

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION
DIVISION OF PARI-MUTUEL WAGERING**

FILED	
<small>Department of Business and Professional Regulation Deputy Agency Clerk</small>	
CLERK	Brandon Nichols
Date	2/7/2013
File #	2013-00665

**WASHINGTON COUNTY KENNEL
CLUB, INC., d/b/a/ Ebro Greyhound Park,**

Petitioner,

v.

**DEPARTMENT OF BUSINESS &
PROFESSIONAL REGULATION, DIVISION
OF PARI-MUTUEL WAGERING,**

Respondent.

CASE No. 2012048225

VW 2012-365

FINAL ACTION ON PETITION FOR WAIVER

The Department of Business & Professional Regulation, Division of Pari-Mutuel Wagering (Division), files this final action on Washington County Kennel Club, Inc.'s "Petition for Variance or Waiver" pursuant to Section 120.542, Florida Statutes.

ISSUE

1. Petitioner Washington County Kennel Club, Inc., d/b/a Ebro Greyhound Park (Ebro), requests that it be granted a variance or waiver from the Rule 61D-11.005(6), Florida Administrative Code (F.A.C.), that prohibits cardroom occupational licensees "from participating in card games at the licensed facility where they are employed."

FACTS

2. Petitioner is a Florida pari-mutuel facility licensed to operate a cardroom pursuant to Section 849.086(5), Florida Statutes.

3. Pursuant to Sections 550.0251(12) and 849.086(4), Florida Statutes, the Division is authorized to regulate cardrooms and generally administer Florida's cardroom law, Section 849.086, Florida Statutes.

4. On November 15, 2012, Petitioner filed a "Petition for Variance or Waiver" (Petition) from the provisions of Rule 61D-11.005(6), F.A.C., which prohibits cardroom occupational licensees "from participating in card games at the licensed facility where they are employed." Petitioner sought the waiver because its cardroom occupational licensees, in being prohibited from playing card games at the Ebro facility, would have to travel some 80 miles to another licensed cardroom if they wished to play and gamble in legal card games. Waiver of the rule would allow Ebro cardroom occupational licensees to play card games at the Ebro facility itself, resulting in greater income to Petitioner which has suffered a loss of revenues in recent months.

5. Notice of the Petition was published on December 5, 2012, in Vol. 37, Issue No. 7, of the Florida Administrative Register (FAR). The notice required that any affected person file a petition to intervene within no more than 14 days of the FAR publication. No one intervened.

CONCLUSIONS OF LAW

6. Section 849.086(4), Florida Statutes, provides in relevant part:

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

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

And Section 550.0251(12), Florida Statutes, provides :

(12) 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.

7. Rule 61D-11.005(5), F.A.C., provides:

(5) Cardroom occupational licensees are prohibited from participating in authorized cardroom games at the cardroom facility where they are employed.

8. Finally, Section 120.542, Florida Statutes, provides in relevant part:

(1) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness.

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver.

(5) A person who is subject to regulation by an agency rule may file a petition with that agency, with a copy to the committee, requesting a variance or waiver from the agency's rule.

9. A "Waiver" is defined in Section 120.52(22), Florida Statutes, as "a decision by an agency not to apply all or part of a rule to a person who is subject to the rule."

10. Assuming without deciding that Petitioner is a "person subject to the rule" within the meaning of Section 120.542(1) & (2), Florida Statutes, nevertheless Section 120.542(2), Florida Statutes, requires that the person seeking a waiver or variance show that the rule creates a "substantial hardship" on them, personally, not on third persons who have not petitioned for a variance or waiver. Thus, the alleged hardship asserted on behalf of Petitioner's cardroom occupational licensees, in having to drive some 80 miles if they wish to legally play cards, cannot be considered.

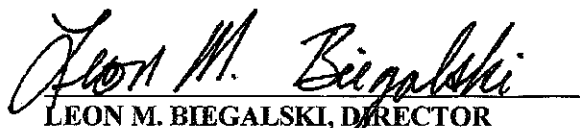
11. Section 120.542(2), Florida Statutes, also requires that the person seeking a variance or waiver provide a "demonstrated" showing of "economic, technological, legal, or other type of hardship." Petitioner has provided no figures or concrete estimates of any sort as to its present loss of revenues or the amount of increased revenue it would reasonably expect to re-

ceive if Rule 61D-11.005(5), F.A.C., were waived and Petitioner's cardroom occupational licenses were allowed to play cards in Petitioner's licensed facility. Thus, there has been no "demonstrated economic" hardship shown in this case.

