal of a slot machine license.
>
> (b) Technical requirements and the qualifications contained in this chapter that are necessary to receive a slot machine license or slot machine occupational license.
>
> (c) Procedures to scientifically test and technically evaluate slot machines for compliance with this chapter. The division may contract with an independent testing laboratory to conduct any necessary testing under this section. The independent testing laboratory must have a national reputation which is demonstrably competent and qualified to scientifically test and evaluate slot machines for compliance with this chapter and to otherwise perform the functions assigned to it in this chapter. An independent testing laboratory shall not be owned or controlled by a licensee. The use of an independent testing laboratory for

any purpose related to the conduct of slot machine gaming by a licensee under this chapter shall be made from a list of one or more laboratories approved by the division.

(d) Procedures relating to slot machine revenues, including verifying and accounting for such revenues, auditing, and collecting taxes and fees consistent with this chapter.

(e) Procedures for regulating, managing, and auditing the operation, financial data, and program information relating to slot machine gaming that allow the division and the Department of Law Enforcement to audit the operation, financial data, and program information of a slot machine licensee, as required by the division or the Department of Law Enforcement, and provide the division and the Department of Law Enforcement with the ability to monitor, at any time on a real-time basis, wagering patterns, payouts, tax collection, and compliance with any rules adopted by the division for the regulation and control of slot machines operated under this chapter. Such continuous and complete access, at any time on a real-time basis, shall include the ability of either the division or the Department of Law Enforcement to suspend play immediately on particular slot machines if monitoring of the facilities-based computer system indicates possible tampering or manipulation of those slot machines or the ability to suspend play immediately of the entire operation if the tampering or manipulation is of the computer system itself. The division shall notify the Department of Law Enforcement or the Department of Law Enforcement shall notify the division, as appropriate, whenever there is a suspension of play under this paragraph. The division and the Department of Law Enforcement shall exchange such information necessary for and cooperate in the investigation of the circumstances requiring suspension of play under this paragraph.

> (f) Procedures for requiring each licensee at his or her own cost and expense to supply the division with a bond having the penal sum of $2 million payable to the Governor and his or her successors in office for each year of the licensee's slot machine operations. Any bond shall be issued by a surety or sureties approved by the division and the Chief Financial Officer, conditioned to faithfully make the payments to the Chief Financial Officer in his or her capacity as treasurer of the division. The licensee shall be required to keep its books and records and make reports as provided in this chapter and to conduct its slot machine operations in conformity with this chapter and all other provisions of law. Such bond shall be separate and distinct from the bond required in s. 550.125.
>
> (g) Procedures for requiring licensees to maintain specified records and submit any data, information, record, or report, including financial and income records, required by this chapter or determined by the division to be necessary to the proper implementation and enforcement of this chapter.
>
> (h) A requirement that the payout percentage of a slot machine be no less than 85 percent.
>
> (i) Minimum standards for security of the facilities, including floor plans, security cameras, and other security equipment.
>
> (j) Procedures for requiring slot machine licensees to implement and establish drug-testing programs for all slot machine occupational licensees.

17. Section 551.122 provides: "The division may adopt rules pursuant to ss. 120.536(1) and 120.54 to administer the provisions of this chapter."

18. As sources of rulemaking authority, section 551.122 and the first sentence of section 551.103(1) fall within the

scope of the final sentence of the flush-left language of section 120.52(8) as general descriptions of the powers and functions of Respondent. These statutory provisions are therefore of no particular value in determining Respondent's specific rulemaking authority.

19. However, the remainder of section 551.103(1) confers specific powers and duties upon Respondent with respect to rulemaking. The question is whether any of these provisions explicitly authorizes Respondent to require an internal random number generator. Most of the provisions obviously do not authorize such a requirement, but four subsections warrant discussion.

20. Section 555.103(1)(b) authorizes Respondent to adopt rules concerning "[t]echnical requirements and . . . qualifications," but of licensees, not of devices.

