

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CALDER RACE COURSE, INC., a)
Florida corporation; TROPICAL)
PARK, INC., a Florida)
corporation; and GULFSTREAM)
RACING ASSOCIATION INC., a)
Florida corporation,)

Petitioners,)
and)

FLORIDA HORSEMEN'S BENEVOLENT)
AND PROTECTIVE ASSOCIATION, INC.,)
and FLORIDA VETERINARY MEDICAL)
ASSOCIATION,)

CASE NO. 96-0343RP

Intervenors,)

vs.)

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

Respondent.)

INVESTMENT CORPORATION OF PALM)
BEACH d/b/a PALM BEACH KENNEL CLUB)
and PALM BEACH JAI ALAI, WEST)
FLAGLER ASSOCIATES, LTD. d/b/a)
FLAGLER GREYHOUND TRACK, HARTMAN)
AND TYNER, INC. d/b/a HOLLYWOOD)
GREYHOUND TRACK, ASSOCIATED)
OUTDOOR CLUBS, INC. d/b/a TAMPA)
GREYHOUND TRACK, ST. PETERSBURG)
KENNEL CLUB, INC. d/b/a DERBY)
LANE, SOUTHWEST FLORIDA)
ENTERPRISES, INC. d/b/a BONITA-FT.)
MYERS GREYHOUND TRACK, BAYARD)
RACEWAYS, INC. d/b/a ST. JOHNS)
GREYHOUND PARK, JACKSONVILLE)
KENNEL CLUB, INC. d/b/a)
JACKSONVILLE KENNEL CLUB, AND)
ORANGE PARK KENNEL CLUB, INC.)
d/b/a ORANGE PARK KENNEL CLUB,)
SPORTS PALACE, INC. d/b/a)
MELBOURNE GREYHOUND TRACK,)
SEMINOLE RACING, INC. d/b/a)
DAYTONA BEACH KENNEL CLUB AND)
SEMINOLE GREYHOUND PARK,)
SANFORD-ORLANDO KENNEL CLUB, INC.)
d/b/a SANFORD-ORLANDO KENNEL CLUB,)
SARASOTA KENNEL CLUB, INC. d/b/a)
SARASOTA KENNEL CLUB, WASHINGTON)
COUNTY KENNEL CLUB, INC. d/b/a)
EBRO GREYHOUND TRACK,)

Petitioners,)
and)

FLORIDA HORSEMEN'S BENEVOLENT)
AND PROTECTIVE ASSOCIATION, INC.,)
and FLORIDA VETERINARY MEDICAL)
ASSOCIATION,)

Intervenors,)

vs.)

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

Respondent.)

CASE NO. 96-0344RP

TAMPA BAY DOWNS, INC.,)
)
 Petitioner,)
)
 and)
)
 FLORIDA HORSEMEN'S BENEVOLENT)
 AND PROTECTIVE ASSOCIATION, INC.,)
 and FLORIDA VETERINARY MEDICAL)
 ASSOCIATION,)
)
 Intervenor,)
)
 vs.)
)
 DEPARTMENT OF BUSINESS AND)
 PROFESSIONAL REGULATION, DIVISION)
 OF PARI-MUTUEL WAGERING,)
)
 Respondent.)

CASE NO. 96-0345RP

TAMPA BAY DOWNS, INC.,)
)
 Petitioner,)
)
 vs.)
)
 DEPARTMENT OF BUSINESS AND)
 PROFESSIONAL REGULATION, DIVISION)
 OF PARI-MUTUEL WAGERING,)
)
 Respondent.)

CASE NO. 96-2465RP

CALDER RACE COURSE, INC., a)
 Florida corporation; TROPICAL)
 PARK, INC., a Florida corporation;)
 and GULFSTREAM RACING ASSOCIATION,)
 INC., a Florida corporation,)
)
 Petitioners,)
)
 vs.)
)
 DEPARTMENT OF BUSINESS AND)
 PROFESSIONAL REGULATION, DIVISION)
 OF PARI-MUTUEL WAGERING,)
)
 Respondent.)

CASE NO. 96-2620RP

FINAL ORDER

In lieu of formal hearing, by stipulation of the parties, the issues in these consolidated cases, involving challenges to proposed rules, were presented for disposition on the record described below.

APPEARANCES

For Petitioners,
Calder Race Course, Inc.
Tropical Park, Inc., and
Gulfstream Park Racing
Association, Inc.

