

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO

FILED	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	5/7/2012
File #	2012-02930

IN RE:

PETITION FOR DECLARATORY STATEMENT BEFORE
THE FLORIDA DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION, DIVISION OF
ALCOHOLIC BEVERAGES AND TOBACCO,

On behalf of ASTOR POST NO. 9986 VETERANS OF
FOREIGN WARS OF THE UNITED STATES, INC.,

Petitioner.

DS 2011-098

DECLARATORY STATEMENT

This Declaratory Statement is rendered by the Director of the Division of Alcoholic Beverages and Tobacco (hereinafter "Division") pursuant to Section 120.565, Florida Statutes. The Petitioner, Astor Post No. 9986 Veterans of Foreign Wars of the United States, Inc. (hereinafter "Astor VFW"), has filed a Petition for Declaratory Statement, containing a statement of facts, and a discussion of relevant Florida law and administrative rules. A copy of the Petition for Declaratory Statement is attached hereto and incorporated by reference.

ISSUE PRESENTED

The Petitioners present the following issue to the Division:

Whether Florida's Beverage Law prohibits Astor VFW, holder of a valid Florida alcoholic beverage license, from renting equipment, property or any other thing of value from "industry members" not part of the alcoholic beverage industry, or conducting live or electronic contests sponsored thereby.

FACTS

1. On December 27, 2011, Petitioner filed with the Division a Petition for Declaratory Statement, thereby giving the Division ninety days to respond from the date of the petition. The Division renders its Findings of Fact on the basis of the information contained in the Petition for Declaratory Statement.

2. The conclusion of this Declaratory Statement is based on the facts described in Petitioner's Petition for Declaratory Statement (hereinafter "the Petition"), research by the Division, and the particular factual assertions described therein. All of the facts presented in the Petition were duly considered and form the basis for this Declaratory Statement. A summary of the facts stated in the Petition for Declaratory Statement is as follows:

Astor VFW is a private, membership-based organization and a duly licensed vendor of alcoholic beverages in the State of Florida. Petitioner is licensed to sell alcoholic beverages to its members, and also offers its members a variety of social activities and entertainment, including vending and amusement equipment.

In particular, Astor VFW is considering the lease of equipment that would sell phone time in connection with a sweepstakes. Phone time would be dispensed from a free-standing machine onto a ticket containing a phone number, along with an access code that would permit the purchaser to make phone calls. Phone time would be sold at a competitive market rate, and tickets would also contain free entries into a sweepstakes.

Members purchasing phone time would be able to use the same or nearby machines – all located on Astor VFW's premises – to reveal the results of their sweepstakes entries. Customers who obtained a winning entry would be able to redeem their entry on the premises, and prizes would include cash.

Astor VFW plans to lease this equipment as a fundraising measure, and expects that the lease agreement will provide it with a portion of the revenue generated from the machines. Astor VFW now seeks an opinion thereon.

CONCLUSIONS OF LAW

1. The Division has jurisdiction over this matter pursuant to Sections 120.565, 561.02, 561.08, 561.11, 561.42, Florida Statutes, and is responsible for the application and enforcement of Chapters 561, Florida Statutes.

2. Section 561.08, Florida Statutes empowers and directs the Division to enforce the provisions of the Beverage Law and perform such acts as may be necessary to carry out the provisions thereof. Pursuant to this authority, the Division is empowered to enforce the provisions of the Beverage Law and implement the rules necessary to carry out the purpose and intent of the Beverage Law statutes. Accordingly, it is the Division that construes and interprets the alcoholic beverage laws of the State of Florida and makes the determination as to whether they are applicable to a specific set of facts.

3. Petitioner Astor VFW is substantially affected by the statutory provisions cited above and has standing to seek this declaratory statement.

4. Section 120.565, Florida Statutes, provides:

Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

5. Rule 28-105.001, F.A.C., provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

6. Section 561.42(1), Florida Statutes, provides:

No manufacturer, distributor, importer, primary American source of supply, or brand owner or registrant of any of the beverages herein referred to, whether licensed or operating in this state or out-of-state, nor any broker, sales agent, or sales person thereof, shall have any financial interest, directly or indirectly, in the establishment or business of any vendor licensed under the Beverage Law; nor shall such manufacturer, distributor, importer, primary American source of supply, brand owner or brand registrant, or any broker, sales agent, or sales person thereof, assist any vendor by any gifts or loans of money or property of any description or by the giving of any rebates of any kind whatsoever. No licensed vendor shall accept, directly or indirectly, any gift or loan of money or property of any description or any rebates from any such manufacturer, distributor, importer, primary American source of supply, brand owner or brand registrant, or any broker, sales agent, or sales person thereof.

