

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

SOUTH MARION REAL ESTATE HOLDINGS,
LLC, D/B/A OXFORD DOWNS AND
DAROLD R. DONNELLY,

Petitioners,

vs.

Case No. 22-0968RX

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION, DIVISION OF
PARI-MUTUEL WAGERING,

Respondent.

_____ /

FINAL ORDER

This case is before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings (“DOAH”), based on the parties’ cross-motions for summary final order.

STATEMENT OF THE ISSUE

The issue for determination is whether Florida Administrative Code Rule 61D-11.005(5) is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On March 25, 2022, South Marion Real Estate Holdings, LLC, d/b/a Oxford Downs (“Oxford Downs”) and Darold R. Donnelly (“Mr. Donnelly”) filed a Petition alleging that rule 61D-11.005(5) is an invalid exercise of delegated legislative authority.

During a telephonic status conference on April 4, 2022, the parties agreed that there were no material facts in dispute and that the instant case could

be decided via a summary final order.¹ The undersigned accepted the parties' proposed pleading schedule and issued an Order on April 5, 2022, establishing April 29, 2022, as the deadline for the parties to submit motions for summary final order. The parties then had up to seven days to file responses to the opposition's motion for summary final order.

The parties filed timely Motions for Summary Final Order. Petitioners responded to the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering's ("the Division") Motion for Summary Final Order on May 6, 2022. The Division did not respond to Petitioners' Motion for Summary Final Order.

Unless stated otherwise, all statutory references shall be to the 2021 version of the Florida Statutes.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, stipulated facts, the entire record of this proceeding, and matters subject to official recognition, the following Findings of Fact are made:

1. Oxford Downs is a Florida limited liability company that owns and operates a pari-mutuel facility and cardroom in Marion County, Florida.

2. Section 849.086(2)(c), Florida Statutes, defines a "cardroom" as

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

¹ Section 120.57(1)(h), Florida Statutes (2021), provides that "[a]ny party to a proceeding in which an administrative law judge has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other information required by law to be contained in the final order."

a fee for participation by the operator of such facility. Authorized games and cardrooms do not constitute casino gaming operations.

3. Mr. Donnelly holds cardroom employee occupational license number 11022678 and is employed by Oxford Downs.

4. Section 849.086(6)(a) mandates that

[a] person employed or otherwise working in a cardroom as a cardroom manager, floor supervisor, pit boss, dealer, or any other activity related to cardroom operations while the facility is conducting card playing or games of dominoes must hold a valid cardroom employee occupational license issued by the [D]ivision. Food service, maintenance, and security employees with a current pari-mutuel occupational license and a current background check will not be required to have a cardroom employee occupational license.^[2]

5. The Division is the state agency charged with regulating the operation of pari-mutuel facilities and cardrooms in Florida. Section 550.0251, Florida Statutes, sets forth the Division's "powers and duties." Section 550.0251(12) provides that 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."

6. Section 849.086(4) further delineates the Division's authority over cardrooms. It states that the Division

² Section 849.086 authorizes cardrooms in Florida, and subsection (1) states that "[i]t 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 operators, 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 games against each other instead of against the house."

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.

(c) Review the books, accounts, and records of any current or former cardroom operator.

(d) Suspend or revoke any license or permit, after hearing, for any violation of the provisions of this section or the administrative rules adopted pursuant thereto.

(e) Take testimony, issue summons and subpoenas for any witness, and issue subpoenas duces tecum in connection with any matter within its jurisdiction.

(f) Monitor and ensure the proper collection of taxes and fees imposed by this section. Permitholder internal controls are mandated to ensure no compromise of state funds. To that end, a roaming division auditor will monitor and verify the cash flow and accounting of cardroom revenue for any given operating day.

7. The Division has adopted a series of rules pertaining to cardrooms. Rule 61D-11.005 is entitled "Prohibitions," and subsection (5) states that "[c]ardroom occupational licensees are prohibited from participating in authorized cardroom games at the cardroom facility where they are employed." This prohibition has been in place since at least May 5, 2004.