Wilbur E. Brewton, Esquire
Kelly B. Plante, Esquire
Gray Harris & Robinson P.A.
Suite 250
225 South Adams
Tallahassee, Florida 32301

David Romanik, Esquire
Romanik Lavin Huss & Paoli
1901 Harrison Street
Hollywood, Florida 33020

For Petitioners,
Investment Corporation of
Palm Beach et al.

Harry F.X. Purnell, Esquire
Rutledge Ecenia Underwood
Purnell & Hoffman P.A.
Post Office Box 551
Tallahassee, Florida 32302

For Respondent,
Division of Pari-Mutuel
Wagering

John J. Rimes, III, Esquire
Lee Ann Gustafson, Esquire
Assistant Attorney General
Department of Legal Affairs
PL-01, The Capitol
Tallahassee, Florida 32399

Alex Twedt, Esquire
Assistant General Counsel
Division of Pari-Mutuel
Wagering
725 South Bronough Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

The parties' stipulation filed March 21, 1997, states there are no disputed facts and describes these disputed issues of law:

a. whether proposed rule 61D-2.002 is an invalid exercise of delegated legislative authority;

b. whether proposed rule 61D-2.002 violates the 4th Amendment of the United States Constitution; and

c. whether proposed rule 61D-2.002 violates Article I, Sections 12 and 23 of the Florida Constitution.

PRELIMINARY STATEMENT

On December 29, 1995, the Division of Pari-Mutuel Wagering published in the Florida Law Weekly its proposed rules intended to regulate pari-mutuel wagering pursuant to Chapter 550, Florida Statutes. On January 19, 1996, Petitioners, Calder Race Course, Inc., Tropical Park, Inc. and Gulfstream Park Racing Association, Inc. (hereinafter Calder, Tropical and Gulfstream, respectively) filed a joint petition challenging thirty-seven of the proposed rules; Petitioner, Tampa Bay Downs, Inc. (Tampa Bay) filed a petition challenging fourteen of the proposed rules; and Petitioners, Investment Corporation of Palm Beach, et al., filed a petition challenging nine of the proposed rules. The cases were assigned and set for hearing.

On January 31, 1996, Petitioners and the Division of Pari-Mutuel Wagering agreed to consolidate the cases, to waive the 30-day hearing deadline, to postpone the hearing which was scheduled for February 21, 1996, and to hold the case in abeyance for settlement conferences.

On February 7, 1996, the Florida Veterinary Medical

Association (FVMA) filed a Petition for Leave to Intervene in the consolidated case seeking to challenge sixteen of the proposed rules. On February 13, 1996, the Florida Horsemen's Benevolent and Protective Association, Inc. (FHBPA) filed a Motion to Intervene in the consolidated case. An order entered March 6, 1996, granted the FHBPA and FVMA's petitions to intervene, but limited the issues in the case to those raised in the initial petitions filed on January 19, 1996.

An order on March 26, 1996, continued to hold the consolidated case in abeyance while the parties conducted settlement conferences.

On May 10, 1996, the Division of Pari-Mutuel Wagering published in the Florida Law Weekly a notice of change to numerous rules which were at issue in the consolidated case. On May 22, 1996, Tampa Bay filed a petition renewing its challenges. On May 31, 1996, Petitioners, Calder Race Course, Inc., Tropical Park, Inc. and Gulfstream Park Racing Association, Inc. filed a petition challenging thirty-three of the changed rules. These petitions were consolidated with the instant consolidated case, and the hearing was set for July 22-26, 1996. This hearing was later continued for good cause on the joint request of the parties.

On August 23, 1996, Petitioners, Calder, Tropical, Gulfstream, Tampa Bay, and Investment Corporation of Palm Beach, et al., entered into a Joint Stipulation for Partial Dismissal

dismissing all of the challenges to the proposed rules except the challenges to proposed rules 61D-2.002, 61D-2.003, 61D-2.005 and 61D-2.011. This stipulation effectively disposed of the challenges by Tampa Bay. On September 23, 1996, Intervenor, FVMA, filed a Notice of Joinder in the Joint Stipulation for Partial Dismissal. The hearing on the four remaining rules was scheduled for March 31, 1997.

On March 21, 1997, Petitioners, Calder, Tropical, Gulfstream and Investment Corporation of Palm Beach, et al., filed another Joint Motion for Partial Dismissal dismissing all of the challenges to the proposed rules except the challenge to proposed rule 61D-2.002, stipulated that there were no disputed factual issues remaining in the case, described stipulated exhibits and requested filing proposed final orders in lieu of a formal hearing. An order on March 31, 1997, canceled the hearing, and required that the parties file proposed final orders on or before May 1, 1997.