ORDER

WHEREFORE, it is hereby ORDERED that request for a waiver of the requirements of current Rule 61D-11.005(5), F.A.C., shall be and is hereby DENIED.

DONE AND ORDERED this 7th day of February, 2013, in Tallahassee, Florida.



LEON M. BIEGALSKI, DIRECTOR
Division of Pari-Mutuel Wagering
Department of Business & Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1035

NOTICE OF RIGHT TO APPEAL UNLESS WAIVED

Any party to this proceeding has the right to seek its judicial review under § 120.68, Florida Statutes, by the filing of a notice of appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Agency Clerk, 1940 North Monroe Street, Tallahassee, Florida 32399-2202, and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notice of appeal must be filed (received) in the Office of the Agency Clerk within thirty days after the date this Order is filed with the Clerk.

CERTIFICATE OF SERVICE

I hereby certify this 7th day of February, 2013, that a true copy of the foregoing

“Final Action” has been served by Email upon the following to:

GARY R. RUTLEDGE, ESQ.

<gary@reuphlaw.com>

MICHAEL J. BARRY, ESQ.

<mbarry@reuphlaw.com>

Rutledge Ecenia, P.A.

Post Office Box 551

Tallahassee, Florida 32302-0551



AGENCY CLERK'S OFFICE

Department of Business & Professional Regulation

Email Copies Furnished:

Gary Rutledge <gary@reuphlaw.com>

Mike Barry <mbarry@reuphlaw.com>

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

FILED	
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WASHINGTON COUNTY KENNEL
CLUB, INC., d/b/a EBRO GREYHOUND
PARK,

Petitioner,

v.

Case No. **VW 2012-365**

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

Respondent.

PETITION FOR VARIANCE OR WAIVER
FROM RULE 61D-11.005(6), F.A.C.

Washington County Kennel Club, Inc., d/b/a Ebro Greyhound Park (the "Petitioner") hereby petitions the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the "Division") for a waiver or variance pursuant to section 120.542, F.S., and rule 28-104.002, F.A.C., and in support thereof states as follows:

Parties

1. The affected state agency is the State of Florida, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, 1940 North Monroe Street, Tallahassee, Florida 32399. The Division is the state agency authorized to administer section 849.086 and regulate the operation of cardrooms under the section in the manner provided by law. See § 849.086(4), Fla. Stat. (2010).

2. The Petitioner is a Florida corporation authorized to conduct business in Florida. The Petitioner owns and operates Ebro Greyhound Park, a facility authorized by the Division to

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conduct pari-mutuel wagering activities at 6558 Dog Track Road, Ebro, Florida 32437 ("Facility"). For purposes of this proceeding, the Petitioner's address is that of its undersigned counsel.

Background

3. The Petitioner is the holder of a valid pari-mutuel permit issued by the Division pursuant to chapter 550, F.S., for the conduct of greyhound racing ("Permit"). The Permit authorizes the Petitioner to conduct pari-mutuel wagering pursuant to chapter 550, F.S., at its Facility. The Petitioner conducts greyhound racing at the Facility pursuant to the Permit.

4. Pursuant to the Permit, the Petitioner is also the holder of a cardroom operator's license issued by the Division pursuant to section 849.086(5), F.S. ("License"). The License authorizes the Petitioner to operate a cardroom open to the public and to conduct authorized games therein at the Facility, pursuant to chapter 849, F.S. The games conducted in the cardroom are pari-mutuel in nature, in which players wager and compete against fellow players (i.e., poker) – as opposed to casino games, in which players wager and compete against the house (i.e., blackjack). A portion of the revenues from the cardroom activity is used to supplement purses of the live greyhound racing conducted at the Facility. The Petitioner makes money by collecting a fixed portion of total amounts wagered on card games and remits a 10% tax to the Division.

5. The Petitioner and the Facility are situated in a rural area in Northwest Florida. The closest pari-mutuel wagering and cardroom facilities to the Facility are located at an approximate distance of 83 miles (Gretna Racing) and 92 miles (Pensacola Greyhound), respectively. In recent months, cardroom revenues and tax revenues for the Facility have decreased significantly, due to a variety of factors including the Facility's remote location.

6. Many employees at the Petitioner's Facility, including cardroom occupational licensees, work and reside in the immediate vicinity of the Petitioner's Facility, and do not have the means to travel the over 80 miles necessary to visit another pari-mutuel facility. A sizeable portion of those employees enjoy playing card games and are therefore potential patrons of the Petitioner's cardroom. Due to the significant distances between the Facility and other pari-mutuel facilities, the only practical venue available for these employees to legally play and wager on card games is the Facility.