21. Applicable to devices, section 555.103(1)(c) authorizes Respondent to adopt rules concerning "[p]rocedures to scientifically test and technically evaluate slot machines," but only to determine compliance with chapter 551. This statute authorizes rulemaking of procedures, which are not components of slot machines. Even ignoring the distinction between procedures and random number generators, this statute does not authorize rulemaking of substantive requirements to be imposed upon slot machines, unless these substantive requirements are found

elsewhere within chapter 551. Section 551.103(8) defines "slot machines," although more inclusively than exclusively, and section 555.121 adds important restrictions on slot machines. However, neither of these provisions, nor any provision in chapter 551, requires that each slot machine contain an internal random number generator.

22. Also applicable to devices, section 555.103(1)(e) authorizes Respondent to adopt rules concerning:

> [p]rocedures for regulating, managing, and auditing the operation, financial data, and program information relating to slot machine gaming that allow the division and the Department of Law Enforcement to audit the operation, financial data, and program information of a slot machine licensee, as required by the division or the Department of Law Enforcement, and provide the division and the Department of Law Enforcement with the ability to monitor, at any time on a real-time basis, wagering patterns, payouts, tax collection, and compliance with any rules adopted by the division for the regulation and control of slot machines operated under this chapter.

23. This statute also authorizes rulemaking of procedures, not components of slot machines. Even ignoring the distinction between procedures and random number generators, this statute does not authorize the adoption of a rule requiring an internal random number generator. The authorized procedures fall into two categories. The first set of procedures is to allow Respondent to audit the operation and program information of a

slot machine licensee, not a slot machine. This authority thus does not involve the devices themselves.

24. The second set of procedures is to provide Respondent with the ability to monitor, in real time, wagering patterns, payouts, tax collection, and compliance with the rules. This authority involves the devices themselves, but provides no authority for differentiating between internal and external random number generators. There does not appear to be a relationship between the requirement of an internal random number generator and procedures to monitor, in real time, wagering patterns, payouts, tax collection, and compliance with the rules.

25. Section 555.103(1)(g) authorizes Respondent to adopt rules concerning "[p]rocedures for requiring licensees to maintain specified records and submit any data, information, record, or report, including financial and income records, required by this chapter or determined by the division to be necessary . . .." This statute pertains also to procedures and financial records; as such, it provides no authority for differentiating between internal and external random number generators. Even ignoring the distinction between procedures and random number generators, this authority involves the maintaining and submitting of financial records, not slot machines.

26. During the March 18 telephone conference, Respondent cited PPI, Inc. v. Department of Business and Professional Regulation, 698 So. 2d 306 (Fla. 3d DCA 1996). Among the holdings in this opinion is a reversal of an Administrative Law Judge, who had invalidated a rule. The rule required pari-mutuel wagering permit holders that operated cardrooms to install electronic surveillance devices. Noting, under then-current law, that "[w]here an agency is granted rule-making authority, it is granted wide discretion in exercising that authority," the court cited statutory authority empowering Respondent to adopt rules for the operation of cardrooms, to monitor the operation of cardrooms, and to insure the implementation of internal controls and the collection of fees and taxes. Much has changed in the law of rulemaking since 1996. See, e.g., Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000). Regardless of these changes, a statute authorizing an agency to adopt rules for the operation of cardrooms, for the monitoring of the operations of cardrooms, and for the assurance of the implementation of internal controls and the collection of fees and taxes provides firmer administrative footing for a rule requiring security cameras than the above-quoted statutes provide for a rule requiring an internal random number generator in every slot machine.

27. During the March 18 telephone conference, Respondent argued that internal random number generators were important in assuring the security of slot machines. Thus, Respondent reasoned, it would be necessary to receive evidence, even on the two claims--lack of rulemaking authority and lack of law implemented--addressed in this Order. Perhaps the evidence would have showed that the requirement of an internal random number generator provides the assurance of a secure slot-machine gaming experience. Perhaps the evidence would have showed that the location of the random number generator does not affect the security of the slot-machine gaming experience. But the existence of either situation has no bearing on the absence of statutory authority to adopt the rule or the fact that the rule enlarges, modifies, or contravenes the law implemented.