On April 16, 1996, the following stipulated exhibits were filed with the Division of Administrative Hearings:

1. Deposition of John Pozar, pages 1 through 61, including exhibits A, B and C to the deposition;
2. Deposition of C. Kenneth Dunn, pages 7 through 13;
3. Deposition of Douglas Donn, pages 1 through 26;
4. Deposition of Tony Otero, all pages;
5. Calder 1996 Employee Handbook;
6. Gulfstream Park Frontside Security Standard Operating Procedures 1994-1995 (3 pages); and
7. Gulfstream Park Stable Security Standard Operating Procedures 1994-1995 (13 pages).

These exhibits have been considered and the parties' proposed findings are substantially adopted.

FINDINGS OF FACT

1. Petitioners hold valid pari-mutuel permits and licenses to operate pari-mutuel facilities and conduct pari-mutuel wagering in the State of Florida, and are governed by Chapter 550, Florida Statutes, and the rules promulgated by the Respondent (Division) under Chapter 550, Florida Statutes.

The Proposed Rule and Statutory Underpinings

2. Proposed rule 61D-2.002 provides:

61D-2.002 Authorized Search

The Division, investigating violations of Chapter 550, or enforcing the provisions thereof, and the rules promulgated thereunder, shall have the power to permit persons authorized by the Division to search the person, or to enter and search the stables, rooms, lockers, vehicles, and automobiles or other places within a pari-mutuel wagering permitted facility at which a race, game meeting, or pari-mutuel wagering is held, or other permitted or licensed places where racing animals eligible to race at said race meeting are kept. Searches of persons shall be limited to those individuals licensed by the Division on a permitted facility. Each licensee, in accepting a license, does thereby consent to such search. Division personnel who are authorized to conduct searches are as follows: Division Investigators, Chief Inspectors, Division Veterinarians, Division Judges/Stewards, Regional Managers and Auditing Field Personnel. All Division personnel authorized to conduct searches must follow the Division of Pari-Mutuel Wagering's Search Guidelines, herein incorporated by reference.

3. The incorporated Search Guidelines provide:
 1. Searches are conducted by authorized personnel of the Division of Pari-Mutuel Wagering.
 2. Searches of individuals will be limited to occupational licensees, only on Pari-Mutuel facilities licensed to conduct pari-mutuel events by the Division of Pari-Mutuel Wagering.
 3. Routine searches are conducted on licensee's vehicles, stables, compounds, or other areas of a pari-mutuel facility, to determine that there are no violations of Statutes or Rules governing pari-mutuel wagering, and are not limited to drug related violations.
 4. The persons and areas of routine searches shall be randomly selected. However, all licensees shall be subject to the search process, and care must be taken to ensure this process is not used to abuse the rights of any one individual. To ensure fairness to all participants, the following procedure will be followed:
 - a. An Inspection/Search Report Form will be prepared on all searches, to include the name of the subject, the area(s) inspected, and the findings. If there are no violations, it should be so noted. If there are violations, they shall be listed, and what action was taken.
 - b. Inspection/Search reports will be kept on file for each facility, and will be periodically reviewed.
 5. Searches of barns, and kennels will only be conducted in the presence of the trainer, or a person of authority representing the trainer, or the stable/kennel operator. Exceptions, [sic] are cases where the stable or kennel is unsecured, with no one in attendance, and drugs, medications or

paraphernalia or other contraband are observed in plain view, or there is a reason to believe that contraband will be removed if the search is not carried out immediately. The search will then be conducted only under the following circumstances:

a. [sic] A witness, other than bureau personnel, is present. A greyhound or horseman's representative, a Steward/Judge, the Chief Inspector, or the Security Chief, or one of his representatives.

6. On Searches that are the result of a drug positive, reported violations, or as a result of an investigation, a report of investigations shall be prepared, and the Search report shall be attached as a supplement to the report.

7. On all cases where drugs, contraband, or evidence is confiscated, a case will be opened, and a copy of the search report, Report of Investigation, and a copy of the Property receipt will be attached to the case file.

4. Proposed rule 61D-2.002 cites section 550.0251(3), Florida Statutes, as the specific authority, and section 550.0251, Florida Statutes, generally, as the law implemented by the proposed rule.

5. Section 550.0251(3), Florida Statutes, provides:

(3) The division shall adopt reasonable rules 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. Such rules must be uniform in application and effect, and the duty of exercising this control and power is made mandatory upon the division.