Applicable Law and Its Application to the Petitioner

7. Rule 61D-11.005(6), F.A.C., (the "Rule") states as follows:

Cardroom occupational licensees are prohibited from participating in card games, at the licensed cardroom facility where they are employed.

8. Section 120.542(1), F.S., provides the following:

Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation.

...
Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section.

9. Section 120.542(2), F.S., provides the following:

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness.

10. A "Variance" is defined under section 120.52(21), F.S., as "a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule." A "Waiver" is defined under section 120.52(22), F.S., as "a decision by an agency not to apply all or part of a rule to a person who is subject to the rule."

“Substantial hardship” is defined under that subsection as a “demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance.” “Principles of fairness,” as defined under that subsection, are “violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.”

11. As a result of this Rule and the particular way it uniquely and adversely impacts the Facility, the Petitioner is losing potential patrons and revenue, greyhound purses are smaller, and the Petitioner’s employees are losing the opportunity to engage in regulated pari-mutuel activity. As a consequence, some of the Petitioner’s employees may be tempted to resort to illicit gambling activity, including both illegal and authorized card games at unauthorized locations. In short, the Rule as applied in these circumstances imposes substantial economic hardship and results in fundamental unfairness, in that it deprives the Petitioner of business and revenues, diminishes purses, lowers tax revenues while presenting avoidable enforcement issues, and effectively deprives certain occupational licensees of the opportunity to engage in pari-mutuel activities enjoyed by all other residents of Florida.

Relief Requested

12. To avoid the continuing hardship and unfairness to both the Petitioner and its employees, the Petitioner is requesting a variance or waiver from rule 61D-14.005(6), F.A.C., pursuant to section 120.542, F.S., and rule 28-104.002, F.A.C. The Rule as applied to the Petitioner is unfair, needlessly burdensome, and completely unnecessary to accomplish the objectives of the underlying statutes.

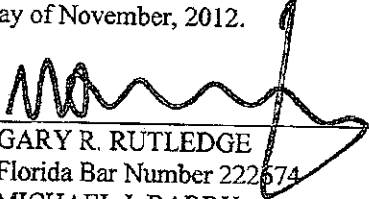
13. Strict application and enforcement of the Rule by the Division at the Petitioner’s Facility has led to unreasonable, unfair and unintended consequences in this instance. As a

result, the Rule imposes substantial hardship and violates principles of fairness, in several ways. First, while cardroom occupational licensees at most pari-mutuel facilities are at liberty to drive a few miles to a neighboring facility to participate in card games, the employees at the Petitioner's Facility are faced with 2-3 hours of driving to participate in such games. Second, at most facilities, the Rule simply diverts the wagering activity and dollars of such employees from one facility to another facility. In most markets, such as Broward and Miami-Dade counties, the pari-mutuel facilities enjoy a reciprocal benefit from their employees patronizing each other's cardrooms. For the Petitioner and its employees – because of the Facility's remote location – the Rule completely eliminates all wagering activity and revenue from cardroom occupational licensees, because there is no other place to go. Likewise, there is no reciprocal benefit to the Facility from incoming business of neighboring pari-mutuel employees, including cardroom occupational licensees, because of the great distances between pari-mutuel facilities in the Petitioner's area. As a result, the Rule affects the Petitioner and its employees "significantly different" than it affects other facilities and their employees located within much closer proximities of other pari-mutuel facilities.

14. Furthermore, the purpose of the underlying statutes, sections 550.0251(3) and 849.086(4), F.S, which is to maintain the integrity of gaming and protect the public at pari-mutuel facilities, can be achieved by means other than the literal and uniform application of the Rule to the Petitioner and the Facility. The various statutory and rule provisions governing the Petitioner provide ample protections to ensure the integrity of the gaming operations conducted at the Facility in the event cardroom employees are permitted to participate in card games at the Facility.

WHEREFORE, based on the foregoing and pursuant to section 120.542, F.S., and rule 28-104.002, F.A.C., the Petitioner requests the Division to promptly grant an immediate variance or waiver from rule 61D-11.005(6), F.A.C. The request submitted in this Petition is supplemental to any other relief that is or may become available under State law.

RESPECTFULLY SUBMITTED this 15th day of November, 2012.



GARY R. RUTLEDGE
Florida Bar Number 222674
MICHAEL J. BARRY
Florida Bar Number 646911
RUTLEDGE ECENIA, P. A.
Post Office Box 551 (32302)
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301
(850) 681-6788
(850) 681-6515 facsimile

ATTORNEYS FOR THE PETITIONER