7. Rule 61A-1.010, F.A.C., provides:

(1) Industry members are prohibited from furnishing, supplying, giving, renting, or lending, to a vendor, any equipment, fixtures, furniture, furnishings, signs, supplies, credit, money, compensation, rebates, accumulated rebates, fees of any kind including slotting fees, services, property, or other thing of value of any description not included in the exceptions specified in Chapter 61A-1, F.A.C., or specifically authorized by Florida Statutes, to vendors or their employees or agents acting within their scope of employment. In addition, vendors and their employees or agents acting within the scope of employment are prohibited from accepting such forms of assistance. This prohibition against assisting any vendor includes engaging in cooperative advertising – participating in or paying for any advertising in cooperation with a vendor.

(2) As used in Rules 61A-1.010 through 61A-1.0108, F.A.C., “industry member” means manufacturer; distributor; importer; primary American source of supply; brand owner or registrant; and any broker, sales agent, or sales person of any of the aforementioned licensees.

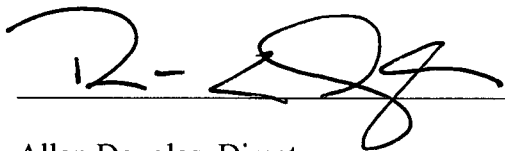
8. Rule 61A-1.0104, F.A.C., provides:
 - (3) Vendors shall not collect completed entry forms, and the selection of winners shall not occur at a vendor's place of business. Any completed entry forms deposited on the vendor's licensed premises shall be collected by the industry member. Live or electronic contests sponsored by industry members shall not be held at a vendor's place of business.
9. In accordance with Section 561.42, Florida Statutes, the Division interprets the phrase "industry members", as used in Rules 61A-1.010 and 61A-1.0104, F.A.C., to mean those alcoholic beverage manufacturers, distributors, importers, brand owners and primary American sources of supply referred to in 561.42, F.S. As used here, the Division interprets "industry members" to mean members of the alcoholic beverage industry.
10. In its proposed business model, Petitioner would lease equipment to provide phone time in connection with a sweepstakes, and conduct electronic contests related thereto. As such, provided Petitioner does not enter into this agreement with a member of the alcoholic beverage industry, Petitioner's proposed business model conforms to specific guidelines detailed in Rules 61A-1.010 and 61A-1.0104, F.A.C.

CONCLUSION

11. In conclusion, based upon the facts set out in the submitted Petition for Declaratory Statement, Petitioner's proposed business model conforms to the guidelines listed in Rules 61A-1.010 and 61A-1.0104, F.A.C., and in that respect, is valid under Florida Statutes Sec. 561.42.

12. The Division takes no position as to the legality of the sweepstakes arrangement specified in the Petition, or whether it constitutes gambling, lawful or otherwise, under Florida Law.
13. This conclusion is based on the facts described in the Petitioner's Petition for Declaratory Statement and legal research by the Division. Accordingly, this conclusion has no application in the event that the factual circumstances and/or relationships among the entities described herein are incorrect or change.

Dated this 4 day of May, 2012.

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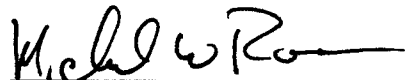
Allen Douglas, Director
Division of Alcoholic Beverages and Tobacco
1940 North Monroe Street
Tallahassee, Florida 32399-1020

RIGHT TO APPEAL

THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH SARAH L. WACHMAN, AGENCY CLERK FOR THE DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, WITHIN 30 DAYS OF THE RENDITION OF THIS DECLARATORY STATEMENT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Kelly B. Mathis and Adam F. Regar, 1200 Riverplace Boulevard, Suite 902, Jacksonville, Florida 32207 on this 7 day of May, 2012.



Michael W. Ross
Chief Attorney.

FILED	
Department of Business and Professional Regulation	
Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	12/27/2011
File #	

BEFORE THE FLORIDA DEPARTMENT OF BUSINESS
AND PROFESSIONAL REGULATION
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO

ASTOR POST NO. 9986 VETERANS
OF FOREIGN WARS OF THE UNITED
STATES, INC.

Petitioner,

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION
DIVISION OF ALCOHOLIC
BEVERAGES AND TOBACCO,

DS 2011-098

Respondent.

**PETITION FOR DECLARATORY STATEMENT BEFORE DIVISION OF
ALCOHOLIC BEVERAGES AND TOBACCO**

Petitioner, Astor Post No. 9986 Veterans of Foreign Wars of the United States, Inc. ("Astor VFW"), by and through its undersigned counsel and pursuant to Fla. Stat. § 120.565 and Florida Administrative Code 28-105.001 et seq., hereby files its Petition for Declaratory Statement before the Division of Alcoholic Beverages and Tobacco ("ABT") and says:

1. Petitioner, Astor VFW, holds an active and valid alcoholic beverages license issued by ABT, license type 11C, license number BEV4500935. Astor VFW's address is 55620 Veterans Dr., Astor, FL 32102, and its telephone number is 352-759-3514.

2. This Petition for a Declaratory Statement is sought regarding Florida Administrative Code chapter 61A-1, which states, in pertinent part:

61A-1.010 Tied House Evil Prohibition Against Vendor Assistance.