6. Section 550.0251(3), Florida Statutes, is the general rulemaking authority of the Division of Pari-Mutuel Wagering. There is nothing in its text which addresses searches and seizure by the Division.

7. Proposed rule 61D-2.002 cites no other statute as the specific authority for the rule.

8. Section 550.0251, Florida Statutes, the "law implemented", is entitled "The powers and duties of the Division of Pari-mutuel Wagering of the Department of Business and Professional Regulation". The Division argues that certain provisions within that section are implemented by the proposed rule.

9. Section 550.0251(4), Florida Statutes, provides:

(4) The division may take testimony concerning any matter within its jurisdiction and issue summons and subpoenas for any witness and subpoena duces tecum in connection with any matter within the jurisdiction of the division under its seal and signed by the director.

10. Section 550.0251(5), Florida Statutes, grants the Division the authority to promulgate rules concerning the testing of occupational licenseholders for controlled substances or alcohol.

11. Chapter 550.0251(9), Florida Statutes, authorizes the Division to conduct investigations in enforcing Chapter 550, Florida Statutes, and also defines an active investigation as an investigation being conducted with "a reasonable, good faith

belief that it could lead to an administrative, civil or criminal action" by the appropriate authorities.

12. Section 550.0251(11), Florida Statutes, requires that the Division shall supervise and regulate the welfare of racing animals at pari-mutuel facilities.

13. Those subsections do not expressly authorize the Division to conduct the activities contemplated by its proposed rule.

Practices by the Division

14. The Division uses routine searches to locate drugs or other contraband, including mechanical devices used to affect the performance of an animal. The proposed rule would permit a strip search of an individual, but pat-downs are most common. Drugs and drug paraphernalia and illegal electric devices have been uncovered in these searches.

15. Training of Division investigators in the Division's policies and procedures is primarily on-the-job training. All of the investigators have some law enforcement background. Under the proposed rule Division personnel authorized to conduct searches are not limited to Division investigators.

16. The Division considers random searches an important function within the Division's responsibility to prevent individuals from violating Chapter 550, Florida Statutes.

17. The Division, while not required by the rule, generally involves personnel of the licensee in the searches. Members of

the Florida Thoroughbred Breeders' and Horsemen's Association are often invited on random barn inspections because they make good witnesses. Security personnel hired by the tracks also conduct random searches under procedures adopted by the facilities.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the instant action pursuant to Section 120.56, Florida Statutes. (Supp. 1996)

19. It is undisputed that all the petitioners have standing pursuant 120.56, Florida Statutes, which provides that any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

20. Section 120.52(8), Florida Statutes (Supp. 1996), describes "invalid exercise":

(8) "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 of the following applies:

(a) The agency has materially failed to follow the applicable rulemaking procedures and requirements set forth in this chapter;

(b) The agency has exceeded its grant of rulemaking authority, citation of which is required by section 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)1.;

(d) The rule is vague, fails to establish

adequate standards for agency decisions, or vest unbridled discretion in the agency;

(e) The rule is arbitrary or capricious;

(f) The rule is not supported by competent substantial evidence; or

(g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of least costly alternatives that substantially accomplish the statutory objective.

21. Both Section 120.52(8), and Section 120.536(1), Florida Statutes, (Supp. 1996) provide that:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have the authority to adopt a rule only because it is reasonably related to the purpose of the enabling statute and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

22. Prior to the 1996 amendments to Chapter 120, Florida Statutes, courts held that an agency's rulemaking authority may be implied to the extent necessary to properly implement 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, 942 (Fla. 1st DCA 1985). Thus, in the past, where the enabling provisions of a statute simply stated that an agency "may make

such rules and regulation as may be necessary to carry out the provisions of this Act", regulations were valid as long as they were reasonably related to the purposes of the enabling legislation, and not arbitrary and capricious. Florida Beverage Corp. v. Wynne, 306 So. 2d 200, 202 (Fla. 1st DCA 1975).

However, this legal principle was expressly repealed by the 1996 amendments to section 120.52(8), and by the creation of section 120.536(1), Florida Statutes.

23. The agency now has the burden of proving that a proposed rule is not an invalid exercise of delegated legislative authority when challenged by a petition pursuant to section 120.56(2), Florida Statutes (Supp. 1996).

