

**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	10/2/2012
File #	

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

Petitioner,

vs.

**DABT CASE NO.: 2012-036930
LICENSE NO.: BEV4500935**

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

Respondent.

DS 2012-067

**ORDER DISMISSING
PETITION FOR DECLARATORY STATEMENT**

This matter comes before me for Final Agency Order.

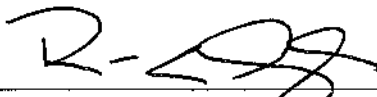
On August 22, 2012, the Division received a petition for declaratory statement from Petitioner, Astor Post No. 9986 Veterans of Foreign Wars of the United States, Inc. The Petitioner sought the agency's opinion as to whether the agency will adopt the Attorney General's opinion that nonprofit organizations cannot conduct sweepstakes pursuant to Florida Statutes on 849.094.

On August 30, 2012, the Division received a notice of withdrawal of the petition for declaratory statement from the Petitioner regarding the matter at hand.

Having fully considered the complete record of this case and pursuant to the request of the petitioner, it is hereby ORDERED that the petition for declaratory statement dated August 22, 2012, shall be dismissed.

DONE and **ORDERED** in Tallahassee, Florida this 2 day of Oct, 2012.

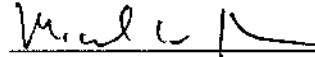



Robert Allen Douglas, Director
Division of Alcoholic Beverages & Tobacco

This *Order* of the Director of the Division of Alcoholic Beverages and Tobacco will become final unless judicial review is initiated within 30 days of the date of rendition. The rendition date is the date the *Order* is filed by the Agency Indexing Clerk. Judicial review may be commenced by filing an original *Notice of Appeal* with the Clerk of the Division of Alcoholic Beverages and Tobacco and a copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal, pursuant to Section 120.68, Florida Statutes and Rule 9.110, F.R.A.P. A transcript of the informal hearing may be obtained upon written request received no later than 60 days from the rendition date of this Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Adam Regar, 1200 Riverplace Boulevard, Suite 902, Jacksonville, Florida 32207 on this 2 day of October, 2012.



Michael W. Ross
Chief Attorney.

FILED	
Department of Business and Professional Regulation	
Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	8/30/2012
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 2012-067


Respondent.

NOTICE OF WITHDRAWAL
OF PETITION FOR DECLARATORY STATEMENT BEFORE THE 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 hereby withdraws its Petition for Declaratory Statement before the Division of Alcoholic Beverages and Tobacco ("Division"), which was filed on August 22, 2012.

Dated this 30th day of August 2012.

MATHIS & MURPHY, P.A.

By: 
Kelly B. Mathis
Florida Bar No.: 0768588
Adam F. Regar
Florida Bar No.: 0014637

1200 Riverplace Boulevard, Suite 902
Jacksonville, FL 32207
904/396-5500 (ph); 904/396-5560 (fax)
Attorneys for Astor Post No. 9986 Veterans
of Foreign Wars of the United States, Inc.

FILED	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	8/22/2012
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,

DS 2012-067

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

Respondent.

**PETITION FOR DECLARATORY STATEMENT BEFORE THE 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 ("Division") and says:

1. Petitioner, Astor VFW, holds an active and valid alcoholic beverages license issued by the Division, 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 the Division's interpretation of Florida Administrative Code chapter 61A-1, which states, in pertinent part:

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DBPR Agency Clerk

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

(1) Industry members may provide entry forms, rules, advertising materials, and a box or other similar container in which to collect completed entry forms to vendors. These advertising materials must be offered to all vendors who wish to participate in quantities reasonably calculated to accommodate the individual vendor's level of sales during the promotion period. The prize or giveaway shall not be placed on any vendor's licensed premises for display.

(2) Sweepstakes, drawings, and contests shall not require proof of purchase to enter and shall be open for the general public to participate; however, no vendor or vendor's employee or agent shall be eligible to participate or win. A means of entry may be provided with a purchased alcoholic beverage, so long as an alternative means of entry not requiring a purchase is made available.