28. A more relevant case is St. Petersburg Kennel Club v. Department of Business and Professional Regulation, 719 So. 2d 1210 (Fla. 2d DCA 1998) (per curiam). In this case, the court considered the statute authorizing pari-mutuel wagering permit holders to operate cardrooms and whether Respondent had the authority to adopt a rule defining the game of poker. Reviewing a list of statutes that authorized Respondent to adopt rules for the issuance of cardroom licenses, the operation of a cardroom, recordkeeping and reporting requirements, and the collection of all fees and taxes, the court concluded that Respondent lacked

the specific authority to adopt rules defining poker, even though the substantive statute cross-referenced another statute that included poker among a list of approved games. There was some relationship between a statute authorizing Respondent to adopt rules licensing cardrooms and governing their operation and a rule defining poker, as contrasted to the present case where there is no relationship between the cited statutes and the challenged rule, but the St. Petersburg Kennel Club court held that the relationship was insufficient to support the definitional rule.

29. The Blair decision, supra, involves a definitional rule, which the court held was valid. The rule defines a statutory term, "willful," in determining the existence of campaign finance violations. Listing the statutes empowering the agency to "investigate and determine" violations of the law, the court reasoned that the agency had to "interpret and apply" the meaning of "willful" to discharge its clear statutory duties. Similarly, the Blair court determined that the definitional rule properly implemented the law because a statute predicated liability on a willful violation of the law.

30. The Blair holding is based on the close relationship between the object of agency regulation--the definition of "willful"--and the clear statutory assignment of duties to the agency to determine willful violations of campaign finance laws.

Without determining the meaning of "willful," the agency could not discharge any of these duties. The relationship between the object of agency regulation--the definition of poker--and the clear statutory assignment of duties to Respondent was more attenuated in St. Petersburg Kennel Club. In the present case, there is no relationship between the object of agency regulation--internal random number generators--and the statutory assignment of duties listed above; Respondent can meaningfully discharge each of these duties without requiring slot machine manufacturers or distributors to include a random number generator in each slot machine.

31. For the reasons set forth above, Respondent lacks the rulemaking authority to adopt the requirement of an internal random number generator in rule 61D-14.041(1).

32. For the reasons set forth above, the requirement of an internal random number generator in rule 61D-14.041(1) enlarges, modifies, and contravenes section 551.103(1)(c), (e), and (g), Florida Statutes.

33. Section 120.56(3)(b) provides:

> The administrative law judge may declare all or part of a rule invalid. The rule or part thereof declared invalid shall become void when the time for filing an appeal expires. The agency whose rule has been declared invalid in whole or part shall give notice of the decision in the Florida Administrative Weekly in the first available issue after the rule has become void.

ORDER

Based on the foregoing,

It is

ORDERED that the word, "internal," in Florida Administrative Code Rule 61D-14.041(1) is stricken as an invalid exercise of delegated legislative authority because of a lack of rulemaking authority to adopt a rule imposing this requirement and because the word, "internal" in this rule enlarges, modifies, and contravenes the law implemented.

DONE AND ORDERED this 7th day of April, 2011, in Tallahassee, Leon County, Florida.

____
ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of April, 2011.

COPIES FURNISHED:

John M. Lockwood, Esquire
Matthew J. Feil, Esquire
Gunster, Yoakley & Stewart, P.A.
215 South Monroe Street, Suite 618
Tallahassee, Florida 32301

Charles T. "Chip" Collette, Assistant General Counsel
Joseph M. Helton, Jr., Chief Attorney
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Marc W. Dunbar, Esquire
Joshua D. Aubuchon, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 South Monroe Street, 2nd Floor
Post Office Box 10095
Tallahassee, Florida 32302-2095

Layne Smith, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Ken Lawson, Secretary
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Milton Champion, Director
Division of Pari-Mutuel Wagering
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

NOTICE OF RIGHT OF JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review. 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.