24. The 1996 amendments to Chapter 120, Florida Statutes, apply in the instant case. Life Care Centers of America, Inc. v. Sawyers Care Center, Inc., 683 So.2d 609, (Fla. 1st DCA 1996), Florida Ass'n of Blood Banks v. Board of Clinical Laboratory Personnel, DOAH case no. 96-4335 (April 2, 1997).

25. The Division may no longer rely on prior authority which upheld a predecessor of proposed rule 61D-2.002. In Federman v. State Dept. of Business Regulation, Division of Pari-Mutuel Wagering, 414 So.2d 28 (Fla. 3rd DCA 1982), the court affirmed orders of the Division of Administrative Hearings which approved rules authorizing random searches within the confines of a pari-mutuel permit holder's premises. The court in Federman relied in turn on Solimena v. State of Florida, Dept. Business

Regulation, Division of Pari-Mutuel Wagering, 402 So.2d 1240 (Fla 3rd DCA 1981), rev. den. 412 So.2d 470 (Fla. 1982), where the court validated an absolute insurer rule as reasonably related to the Division's broad duties to supervise and control pari-mutuel wagering.

26. As provided in the 1996 amendments to Chapter 120, discussed above, "reasonably related" or implied authority is no longer sufficient. However reasonable the proposed rule may be, there is no specific authority in Chapter 550 for the rule, and it therefore constitutes an invalid exercise of delegated legislative authority as described in section 120.52(8)(b) and (c), Florida Statutes (Supp. 1996).

27. A grant of specific legislative authority is needed for the Division's search rule. An example of such authority is found in Chapter 562, Florida Statutes, governing a different industry "pervasively and completely regulated": the liquor industry. There, in section 562.41, Florida Statutes, the legislature has provided:

(5) Licensees, by the acceptance of their license, agree that their places of business shall always be subject to be inspected and searched without search warrants by the authorized employees of the division and also by sheriffs, deputy sheriffs, and police officers during business hours or at any other time such premises are occupied by the licensee or other persons.

28. Although constitutional claims in a proposed rule challenge are cognizable, see, Department of Environmental

Regulation v. Leon County, 344 So.2d 297 (Fla. 1st DCA 1977);
Cortes v. State Board of Regents, 655 So.2d 132 (Fla. 1st DCA
1995), it is unnecessary to reach those claims, as the proposed
rule must fall on statutory grounds as concluded above.¹

ORDER

Based on the foregoing, it is hereby

ORDERED: Proposed rule 61D-2.002 is an invalid exercise of
delegated legislative authority.

DONE and ORDERED this 13th day of June 1997 in Tallahassee,
Leon County, Florida.

MARY CLARK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(904) 488-9675 SUNCOM 278-9675
Fax Filing (904) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of June 1997.

COPIES FURNISHED:

Wilbur E. Brewton, Esquire
Kelly Brewton Plante, Esquire
Gray Harris and Robinson
Suite 250
225 South Adams Street
Tallahassee, Florida 32301

Gary R. Rutledge, Esquire
Harold F. X. Purnell, Esquire
Rutledge Ecenia Underwood

¹ It is unnecessary, for example to compare the text of the similar prior rule that was upheld against a constitutional challenge in Federman, supra, with proposed rule 61D-2.002.

Purnell and Hoffman, P.A.
Post Office Box 551
Tallahassee, Florida 32302-0551

Howell L. Ferguson, Esquire
Cindy L. Bartin, Esquire
Landers and Parsons
Post Office Box 271
Tallahassee, Florida 32302-0271

Alexander H. Twedt, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1007

John J. Rimes, III, Esquire
M. Catherine Lannon, Esquire
Lee Ann Gustafson, Esquire
Office of the Attorney General
Department of Legal Affairs
PL-01, The Capitol
Tallahassee, Florida 32399-1050

Bruce David Green, Esquire
600 South Andrews Avenue, Suite 400
Fort Lauderdale, Florida 33301

Michael P. Donaldson, Esquire
Carlton Fields Ward Emmanuel
Smith and Cutler, P.A.
Post Office Drawer 190
Tallahassee, Florida 32302-0190

David S. Romanik, Esquire
Romanik Lavin Huss and Paoli
Post Office Box 1040
Hollywood, Florida 33022-1040

Lynda L. Goodgame, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Deborah R. Miller, Director
Division of Pari-Mutuel Wagering
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Carroll Webb, Executive Director
Administrative Procedure Committee
120 Holland Building
Tallahassee, Florida 32399-1300

Liz Cloud, Chief
Bureau of Administrative Code
The Elliott Building
Tallahassee, Florida 32399-0250

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 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.