(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.

61A-1.0105 Vendor's Property Included in Contests or Sweepstakes Exception.

(1) Industry members may administer consumer contests and sweepstakes that include a vendor's property as the prize. However, the contest or sweepstakes shall not be a joint venture with a vendor. Any contest or sweepstakes prizes purchased by the industry member shall be purchased at a cost which is not more than the cost charged to the general public. Any room rental fee paid by the industry member to the vendor shall be no more than the vendor's normal rate.

(2) Industry members may use the names and pictures of the vendor's properties related to prizes awarded to consumers. Any reference to a vendor, other than the identification of the specific property included in the contest or sweepstakes, shall be relatively inconspicuous in relation to the total advertisement or entry form.

3. This Petition is also sought regarding the Division's interpretation of Florida Statute § 561.29, which grants the Division the authority to:

revoke or suspend the license of any person holding a license under the Beverage Law, when it is determined or found by the division upon sufficient cause appearing of:

...
(a) Violation by the licensee ... of any laws of this state or of the United States....

[or]

(e) Violation by the licensee ... of any rule or rules promulgated by the division....

Fla. Stat. § 561.26(1). This interpretation includes the Division's use of Florida Statutes § 849.16 to support findings that licensees have violated Fla. Stat. § 561.26. Florida Statute § 849.16 states

§ 849.16. Machines or devices which come within provisions of law defined

(1) Any machine or device is a slot machine or device within the provisions of this chapter if it is one that is adapted for use in such a way that, as a result of the insertion of any piece of money, coin, or other object, such machine or device is caused to operate or may be operated and if the user, by reason of any element of chance or of any other outcome of such operation unpredictable by him or her, may:

(a) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value or which may be given in trade; or

(b) Secure additional chances or rights to use such machine, apparatus, or device, even though it may, in addition to any element of chance or unpredictable outcome of such operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.

Fla. Stat. § 849.16. The Division in the past has issued warnings against licensees, including Petitioner, alleging such violations. The Division, through its authority under Fla. Stat. § 561.26,

also may enforce violations of Fla. Stat. § 551.109(2), which prohibits possession of slot machines without a license. Florida Statute chapter 551 defines a slot machine as

any mechanical or electrical contrivance, terminal that may or may not be capable of downloading slot games from a central server system, machine, or other device that, upon insertion of a coin, bill, ticket, token, or similar object or upon payment of any consideration whatsoever, including the use of any electronic payment system except a credit card or debit card, is available to play or operate, the play or operation of which, whether by reason of skill or application of the element of chance or both, may deliver or entitle the person or persons playing or operating the contrivance, terminal, machine, or other device to receive cash, billets, tickets, tokens, or electronic credits to be exchanged for cash or to receive merchandise or anything of value whatsoever, whether the payoff is made automatically from the machine or manually. The term includes associated equipment necessary to conduct the operation of the contrivance, terminal, machine, or other device. Slot machines may use spinning reels, video displays, or both. A slot machine is not a "coin-operated amusement machine" as defined in s. 212.02(24) or an amusement game or machine as described in s. 849.161, and slot machines are not subject to the tax imposed by s. 212.05(1)(h).

Fla. Stat. § 551.102(8).

4. In 2011, Attorney General Pam Bondi submitted a briefing paper to the Senate Regulated Industries Committee in which the Attorney General took the following position regarding Florida's Game Promotion statute, Fla. Stat. § 849.094:

The term "Operator" is defined for purposes of section 849.094, Florida Statutes, in subsection (1)(b) to mean "any person, firm, corporation, or association or agent or employee thereof who promotes, operates, or conducts a game promotion, *except any charitable nonprofit organization.*" (e.s.) As the definition expressly excludes charitable nonprofit organizations, section 849.094, Florida Statutes, would not appear to constitute an exception to the state's gambling laws for nonprofit organizations and therefore could not be utilized by such entities to conduct sweepstakes or game promotions.