(1) Industry members are prohibited from furnishing, supplying, giving, renting, or lending, to a vendor, any equipment, fixtures, furniture, furnishings, signs, supplies, credit, money, compensation, rebates, accumulated rebates, fees of any kind including slotting fees, services, property, or other thing of value of any description not included in the exceptions specified in Chapter 61A-1, F.A.C., or specifically authorized by Florida Statutes, to vendors or their employees or agents acting within their scope of employment. In addition, vendors and their employees or agents acting within the scope of employment are prohibited from accepting such forms of assistance. This prohibition against assisting any vendor includes engaging in cooperative advertising – participating in or paying for any advertising in cooperation with a vendor.

(2) As used in Rules 61A-1.010- - 61A-1.0108 FAC, “industry member” means manufacturer; distributor; importer; primary American source of supply; brand owner or registrant; and any broker, sales agent, or sales person of any of the aforementioned licensees.

...

61A-1.0104 Consumer Sweepstakes, Drawings, or Contests Exception.

...

(3) Vendors shall not collect completed entry forms, and the selection of winners shall not occur at a vendor’s place of business. Any completed entry forms deposited on the vendor’s licensed premises shall be collected by the industry member. Live or electronic contests sponsored by industry members shall not be held at a vendor’s place of business.

Fla. Admin. Code 61A-1.

3. These regulations prohibit vendors from engaging in certain transactions with “industry members.” Those transactions include:

- a. “Renting” “equipment”, “property”, or any “other thing of value” from an industry member (unless expressly permitted by the rules); and

b. Conducting “live or electronic contests sponsored by industry members” on the vendor’s premises.

4. Petitioner Astor VFW is a private, membership-based organization and a vendor of alcoholic beverages. Petitioner is licensed to sell alcoholic beverages to its members. Petitioner also offers its members a variety of social activities and entertainments, including vending and amusement equipment.

In particular, Petitioner is considering in the future the lease of equipment that would sell phone time in connection with a sweepstakes (pursuant to Fla. Stat. § 849.094). The phone time would be dispensed from a free-standing machine onto a ticket containing a phone number and access code that would permit the purchaser to make phone calls. The phone time would be sold at a competitive market rate. The phone time tickets would also contain free entries into a sweepstakes.

Members purchasing phone time would be able to use the same or nearby machines (on Petitioner’s premises) to reveal the results of their sweepstakes entries. Customers who obtained a winning entry would be able to redeem their entry on the premises. Prizes would include cash.

Petitioner intends to lease this equipment as a fundraising measure and expects that the lease agreement will provide Petitioner with a portion of the revenue generated from the machines.

Petitioner wishes to avoid any violation of Fla. Admin. Code 61A-1, which addresses the rental of property by industry members to vendors as well as the conduct of contests and sweepstakes by industry members on a vendor’s premises. The definition of “industry member” in Fla. Admin. Code 61A-1.010, however, does not identify whether the manufacturer, distributor, importer, etc. must be one involved with the manufacture, distribution, importation,

etc. of *alcoholic beverages*. Thus, an interpretation by ABT that “industry member” includes entities other than those involved in the alcoholic beverages industry could render Petitioner in violation of this code provision. Conversely, an interpretation by ABT that “industry member” includes only those entities involved in the alcoholic beverages industry would render Petitioner in compliance with this code provision.

5. Petitioner believes that “industry member” refers solely to entities involved in the alcoholic beverages industry, but no opinion, statute, or rule offers clear guidance on the issue. No written opinions by ABT or the Florida courts exist, and the Florida legislature has not spoken on the matter. This matter represents an industry-wide issue, as most alcoholic beverages vendors enter into lease agreements for property with entities unaffiliated with the alcoholic beverages industry and/or permit contests, sweepstakes, or drawings on their premises.

6. Petitioner thus inquires whether “industry member” as defined in Fla. Admin. Code 61A-1.010 refers solely to entities involved in the sale, manufacture, and distribution of alcoholic beverages or whether the term includes entities engaged in businesses unrelated to the alcoholic beverages industry.

7. Petitioner notes that this Petition is its second request for a declaratory statement on this matter. Petitioner’s first Petition for Declaratory Statement was denied because the Division of Alcoholic Beverages and Tobacco found that

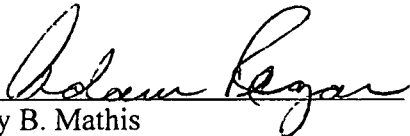
Petitioner has failed to state with particularity the petitioner’s set of circumstances.... Specifically, inadequate information given by petitioner as to the third party businesses who lease the equipment; the leasing agreements of the equipment; a specific description of the vending and amusement equipment both in function and form.

Likewise, the Division stated it is unable “to issue rulings on the propriety of conduct when that conduct has already occurred.” Petitioner has amended its Petition to address these matters.

WHEREFORE, Petitioner respectfully requests that ABT issue a Declaratory Statement resolving Petitioner's questions and doubts concerning the applicability of the aforementioned Administrative rules over which ABT has authority.

Dated this 21st day of December 2011.

MATHIS & MURPHY, P.A.

By: 
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