8. Rule 61D-11.005 cites sections 550.0251(12) and 849.086(4) as its rulemaking authority. The rule identifies section 849.086 as the law being implemented.

CONCLUSIONS OF LAW

9. DOAH has jurisdiction over the subject matter and the parties to this proceeding. § 120.56, Fla. Stat.

Standing

10. Section 120.56(1)(a) 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 the rule is an invalid exercise of delegated legislative authority.”

11. The Division stated in its Motion for Summary Final Order that it “does not contest Petitioners’ standing.” However, the Division’s declination to contest Petitioners’ standing does not resolve the issue. In an administrative context, standing is a matter of subject matter jurisdiction that a tribunal may raise sua sponte. *See Escambia Cnty. Sch. Bd. v. Warren*, 2022 WL 1101300 at *2 (Fla. 1st DCA 2022).

12. Rule 61D-11.005 regulates cardroom operators and employees, and those entities are subject to being penalized for failing to comply with the rule. *See* § 849.086(14)(a), Fla. Stat. (providing that the Division “may deny a license or the renewal thereof, or may suspend or revoke any license, when the applicant has: violated or failed to comply with the provisions of this section *or any rules adopted pursuant thereto*; knowingly caused, aided, abetted, or conspired with another to cause any person to violate this section *or any rules adopted pursuant thereto*; or obtained a license or permit by fraud, misrepresentation, or concealment; or if the holder of such license or permit is no longer eligible under this section.”)(emphasis added); § 849.086(14)(c), Fla. Stat. (providing that “[n]otwithstanding any other provision of this section, the [D]ivision may impose an administrative fine not

to exceed \$1,000 for each violation against any person who has violated or failed to comply with the provisions of this section *or any rules adopted pursuant thereto.*”(emphasis added).

13. Therefore, Oxford Downs and Mr. Donnelly have standing to challenge rule 61D-11.005(5). *See Cole Vision Corp. v. Dep’t of Bus. & Pro. Regul., Bd. of Optometry*, 688 So. 2d 404, 407 (Fla. 1st DCA 1997)(holding the appellants had standing by virtue of being “substantially affected” by a proposed rule “[b]ecause this rule purports to regulate appellants, and as a result potentially exposes them to legal action and monetary penalties ...”).

The Merits

14. “Duly promulgated rules are presumptively valid until invalidated, and the party challenging an administrative rule bears the burden to prove by a preponderance of the evidence that the rule is an invalid exercise of delegated legislative authority.” *Fla. Prepaid College Bd. v. Intuition College Savings Solutions, LLC*, 330 So. 3d 93, 97 (Fla. 1st DCA 2021).

15. Rulemaking is a legislative function, and the Florida Legislature “may specifically delegate, to some extent, its rulemaking authority to the executive branch to permit administration of legislative policy by an agency with the expertise and flexibility needed to deal with complex and fluid conditions.” *Whiley v. Scott*, 79 So. 3d 702, 711 (Fla. 2011).

16. A rule adopted by an agency amounts to an “invalid exercise of delegated legislative authority” if that rule “goes beyond the powers, functions, and duties delegated by the Legislature.” § 120.52(8), Fla. Stat.

17. Section 120.52(8) sets forth the grounds upon which a proposed or existing rule must be deemed an invalid exercise of delegated legislative authority. Pertinent to the instant case is section 120.52(8)(b) and (c). The former provides that a proposed or existing rule is an invalid exercise of delegated legislative authority if the agency responsible for the rule “has exceeded its grant of rulemaking authority.” The latter subsection states that

a proposed or existing rule is invalid if it “enlarges, modifies, or contravenes the specific provisions of law implemented.”

18. With regard to “rulemaking authority,” section 120.52(17) defines the term as “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.’” “[T]he authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific *enough*. Either the enabling statute authorizes the rule at issue or it does not. ... [T]his question is one that must be determined on a case-by-case basis.” *SW. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 599 (Fla. 1st DCA 2000). *See Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery, Inc.*, 808 So. 2d 243, 254 (Fla. 1st 2002)(stating that “the degree of specificity of the grant of authority is irrelevant.”)(superseded by statute on other grounds).