Briefing Paper, p. 2. A photocopy of the Attorney's General's briefing paper is attached as Exhibit A. In sum, the Attorney General stated that nonprofit organizations cannot conduct game promotions pursuant to Fla. Stat. § 849.094.

5. Petitioner Astor VFW is a nonprofit organization and a vendor of alcoholic beverages. Petitioner, in order to raise funds, is considering in the future selling internet access time in connection with an electronic game promotion¹ (pursuant to Fla. Stat. § 849.094). The internet time would be sold at a competitive market rate, and the sweepstakes entries would be provided for free in connection with the sale of the internet time. Participants could use computers, as more specifically described below, offered on Petitioner's premises to purchase and use internet access time as well as reveal the results of their sweepstakes entries. Patrons who obtained a winning entry would be able to redeem their entry on the premises. Prizes would include cash.

5. Petitioner wishes to avoid any violation of Fla. Admin. Code 61A-1 or of Fla. Stat. § 561.29, which address the right of Petitioner to conduct game promotions on its premises. While Fla. Admin. Code 61A-1 provides direction regarding how a licensee may conduct certain game promotions on its premises, it potentially conflicts with the Attorney General's opinion, which holds that a nonprofit organization, such as Petitioner, cannot conduct a sweepstakes at all. If the Division follows the Attorney General's opinion, then all nonprofit licensees will be precluded from conducting or promoting a sweepstakes. In addition, the Division could then find any nonprofit licensee conducting a sweepstakes to be in violation of Fla. Stat. § 561.29 and subject to license suspension or revocation, regardless of whether the licensee complied with Fla. Admin. Code 61A-1.0104 - 1.0105. Conversely, if the Division does not follow the Attorney

¹ Commonly referred to as a sweepstakes.

General's opinion, then nonprofit licensees may continue to conduct sweepstakes on their premises, assuming they comply with all other rules applicable to sweepstakes.

5. Petitioner recognizes that opinions of the Attorney General are not law and are not binding in a court of law; instead, they are advisory in nature. Abreau v. Cobb, 670 So. 2d 1010, 1012 (Fla. 3d DCA 1996). However, Petitioner also recognizes that, "Although an opinion of the Attorney General is not binding on a court, it is entitled to careful consideration and generally should be regarded as highly persuasive." State v. Family Bank of Hallandale, 623 So. 2d 474, 478 (Fla. 1993). No written opinions by the Division or the Florida courts exist and the Florida legislature has not spoken on this matter, which represents an industry-wide issue. Many Division licensees conduct or promote sweepstakes on their premises.

6. Petitioner thus inquires whether the Division will rely on the Attorney General's opinion that nonprofit organizations cannot conduct sweepstakes pursuant to Fla. Stat. § 849.094

to find that Petitioner's proposed sweepstakes is not permitted. Petitioner does not seek a declaratory statement regarding the lawfulness of sweepstakes generally or whether Petitioner's described activity constitutes gambling, lawful or otherwise, under Florida law. Rather, Petitioner's inquiry is solely whether the Division will adopt the Attorney General's position on this matter.

7. If the Division does not follow the Attorney General's opinion, Petitioner additionally inquires whether it may use equipment that operates in the following manner to conduct its game promotion. The proposed equipment consists of self-contained, individual kiosks, each of which will:


- a. operate upon the insertion of U.S. currency (dollar bills),

- b. provide the customer with a corresponding amount of internet time for the currency inserted,
- c. sell internet time at a competitive market rate,
- d. permit the customer to access the internet using the access time purchased,
- e. provide sweepstakes entries from a finite pool of entries contained on each machine, some of which may entitle a customer to a prize, and
- f. dispense tickets memorializing any prizes won, which the customer may redeem for cash from the licensee.

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

Dated this 20th day of August 2012.

MATHIS & MURPHY, P.A.

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