STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN R. WITMER, Petitioner, vs. DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING, Respondent.	)	CASE NO. 93-6549RX

FINAL ORDER

On December 13, 1993, a formal administrative hearing was held in this case in Tallahassee, Florida, before J. Lawrence Johnston, Hearing Officer, Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in these cases are whether the following rules promulgated by the Respondent, the Department of Business Regulation [now the Department of Business and Professional Regulation], Division of Pari-mutuel Wagering, are valid exercises of delegated legislative authority: F.A.C. Rules 61D-1.002(18) [formerly 7E-16.002(18)] and 61D-1.006 [formerly 7E-16.006]; and emergency rules 7ERR92-2(18) and 7EER92-6.

PRELIMINARY STATEMENT

On or about November 16, 1993, the Petitioner, John R. Witmer, filed a Petition to Determine Invalidity of Rules. It challenged the validity of F.A.C. Rules 61D-1.002(18) [formerly 7E-16.002(18)] and 61D-1.006 [formerly 7E-16.006], and emergency rules 7ERR92-2(18) and 7EER92-6. The case was assigned to the undersigned hearing officer on November 18, 1993, and final hearing was scheduled for December 13, 1993, at the Division of Administrative Hearings in Tallahassee.

On the morning of the hearing, the Respondent, the Department of Business and Professional Regulation, Division of Pari-mutuel Wagering (the Division) filed a Motion to Dismiss Challenge to Rule 7EER92-6 and 7E-16.006, Florida Administrative Code. The motion was based on the assertion that the Petitioner lacks standing. The motion was taken up at the beginning of the hearing, and ruling was reserved.

At the final hearing, the Petitioner called no witnesses but had Petitioner's Exhibits A through K admitted in evidence. The Department called three witnesses and had Respondent's Exhibits 1 through 3 admitted in evidence at the hearing. The Department also offered Respondent's Exhibits 4 and 5, and ruling was reserved on the Petitioner's objections. It is now ruled that the objections are overruled, and Respondent's Exhibits 4 and 5 are admitted into evidence.

The Department ordered the preparation of a transcript of the final hearing. The transcript was filed on January 7, 1994. Explicit rulings on the proposed findings of fact contained in the parties' proposed final orders may be found in the attached Appendix to Final Order, Case No. 93-6549RX.

On January 20, 1994, the Division filed a Motion for Partial Summary Final Order, to which the Petitioner responded in writing in opposition. Like the Motion to Dismiss Challenge to Rule 7EER92-6 and 7E-16.006, Florida Administrative Code, filed the day of the hearing, it was based on the assertion that the Petitioner lacks standing to challenge those rules. As the Petitioner points out in its response in opposition, both motions are now moot, as the issues were tried and this Final Order rules on them. The motions are therefore denied.

FINDINGS OF FACT

1. On or about September 30, 1991, the Petitioner, John R. Witmer, applied to the Respondent, the Department of Business Regulation (now the the Department of Business and Professional Regulation), Division of Pari-mutuel Wagering (the Division), for a three-year occupational license as a veterinarian. The license was issued with a scheduled expiration in 1994.

2. In October, 1993, the Division filed an Administrative Complaint alleging that the Petitioner violated emergency rule 7EER92-2(18) and F.A.C. Rule 61D-1.002(18) (formerly codified as F.A.C. Rule 7E-16.002(18)) on November 11, 1992, and April 2, 1993. The charges remain pending and have been referred to the Division of Administrative Hearings, where they have been given DOAH Case No. 93-6638.

3. On or about June 18, 1992, the Division released the legal opinion of its General Counsel that, if certain provisions of the statutes governing pari-mutuel wagering were allowed to sunset on July 1, 1992, the Division legally would be unable to regulate pari-mutuel wagering adequately, and pari-mutuel wagering would become illegal in Florida.

4. In response to the legal opinion, several tracks and jai alai frontons filed suit in circuit court seeking declaratory and injunctive relief. On or about June 30, 1992, a temporary injunction was issued in the court case requiring the parties to maintain the status quo in effect on June 30, 1992, until further order.

5. A final hearing in the court case was held on August 10, 1992. The court's Final Order held that the statutes that remained in effect after July 1, 1992, were "legally sufficient and not in violation of Article X, Section 7, of the Florida Constitution (1968) [a prohibition against lotteries not sanctioned by law]." The court dissolved the temporary injunction effective August 25, 1992.