19. Therefore, it is unnecessary for the authorizing statute to explicitly delineate every conceivable subject matter within an agency’s rulemaking purview. *See Fla. Elections Comm’n v. Blair*, 52 So. 3d 9, 13-14 (Fla. 1st DCA 2010)(holding that “because section 106.26(1) specifically authorizes the Commission to adopt rules pursuant to which it will ‘consider’ sworn complaints, and because an evaluation of ‘willfulness’ is a necessary component of the consideration of the complaint, we conclude that the rule defining ‘willful’ clearly falls within the rulemaking authority provided by this statute.”); *Hanger Prosthetics and Orthotics, Inc. v. Dep’t of Health, Bd. of Orthotists and Prosthetists*, 948 So. 2d 980 (Fla. 1st DCA 2007)(stating “the Legislature has authorized the Board to implement rules governing the standards of practice for orthotists, prosthetists, and pedorthists under section 468.802. A licensed professional’s ‘direct supervision’ of unlicensed support personnel qualifies as a standard of practice. Consequently, the Board acted within its grant of rulemaking authority.”); *United Faculty of*

Fla. v. Fla. State Bd. of Educ., 157 So. 3d 514, 517 (Fla. 1st DCA 2015)(holding that “it is not necessary under *Save the Manatee* and its progeny for the statutes to delineate every aspect of tenure that the Board is authorized to address by rule; instead, all that is necessary is for the statutes to specifically authorize the Board to adopt rules for college faculty contracts and tenure, which the statutes clearly do.”).

20. In addition to being supported by specific rulemaking authority, a proposed or existing rule must also be implementing a specific statute. *See Ass’n of Fla. Cmty. Dev. v. Dep’t of Env’tl. Prot.*, 943 So. 2d 989 (Fla. 1st DCA 2006)(explaining that “[a] rule is an invalid exercise of delegated legislative authority when it enlarges, modifies, or contravenes the specific provision of law implemented. § 120.52(8)(c), Fla. Stat. (2005). Under section 120.52(8)(c), 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.”); *Hanger Prosthetics and Orthotics*, 948 So. 2d at 981 (holding that a proposed rule was valid and stating “[t]he Board’s proposed rule also does not enlarge, modify, or contravene the Legislature’s requirement that unlicensed professionals be given direct supervision. The Legislature has mandated that licensed professionals directly supervise the work they delegate to unlicensed support staff. *See* § 468.808, Fla. Stat. (2005). The proposed rule merely specifies what direct supervision entails in the particular setting addressed by the statute.”).

21. In the instant case, Petitioners argue that rule 61D-11.005 is an invalid exercise of delegated legislative authority under section 120.52(8)(b) because the Division lacks authority to adopt rule 61D-11.005 pursuant to statutes giving the Division the authority to regulate the operation of cardrooms. Petitioners also argue that rule 61D-11.005 is an invalid exercise of delegated legislative authority under section 120.52(8)(c) because nothing in section 849.086 authorizes the Division to prohibit occupational licensees from participating in authorized cardroom games where they are employed.

22. With regard to Petitioners' argument under section 120.52(8)(b), rule 61D-11.005 cites sections 550.0251(12) and 849.086(4) as the sources of its rulemaking authority. Section 550.0251(12) provides that 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." Section 849.086(4) authorizes the Division to "[a]dopt 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."

23. Distilled to its essence, Petitioners' argument on this point is that the authority to adopt rules relating to cardroom operations does not encompass the authority to adopt a rule prohibiting cardroom employees from participating in authorized cardroom games where they work. However, what is a more basic aspect of cardroom operations than deciding who may, and may not, patronize a cardroom? *See generally Warren*, 2022 WL 1101300 at *4 (Tanenbaum, J., concurring)(stating "[t]he appellees in this case administratively challenged a rule that reflected a policy of the school board that governed the hiring, firing, and disqualification of district employees; it appeared under the heading 'Recruitment and Selection of Personnel,' located within the chapter titled 'Human Resource Services.' They claimed that the rule exceeded the authority delegated to the school board by the Legislature. The problem with the claim is that there are few functions more closely associated with the operation, control, and supervision of schools than the management of their personnel.").