6. After the court decision, notwithstanding the earlier legal opinion issued by its General Counsel, the Division determined that it had the necessary statutory authority to promulgate emergency rules to implement what remained of the pari-mutuel wagering statutes after July 1, 1992. Approximately $1.7 billion in cash was being wagered annually. Taxes collected on the wagers amounted to approximately $105 million a year. The possibilities for cheating and stealing to obtain a piece of the action illegally are endless, requiring effective regulation and constant vigilance. It is not unusual, for example, for cheaters to attempt to drug race animals illegally. As a result, some 85,000 urine and blood samples are taken from race animals annually.

7. It was determined that, under the remnants of the statutes that remained after July 1, 1992, there were three areas vital to the public's welfare for which sanctions or rulemaking, or both, were necessary: (1) regulation of the pari-mutuel wagering pool; (2) regulation relative to the collection of taxes; and (3) regulation of the administration of medicines and drugs to racing animals.

8. Fifty-four emergency rules, designated 7EER92-1 through 7EER92-54, were promulgated on or about August 24, 1992. (These compare to the 340 rules previously promulgated under the authority of, and to implement, the entirety of Chapter 550, Fla. Stat. (1991), in effect before July 1, 1992.) In addition, the Division requested that the tracks and frontons promulgate "in-house" rules in an attempt to maintain, as a practical matter, the status quo as of June 30, 1992, to the extent possible. On or about November 22, 1992, the emergency rules were replaced by permanent rules, designated F.A.C. Rule Chapter 7E-16, and F.A.C. Rule Chapter 7E-4 was repealed.

9. On or about December 16, 1992, the Legislature enacted Chapter 92-348, Laws of Florida (1992), a new comprehensive statute governing dog and horse racing pari-mutuel wagering. It replaced the prior law.

10. The final bill analysis and economic impact statement produced by the House of Representatives Committee on Regulated Industries referred to Chapter 92-348 as a "revision" of the law on the subject.

11. The Division suggested to the Senate Commerce Committee that an earlier Senate version of the bill contain a retroactive "savings clause" to specify that the Division would have jurisdiction to prosecute disciplinary proceedings against occupational licensees that were pending on July 1, 1992, under the Division's emergency rules and under the provisions of what would become Chapter 92-348. No such provision was included in Chapter 92-348.

12. On or about December 17, 1992, the Division transmitted to the Department of State, Bureau of Administrative Code, as "technical changes" under F.A.C. Rule 1S-1.002(9), "corrections" to the statutory authority for, and law implemented by, F.A.C. Rule Chapter 7E-16. The "corrections" substituted appropriate provisions from Chapter 92-348.

13. The Division interprets F.A.C. Rule 1S-1.002(9) to apply to changes in the statutory authority for, and law implemented by, rules.

14. F.A.C. Rule Chapter 7E-16 later was redesignated as F.A.C. Rule Chapter 61D-1.

15. Between July 1 and December 16, 1992, the Division issued some 11,000 occupational licenses and denied some 22 applications. During this time period, the Division collected some $400,000 in occupational license fees. The fees were part of the more than $800,000 collected in the fiscal year ending June 30, 1993.

16. During the period from July 1 to December 16, 1992, the Division dismissed more than 80 pending disciplinary matters out of concern for whether the Division still had authority to impose sanctions for the violations in question. In addition, during that time period, out of the same concerns, the Division declined to prosecute more than 260 other cases in which track judges or stewards had found violations.

CONCLUSIONS OF LAW

A. History of Pertinent Statutory and Rule Changes.

17. Prior to July 1, 1992, F.A.C. Rules 7E-4.024(18) and 7E-4.031 were some of the existing rules that had been promulgated by the Division of Pari-mutuel Wagering of the Department of Business Regulation (the Division) under Chapter 550, Fla. Stat. (1991), governing dog and horse racing pari-mutuel wagering.

18. F.A.C. Rule 7E-4.024(6) provided: "No person shall conspire with any other person for the commission of, or connive with any other person in any corrupt or fraudulent practice in relation to racing nor shall he commit such an act on his own account." It recited that it was promulgated under the authority of Section 550.02(3) of the Florida Statutes for purposes of implementing Sections 120.57, 120.58, 120.60, 550.02 and 550.24 of the Florida Statutes. Section 550.02(3)(a) gave the Division rulemaking authority generally "for the control, supervision, and direction of all applicants, permittees, and licensees and for the holding, conducting, and operating of all racetracks, race meets, and races held in this state . . .." Section 550.24 made it a crime for any person to influence or have any understanding or connivance with any person associated with or interested in the conduct of dog or horse racing pari-mutuel wagering to prearrange or predetermine the results of any race, including through administration of medication or drugs to a race animal or conspiracy to administer medication or drugs to a race animal.

19. F.A.C. Rule 7E-4.031 set out a comprehensive scheme for the issuance and regulation of occupational licenses for persons connected with racetracks. It recited that it was promulgated under the authority of Section 550.02(3) of the Florida Statutes for purposes of implementing Sections 550.02 and 550.10 of the Florida Statutes. Section 550.02 is described in the preceding paragraph. Section 550.10 required that every person connected with a racetrack purchase from the Division an occupational license, provided for occupational license fees, and authorized the Division to "deny, suspend, revoke, or place conditions or restrictions on any occupational license" for, among other things, violation of the provisions of chapter 550 or 551 of the Florida Statutes "or the rules and regulations of the division governing the conduct of persons connected with the racetracks."

20. Section 30 of Chapter 91-197, Laws of Florida (1991), repealed numerous sections of Chapter 550, Fla. Stat. (1991), governing dog and horse racing pari-mutuel wagering, including Sections 550.02 and 550.10, effective July 1, 1992.

21. Among the provisions of Chapter 550 that remained in effect after the Chapter 91-197 repeal took effect on July 1, 1992, were: parts of Section 550.09, providing for the assessment and payment of daily license fees and taxes on persons engaged in the business of conducting race meetings; Sections 550.13, 550.131 and 550.14, providing for the division and distribution of monies derived under what was left of the pari-mutuel wagering law; parts of Section 550.16, authorizing and regulating the sale of tickets or other evidences showing an interest in or a contribution to a pari-mutuel pool; Section 550.24, making it a crime for any person to influence or have any understanding or connivance with any person associated with or interested in the conduct of dog or horse racing pari-mutuel wagering to prearrange or predetermine the results of any race, including through administration of medication or drugs to a race animal or conspiracy to administer medication or drugs to a race animal; Section 550.2405, prohibiting the use of a controlled substance or alcohol by "any occupational licensees officiating at or participating in a race" and requiring occupational licensees to consent to submission to certain breath, blood and urine tests for the purpose of detecting a violation of the prohibition; Section 550.241, prohibiting the racing of animals with any drug, medication, stimulant, depressant, hypnotic, narcotic, local anesthetic, or drug-masking agent and authorizing both administrative action against licensees, including occupational licensees, who violate the statute and rulemaking to implement the statute; and Section 550.361, prohibiting bookmaking on the grounds or property of a permitholder of a dog or horse race track and denying persons convicted of bookmaking from entering such a track's premises. In addition, Section 120.633, Fla. Stat. (1991), remained in force and effect, exempting the proceedings of track stewards, judges, and boards of judges from the hearing and notice requirements of Chapter 120, Fla. Stat. (1991), when they hold hearings for the purpose of imposing fines or suspensions for violations of certain Division rules, including those: prohibiting interference with races; prohibiting the drugging or medicating of race animals; prohibiting the possession of paraphernalia that could be used for the prohibited drugging or medicating of race animals; and prohibiting prearranging the outcome of any race.

22. On or about August 24, 1992, the Division promulgated emergency rules governing dog and horse racing pari-mutuel wagering under what was left of Chapter 550. They included 7EER92-2(18) and 7EER92-6.

23. 7EER92-2(18) provided: "No person shall conspire with any other person for the commission of, or connive with any other person in any corrupt or fraudulent practice in relation to racing or jai alai nor shall he commit such an act on his own account." Except for the addition of the reference to jai alai, 7EER92-2(18) is the same as F.A.C. Rule 7E-4.024(6).

24. 7EER92-6 set out a comprehensive scheme for the issuance and regulation of occupational licenses for persons connected with racetracks. It validated occupational licenses issued prior to the promulgation of the emergency rules, and its fee structure for occupational licenses was the same as what was in the repealed Section 550.10, Fla. Stat. (1991).

25. Both emergency rules stated that they were promulgated under the authority of, and to implement, Sections 120.633, 550.16(1), and 550.241 of the Florida Statutes. 7EER92-6 stated that it also implemented the other subsections of Section 550.16.

26. Other emergency rules also were promulgated specifically to implement Sections 120.633, 550.16(1), and 550.241 of the Florida Statutes. Section 120.633 was specifically implemented by 7EER92-4. Section 550.16(1) was specifically implemented by 7EER92-31 and 7EER92-33 through 7EER92-37. Section 550.241 was specifically implemented by 7EER92-7 through 7EER92-9.