24. There is a clear, logical connection between regulating cardroom operations and prohibiting cardroom employees from gambling where they work. *See St. Petersburg Kennel Club v. Dep't of Bus. & Pro. Regul., Div. of Pari-Mutuel Wagering*, 719 So. 2d 1201, 1212 (Fla. 1st DCA 1998)(stating "[t]here is a clear logical connection between the law giving authority to the

Division to conduct investigations and monitor the operation of cardrooms and the rule requiring surveillance equipment.”).

25. Moreover, by specifying in section 849.086(4)(a) that the Division’s rulemaking authority was “not limited to” the items enumerated therein, it is readily apparent that the Florida Legislature intended to give the Division broad rulemaking authority over an industry that is to be “strictly” regulated. *See Dep’t of Elder Affairs v. Fla. Senior Living Ass’n*, 295 So. 3d 904, 913 (Fla. 1st DCA 2020)(stating “[s]ection 429.41(1)(h), Florida Statutes, gives DOEA the responsibility for ‘[t]he care and maintenance of residents.’ In particular, section 429.41(1)(h)7. lists ‘[r]esident records’ as an area of DOEA rulemaking. Furthermore, the statute clearly states that the areas delegated to DOEA for resident care and maintenance ‘include, *but is not limited to*’ the listed areas in section 429.41(h). Thus, DOEA was given flexible rulemaking authority in order to ensure the care of ALF residents.”)(emphasis in original). *See also* § 849.086(1), Fla. Stat. (stating that “[t]o 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.”).³

26. In sum, Petitioners argue that the Division’s rulemaking authority is not specific enough to encompass the prohibition at issue. However, “[a]s *Save the Manatee* makes clear, whether the grant of authority is specific enough is beside the point.” *Fla. Acad. of Cosmetic Surgery, Inc.*, 808 So. 2d at 253-54. “[T]he degree of specificity of the grant of rulemaking authority is irrelevant.” *Id.* at 254.

³ In addition to the foregoing, “it is well established that the legislature had broad discretion in regulating and controlling pari-mutuel wagering and gambling under its police powers.” *Div. of Pari-Mutuel Wagering, Dep’t of Bus. Reg. v. Fla. Horse Council, Inc.*, 464 So. 2d 128, 130 (Fla. 1985); *see also Jacques v. Dep’t of Bus. & Prof’l Reg., Div. of Pari-Mutuel Wagering*, 15 So. 3d 793, 797 (Fla. 1st DCA 2009)(stating “the legislature has broad discretion in regulating and controlling gambling under its police powers, and the state may exercise its police power in a more arbitrary manner because gambling is inherently dangerous to society.”).

27. With regard to Petitioners' argument under section 120.52(8)(c), rule 61D-11.005 cites section 849.086 as the law being implemented. As explained above, section 849.086(4)(a) gives the Division broad authority to regulate cardroom operations, and prohibiting cardroom employees from gambling where they are employed is logically and integrally related to cardroom operations.

28. Rather than enlarging, modifying, or contravening section 849.086, rule 61D-11.005 furthers the legislative directive for the Division to regulate cardroom operations. *See Ass'n of Fla Cmty. Developers v. Dep't of Envtl. Prot.*, 943 So. 2d 989, 992 (Fla. 1st DCA 2006)(noting that under section 120.52(8)(c), the test is whether a rule gives effect to a specific law to be implemented, and whether the rule implements or interprets specific powers and duties). Moreover, it is worth noting that rule 61D-11.005, by barring cardroom employees from gambling where they are employed, furthers the legislative mandate to advance public confidence in the integrity of authorized cardroom operations. *See* § 849.086(1) (noting “[t]o 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.”).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by South Marion Real Estate Holdings, LLC, d/b/a Oxford Downs and Darold R. Donnelly be DISMISSED.

DONE AND ORDERED this 6th day of June, 2022, in Tallahassee, Leon
County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
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Filed with the Clerk of the
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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 administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.