27. On or about November 22, 1992, the Division simultaneously repealed F.A.C. Rule Chapter 7E-4, including Rules 7E-4.024(6) and 7E-4.031, and promulgated F.A.C. Rules 7E-16.001 through 7E-16.004 and 7E-16.006 through 7E-16.054. The old rules were repealed "because the statutory authority for the rules was repealed during the last Legislative session." F.A.C. Rule 7E-16.002(18) is identical to emergency rule 7EER92-2(18). Like emergency rule 7EER92-6, F.A.C. Rule 7E-16.006 sets out a comprehensive scheme for the issuance and regulation of occupational licenses for persons connected with racetracks and is virtually identical to the emergency rule. It also validated occupational licenses issued prior to the promulgation of the emergency rules, and its fee structure for occupational licenses was the same as what was in the repealed Section 550.10, Fla. Stat. (1991).

28. Like the emergency rules they mimic, both F.A.C. Rules 7E-16.002(18) and 7E-16.006 state that they are promulgated under the authority of, and to implement, Sections 120.633, 550.16(1), and 550.241 of the Florida Statutes, and F.A.C. Rule 7E-16.006 states that it also implements the other subsections of Section 550.16.

29. As with the emergency rules, F.A.C. Rule Chapter 7E-16 rules also were promulgated specifically to implement Sections 120.633, 550.16(1), and 550.241 of the Florida Statutes. Section 120.633 was specifically implemented by F.A.C. Rule 7E-16.004. Section 550.16(1) was specifically implemented by F.A.C. Rules 7E-16.031 and 7E-16.033 through 7E-16.037. Section 550.241 was specifically implemented by 7E-16.007 through 7E-16.009.

30. On or about December 16, 1992, the Legislature enacted Chapter 92-348, Laws of Florida (1992), governing dog and horse racing pari-mutuel wagering.

31. Section 7 of Chapter 92-348 created a Section 550.0251 of the Florida Statutes. Like Section 550.02, Fla. Stat. (1991), the new law gave the Division rulemaking authority generally "for the control, supervision, and direction of all applicants, permittees, and licensees and for the holding, conducting, and

operating of all racetracks, race meets, and races held in this state . . .." At the same time, Section 67 purported to again repeal Section 550.02, Fla. Stat. (1991).

32. Section 16 of Chapter 92-348 created a new Section 550.105 of the Florida Statutes. Like Section 550.10, Fla. Stat. (1991), Section 16 of the new law required that each person connected with a racetrack purchase from the Division an occupational license, provided for occupational license fees, and authorized the Division to "deny, suspend, revoke, or place conditions or restrictions on any occupational license" for violation of the statutes, or the rules and regulations of the Division "governing the conduct of persons connected with racetracks." At the same time, Section 67 of the new law purported to again repeal Section 550.10, Fla. Stat. (1991).

33. Although the new Section 550.105, Fla. Stat. (Supp. 1992), was quite similar to the repealed Section 550.10, Fla. Stat. (1991), the two statutes differ in some respects. Under the new statute, the licensing scheme established a new category of restricted occupational licenses for persons not having access to certain specified areas of a track, including the mutuels or money room and the "backside" where the racing animals are kept. With the new licensing scheme came some new and different occupational license taxes. However, the Petitioner's license would remain an unrestricted license, as before the statutory changes, and the occupational license fee for it would remain the same.

34. Section 67 of Chapter 92-348 also repealed Sections 550.16 and 550.241, Fla. Stat. (1991).

35. On or about December 17, 1992, the Division filed a list of "technical changes" to be made to F.A.C. Rules 7E-16.002 through 7E-16.054 "to correct the Specific Authority and Law Implemented sections of these rules." The list changed the "Specific Authority" for F.A.C. Rule 7E-16.002 to Sections 120.633, 550.0251 and 550.155, Florida Statutes, and the "Law Implemented" to Sections 550.0251, 550.0425, 550.235, 550.24055, and 550.2415, Florida Statutes. The list also changed the "Specific Authority" for F.A.C. Rule 7E-16.006 to Sections 550.0251 and 550.155, Florida Statutes, and the "Law Implemented" to Section 550.105, Florida Statutes.

36. Later, the F.A.C. Rule Chapter 7E-16 was recodified as F.A.C. Rule Chapter 61D-1.

B. Standing.

37. In rule challenges such as these, the Petitioner has the burden of proving that he has "standing." See Dept. of Health and Rehabilitative Services v. Alice P., 367 So. 2d 1045, 1052 (Fla. 1st DCA 1979).

38. The Division concedes the Petitioner's standing to challenge emergency rule 7EER92-2(18) and F.A.C. Rule 61D-1.002(18) (formerly F.A.C. 7E-16.002(18)) but contends that the Petitioner has no standing to challenge emergency rule 7EER92-6 and F.A.C. Rule 61D-1.006 (formerly F.A.C. 7E-16.006). The Division's argument is that the Petitioner has not proven "injury in fact." See, e.g., Prof. Fire Fighters of Florida, Inc., et al., v. Dept. of Health and Rehabilitative Services, 396 So. 2d 1194 (Fla. 1st DCA 1981). The Division argues that the pari-mutuel occupational licensing scheme in the Division's emergency rule 7EER92-6 and F.A.C. Rule 61D-1.006 (formerly F.A.C. 7E-16.006) do not, in and of themselves, cause any "injury" to the Petitioner and that they do

not embody changes in the licensing scheme which are more "injurious" than the licensing scheme under the former rules. (The Division argues that the licensing scheme in the rules being challenged does not make any changes that will affect the Petitioner and that, to the contrary, by recognizing the validity of the Petitioner's license, it saves him occupational licensing fees he otherwise would have to pay for a new license.) Essentially, the same arguments form the bases of the Division's prehearing "Motion to Dismiss Challenge to Rule 7EER92.6 and 7E-16.006," ruling on which was reserved, and a posthearing "Motion for Partial Summary Final Order."

39. Notwithstanding the Division's arguments, and the language in some of the decisional law on which it is based, it is concluded that a person who is subject to a licensing scheme, such as the pari-mutuel occupational licensing scheme in the Division's emergency rule 7EER92-6 and F.A.C. Rule 61D-1.006 (formerly F.A.C. 7E-16.006), has standing to challenge the validity of the rules. So long as the rules apply to the person, it is not necessary to prove any more of an "injury in fact," and it is not necessary to prove that the rules embody changes in the licensing scheme which are more "injurious" than the licensing scheme under the former rules. It is concluded that the Petitioner has standing to challenge the rules to which he is subject, and the Division's motions arguing to the contrary are denied.

40. On the other hand, a person whose standing comes from being subject to a licensing scheme does not have standing to challenge the validity of rules to which he is not subject. While the Petitioner has standing to challenge the rules that apply to the occupational license to which he is subject, he does not have standing to challenge rules that do not apply to him.

C. Challenge to 7EER92-6 is Moot.

41. Under Section 120.54(9)(c), Fla. Stat. (1993), emergency rules are effective for a maximum of 90 days. 7EER92-6 has expired and has been replaced by permanent rules. The current rules set out the licensing scheme now in effect. The Petitioner's challenge to 7ERR92-6 is moot. (The only reason the challenge to 7EER92-2(18) is not also moot is that the Petitioner has been charged with having violated it during the time it was still effective.)

D. Burden of Proof in Rule Challenges.

42. In rule challenges such as these, the Petitioner has the burden of proving that the challenged rules are invalid. See Austin v. Dept. of Health and Rehabilitative Services, 495 So. 2d 777 (Fla. 1st DCA 1986).

E. Statutory Tests for Validity.

43. Section 120.56, Fla. Stat. (1993), provides for administrative challenges to agency rules on the ground that they are invalid exercises of delegated legislative authority. Section 120.52(8), Fla. Stat. (1993), provides:

> "Invalid exercise of delegated legislative authority" means action which 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 or more of the following apply:

(a) The agency has materially failed to follow the applicable rulemaking procedures set forth in s. 120.54;
(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(7);
(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);
(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or
(e) The rule is arbitrary or capricious.

Application of Section 120.52(8) to the peculiar circumstances of this case requires that the statutory rulemaking authority for, and law implemented by, the rules be ascertained.

F. Chapter 92-348 as Authority and Law Implemented.

44. One of the Division's arguments is that appropriate citations from Chapter 92-348 serve as the statutory authority for, and law implemented by, the challenged rules. Logically, this argument only can apply to F.A.C. Rules 61D-1.002(18) [formerly 7E-16.002(18)] and 61D-1.006 [formerly 7E-16.006], since the emergency rules already had expired by the time of the enactment of Chapter 92-348.

45. On or about December 17, 1992, the Division transmitted to the Department of State, Bureau of Administrative Code, as "technical changes" under F.A.C. Rule 1S-1.002(9), "corrections" to the statutory authority for, and law implemented by, F.A.C. Rule Chapter 7E-16. The Division argues that the "corrections" substituted the Chapter 92-348 provisions for the remnants of Chapter 550, Fla. Stat. (1991), left after the July 1, 1992, effective date of the repeals enacted in Chapter 91-197, Laws of Florida (1991), that previously were cited as the statutory authority for, and law implemented by, the challenged rules.

46. The Petitioner argues that the substitution of the Chapter 92-348 provisions for the remnants of Chapter 550, Fla. Stat. (1991), as the statutory authority for, and law implemented by, the challenged rules was improper under F.A.C. Rule 1S-1.002(9).

47. F.A.C. Rule 1S-1.002(9) provides:

> Technical changes such as non-substantive changes, punctuation, misspellings, corrections of tense, change of address or telephone number, or similar changes which do not affect the construction or meaning of the rules, may be accomplished by writing a letter to the Bureau of Administrative Code. Such changes do not require notification in the Florida Administrative Weekly.

(Emphasis added.)

48. The Petitioner did not introduce any evidence of an agency interpretation of the underlined language of F.A.C. Rule 1S-1.002(9)--either an interpretation by the Division or by the Department of State--that would support its contention that F.A.C. Rule 1S-1.002(9) does not apply to changes in the statutory authority for, and law implemented by, the challenged rules. To the contrary, the facts demontrate that the Division interprets F.A.C. Rule 1S-1.002(9) to apply to changes in the statutory authority for, and law implemented by, rules. In addition, the absence of any evidence that the Department of State, Bureau of Administrative Code, objected to the Division's technical changes could suggest that the Department of State's interpretation of F.A.C. Rule 1S-1.002(9) is in accord with the Division's.

49. The Petitioner argues that, notwithstanding the Division or even the Department of State interpretation of F.A.C. Rule 1S-1.002(9), the substituted Chapter 92-348 provisions cannot stand as the statutory authority for, and law implemented by, at least some of the rules because they are inconsistent with the rules in some respects, to wit: (1) F.A.C. Rule 61D-1.001 [formerly 7E-16.001] states that it implements Chapter 550, as amended by Chapter 91-197, Laws of Florida (1991), as effective July 1, 1992; (2) F.A.C. Rule 61D-1.006(1)(b) [formerly 7E-16.006(1)(b)] provides that "[p]ari-mutuel occupational licenses issued pursuant to this rule shall only be valid until the expiration of this emergency rule"; (3) F.A.C. Rule 61D-1.006(1)(c) [formerly 7E-16.006(1)(c)] provides for some occupational license taxes that significantly differ from those in Chapter 92-348; and (4) Chapter 92-348 also contains a new category of restricted occupational licenses and some license taxes that either are not addressed or covered in the rules or are inconsistent with the taxes set out in the rules.

50. As for discrepancies (3) and (4), they relate to occupational licenses to which the Petitioner is not subject. As explained in the section "A. Standing"of these Conclusions of Law, supra, the Petitioner has no standing to challenge those rules. In substance, the license and tax applicable to the Petitioner is not changed.

51. As for discrepancies (1) and (2), the Petitioner correctly points out that the change of statutory authority and law implemented affects the construction or meaning of those particular rules and that F.A.C. Rule 1S-1.002(9) does not authorize the purported "technical changes" to the statutory authority for, and law implemented by, those rules.

52. The Petitioner can point to no other rules whose construction or meaning are changed as a result of the change of statutory authority and law implemented. It is concluded that, except for F.A.C. Rules 61D-1.001 [formerly 7E-16.001] and 61D-1.006(1)(b) [formerly 7E-16.006(1)(b)], changes in the statutory authority for, and law implemented by, rules "do not affect the construction or meaning of the rules," and they would be considered "technical changes" under F.A.C. Rule 1S-1.002(9). The substituted provisions from Chapter 92-348 are sufficient to serve as the statutory authority for, and law implemented by, the rest of F.A.C. Rule Chapter 61D-1 [formerly 7E-16].

G. Repeal and Re-enactment Argument.

53. Another of the Division's arguments is in effect that the enactment of Chapter 92-348, Laws of Florida (1992), revived the portions of Chapter 550, Fla. Stat. (1991), that were repealed on the July 1, 1992, effective date of Chapter 91-197, Laws of Florida (1991). According to this argument, having been

revived, they can again serve as the statutory authority for, and law implemented by, existing F.A.C. Rules 61D-1.002(18) [formerly 7E-16.002(18)] and 61D-1.006 [formerly 7E-16.006], as well as the emergency rules.

54. The repeal and re-enactment argument is based on case law such as: McKibben v. Mallory, 293 So. 2d 48 (Fla. 1974); Solloway v. Dept. of Prof. Reg., 421 So. 2d 573 (Fla. 3d DCA 1982); and Goldenberg v. Dome Condominium Ass'n, 376 So. 2d 37 (Fla. 3d DCA 1979). But it is concluded that those decisions are not applicable to this case. They address the amendment of a statute by the simultaneous repeal of former statutory provisions and the re-enactment of a new, comprehensive statute incorporating the amendments. They hold essentially that, when such a simultaneous repeal and re-enactment neither specifies that the new statute shall have retroactive effect nor specifies that rights accruing under the former version of the statute (before the repeal and re-enactment) are extinguished, the Legislature is deemed to have intended for the reenacted provisions to remain in effect continuously and for rights accruing prior to the repeal and re-enactment to be fixed and preserved under the former version of the statute.

55. In this case, there is no question as to the Legislative intent under Chapter 91-197, Laws of Florida (1991). The Legislature clearly intended for the statutory repeals to take effect on July 1, 1992. Had the Legislature re-enacted the repealed provisions, with or without amendments, by July 1, 1992, simultaneous repeal and re-enactment could have been argued. Instead, the repeals took effect without any simultaneous re-enactment.

56. There are indications that the Legislature, in enacting Chapter 92-348, Laws of Florida (1992), considered it to be both a "revision" and a "reenactment" of Chapter 550, Fla. Stat. (1991). Chapter 92-348 also purported to re-repeal the provisions already repealed effective July 1, 1992. But it is concluded that those actions are not sufficient to establish the Legislature's intent to re-enact the repealed portions of Chapter 550 retroactive to July 1, 1992.

57. In addition to the inapplicability of the "simultaneous repeal and re-enactment" principle, the Division ignores other facts which undermine its argument. First, none of the rules in question cite to the repealed portions of Chapter 550, Fla. Stat. (1991), as their statutory authority or as the law implemented by them, as required by Section 120.54(7), Fla. Stat. (1993). Second, as to F.A.C. Rule Chapter 61D-1 [formerly 7E-16], the "technical changes" substituted provisions from Chapter 92-348 as the statutory authority for, and law implemented by, the rules, to the extent that F.A.C. Rule 1S-1.002(9) applies.

H. Remnants of Chapter 550, Fla. Stat. (1991) as Authority and Law Implemented.

58. As set out previously in these Conclusions of Law, the Division cannot resort either to Chapter 92-348 or to the provisions of Chapter 550, Fla. Stat. (1991), that were repealed by Chapter 91-197, Laws of Florida (1991), effective July 1, 1992, as the statutory authority for, and law implemented by, either: (1) F.A.C. Rule 61D-1.001 [formerly 7E-16.001], stating that it implements Chapter 550, as amended by Chapter 91-197, Laws of Florida (1991), as effective July 1, 1992; (2) F.A.C. Rule 61D-1.006(1)(b) [formerly 7E-16.006(1)(b)], providing that "[p]ari-mutuel occupational licenses issued pursuant to this rule shall only be valid until the expiration of this emergency rule"; or (3) emergency rule 7ERR92-2(18). For those rules, it must be determined whether the

remnants of Chapter 550, Fla. Stat. (1991), after the July 1, 1992, effective date of the repeals enacted in Chapter 91-197 are sufficient to serve that purpose.

59. After the repeals, the general rulemaking authority in Section 550.02(3)(a), Fla. Stat. (1991), was gone. So was the specific authority in Section 550.10, Fla. Stat. (1991), for the Division to issue and regulate occupational licenses. But, as was held in Fairfield Communities v. Florida Land and Water Adjudicatory Comm'n, 522 So. 2d 1012, 1014 (Fla. 1st DCA 1988):

> While it is true that no agency has inherent rulemaking authority, and any rulemaking authority which the legislature may validly delegate to the administrative agency is limited by the statute conferring the power, rulemaking authority may be implied to the extent necessary to properly implement a statute governing the agency's statutory duties and responsibilities. Department of Professional Regulation, Board of Professional Engineers v. Florida Society of Professional Land Surveyors, 475 So. 2d 939 (Fla. 1st DCA 1985).

It is concluded that, to the extent that the Division cannot resort to either Chapter 92-348 or the provisions of Chapter 550, Fla. Stat. (1991), that were repealed by Chapter 91-197, Laws of Florida (1991), effective July 1, 1992, the necessary authority for the Division's rules can be inferred under the circumstances of this case.

60. Even after the repeals, the remaining legislation contemplated the continuation of pari-mutuel wagering. Parts of Section 550.09 remained, providing for the assessment and payment of daily license fees and taxes on persons engaged in the business of conducting race meetings. Sections 550.13, 550.131 and 550.14 remained, providing for the division and distribution of monies derived under what was left of the pari-mutuel wagering law. Parts of Section 550.16 remained, authorizing and regulating the sale of tickets or other evidences showing an interest in or a contribution to a pari-mutuel pool.

61. Specific rulemaking authority with respect to occupational licenses remained in the form of Section 550.241, which prohibited the racing of animals with any drug, medication, stimulant, depressant, hypnotic, narcotic, local anesthetic, or drug-masking agent and authorizing both administrative action against licensees, including occupational licensees, who violate the statute and rulemaking to implement the statute.

62. There also was another specific reference to occupational licenses in Section 550.2405, which prohibited the use of a controlled substance or alcohol by "any occupational licensees officiating at or participating in a race" and required occupational licensees to consent to submission to certain breath, blood and urine tests for the purpose of detecting a violation of the prohibition.

63. While not mentioning occupational licenses, other remnants made it clear that neither occupational licensees nor anyone else would be permitted to engage in certain conduct. Section 550.24, Fla. Stat. (1991), made it a crime for any person to influence or have any understanding or connivance with any

person associated with or interested in the conduct of dog or horse racing pari-mutuel wagering to prearrange or predetermine the results of any race, including through administration of medication or drugs to a race animal or conspiracy to administer medication or drugs to a race animal. Section 550.361, prohibited bookmaking on the grounds or property of a permitholder of a dog or horse race track and denying persons convicted of bookmaking from entering such a track's premises. While specifically addressing the proceedings of track stewards, judges, and boards of judges, Section 120.633, Fla. Stat. (1991), referenced their hearings for the purpose of imposing fines or suspensions for violations of certain Division rules, including those: prohibiting interference with races; prohibiting the drugging or medicating of race animals; prohibiting the possession of paraphernalia that could be used for the prohibited drugging or medicating of race animals; and prohibiting prearranging the outcome of any race.

64. It is concluded that the authority for F.A.C. Rules 61D-1.001 [formerly 7E-16.001] and 61D-1.006(1)(b) [formerly 7E-16.006(1)(b)], as well as emergency rule 7EER92-2(18), can be inferred from the foregoing remnants of Chapter 550 which they implement.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law: (1) the Petitioner's challenge to the validity of 7ERR92-6 is dismissed as moot; and (2) the Petitioner's challenges to 7ERR92-2(18), F.A.C. Rule 61D-1.002(18) [formerly 7E-16.002(18)], and F.A.C. Rule 61D-1.006 [formerly 7E-16.006] are denied, and those rules are held to be valid.

DONE AND ORDERED this 4th day of February, 1994, in Tallahassee, Florida.

_____

J. LAWRENCE JOHNSTON
Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of February, 1994.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 93-6549RX

To comply with the requirements of Section 120.59(2), Fla. Stat. (1991), the following rulings are made on the parties' proposed findings of fact:

Petitioner's Proposed Findings of Fact.

1.-2. Accepted and incorporated to the extent not subordinate or unnecessary.
3.-12. Conclusion of law.
13. Accepted and incorporated.
14.-26. Conclusions of law.

27-29. Facts accepted but largely subordinate, unnecessary and conclusion of law.
30. Accepted and incorporated.
31. Conclusion of law.
32.-33. Argument and conclusion of law.
34. Accepted and incorporated to the extent not subordinate, unnecessary or conclusion of law.
35. Accepted and incorporated to the extent not subordinate or unnecessary.
36. Accepted and incorporated.
37.-38. Argument and conclusion of law.
39.-40. Conclusion of law.
41.-42. Argument and conclusion of law.

Respondent's Proposed Findings of Fact.

1. Accepted and incorporated.
2. Conclusion of law.
3. Accepted and incorporated to the extent not subordinate, unnecessary or conclusion of law.
4. Accepted and incorporated.
5. Last sentence, rejected as contrary to the greater weight of the evidence. (The press release referred only to "facilities" not parties to the lawsuit.) Otherwise, accepted and incorporated to the extent not subordinate or unnecessary.
6.-8. Accepted and incorporated to the extent not subordinate or unnecessary.
9. First sentence, accepted and incorporated. The second, third and fourth sentences are rejected as contrary to the greater weight of the evidence. The rest is accepted and incorporated to the extent not subordinate, unnecessary or conclusion of law.
10. Generally accepted but largely unnecessary; incorporated to the extent not subordinate or unnecessary.
11. Accepted and incorporated to the extent not subordinate or unnecessary.
12.-14. Accepted and incorporated to the extent not subordinate or unnecessary.
15. Accepted but subordinate and unnecessary.
16. First sentence, accepted but subordinate and unnecessary; the rest, conclusions of law.
17. Mostly argument and conclusions of law. The facts are accepted but are subordinate and unnecessary.
18. Facts are rejected as not proven. The rest is rejected as irrelevant and as argument and conclusion of law. Also unnecessary.
19. Accepted but irrelevant, subordinate and unnecessary.
20. Accepted and incorporated.

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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 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.