STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CALDER RACE COURSE, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-3026RP
	)	
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on October 15, 2004, in Tallahassee, Florida, before Susan B. Harrell,[1] a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

Whether proposed rules 61D-7.021(5)(f) and 61D-7.021(5)(g) are invalid exercises of legislative delegated authority pursuant to Subsection 120.52(8), Florida Statutes (2004),[2] and, if so, whether Petitioner is entitled to an award of costs and attorney's fees pursuant to Subsection 120.595(2), Florida Statutes.

PRELIMINARY STATEMENT

On August 26, 2004, Petitioner, Calder Race Course, Inc. (Calder), filed a Petition for Administrative Hearing, challenging the validity of proposed rule 61D-7.021 of Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Department). Calder filed a Motion for Leave to Amend Petition for Administrative Hearing on September 8, 2004. The motion was granted, and the Amended Petition for Administrative Hearing was deemed filed on September 10, 2004.

Calder filed a Motion for Official Recognition, requesting that official recognition be taken of Chapter 550, Florida Statutes (2003), and Florida Administrative Code Rule Chapter 61D-7. The motion was granted.

The parties entered into a Joint Prehearing Stipulation, in which they stipulated to certain facts and issues of law contained in Sections E and F, respectively, of the Joint

Prehearing Stipulation. Those facts and agreed issues of law have been incorporated in this Final Order.

At the final hearing the parties submitted Joint Exhibits 1 through 5, which were admitted in evidence. Calder called James Hakemoller and Dian Stoess as its witnesses and submitted Petitioner's Exhibits 1, 3, 3A, and 4, which were admitted in evidence. The Department did not call any witnesses, and submitted Respondent's Exhibits 1 through 3, which were admitted in evidence.

The Transcript was filed on November 15, 2004. The parties agreed to file their proposed final orders within ten days of the filing of the Transcript. On November 15, 2004, the Department filed an Agreed Motion for Extension to File Proposed Orders, requesting the time for filing proposed orders be extended to November 30, 2004. The request was granted. The parties timely filed their proposed orders.

FINDINGS OF FACT

1. Calder is a Florida corporation and a pari-mutuel permitholder permitted and licensed by the Department pursuant to Chapter 550, Florida Statutes.

2. Calder seeks to challenge proposed amendments to Florida Administrative Code Rule 61D-7.021. Specifically, Calder challenges Subsection (5)(f), as noticed in the Florida Administrative Weekly, Volume 30, Number 32, August 6, 2004, and

Subsection (5)(g), as noticed in the Florida Administrative Weekly, Volume 30, Number 21, May 21, 2004.[3] The challenged amendments shall be referred to as the "Proposed Rules." The Proposed Rules provide:

> (f) For tickets cashed more than 30 days after the purchase of the ticket, the ticket may not be cashed at any type of patron-operated machine or terminal. The totalisator system must be configured to instruct patrons on how to cash the ticket.
> (g) The totalisator system must have the ability to identify such tickets and indicate to a teller that the ticket falls within this category.

3. Calder is a licensed and permitted pari-mutuel facility which sells tickets and uses totalisator machines, and the Proposed Rules would govern the operation of such facility. The Proposed Rules have the effect of directly regulating the operation of Calder's pari-mutuel facility, and, as such, Calder is substantially affected by the Proposed Rules. The parties have stipulated that Calder "may properly challenge both Proposed Rules 61D-7.021(5)(f) and 61D-7.021(5)(g)."

4. A pari-mutuel ticket evidences participation in a pari-mutuel pool. A winning or refundable pari-mutuel ticket belongs to the purchaser and may be claimed by the purchaser for a period of one year after the date the pari-mutuel ticket was issued. An "outs" or "outs ticket" is a winning or refundable pari-mutuel ticket which is not redeemed. If a ticket remains

unclaimed, uncashed, or abandoned after one year from the date of issuance, such uncashed ticket escheats to the state unless the ticket was for a live race held by a thoroughbred permitholder such as Calder, in which case the funds are retained by the permitholder conducting the race.

5. A totalisator machine is "the computer system used to accumulate wagers, record sales, calculate payoffs, and display wagering data on a display device that is located at a pari-mutuel facility." § 550.002(36), Fla. Stat.

6. The Department was prompted to begin the rulemaking process for the Proposed Rules by two major cases involving fraud, one Florida case and one national case. The Florida case involved two totalisator employees named Dubinsky and Thompson, who allegedly accessed outs ticket information in the totalisator's central computer system, counterfeited outs tickets based on the information, and cashed the tickets at self-service machines at two pari-mutuel wagering facilities. The fraudulent conduct involved approximately $13,000. In the Florida case the fraudulent tickets were cashed several months after the tickets were said to have been issued. The fraud came to light when the ticketholder who held the true ticket attempted to cash the ticket, but could not because the fraudulent ticket had been cashed.

7. The national case also involved a totalisator employee who cashed fraudulent outs tickets. In the national case, the fraudulent tickets were cashed less than 30 days after the date the tickets were purportedly issued.

8. The purpose of the Proposed Rules is to deter the cashing of fraudulent tickets. The Department received comments from AmTote International, a totalisator company, at the rule workshop held during the rulemaking process and received written comments submitted by AmTote International after the workshop, indicating that the majority of tickets are cashed within six to nine days after the date of issuance. The older a ticket gets the less likely it becomes that the ticket will be cashed, and the less likely that it becomes that the cashing of a fraudulent ticket would be revealed by the true owner attempting to cash the ticket.

9. Staff of the Department felt that by requiring that outs tickets older than 30 days be cashed by a live person, a thief would be deterred because he would be dealing with a person rather than a machine. The only thing that the self-service machine requires to redeem a ticket is a bar code, so it would be possible to submit a ticket containing nothing but the bar code and receive a voucher which could be submitted to a teller for money.[4] If the fraudulent ticket looks different in

anyway from a valid ticket, a teller may be able to spot the difference and question the transaction.

10. Calder argues that the way to deter the fraud which has occurred is to stop totalisator employees from being able to print fraudulent tickets. However, the Department is also concerned about computer hackers potentially getting into the computer system which contains the outs tickets numbers and copying the bar code which could be submitted to a self-service machine. By regulating the method of cashing outs tickets, the Department is attempting to deter fraud by totalisator employees and others who may be able to access outs tickets information which could be used in producing counterfeit tickets.

11. During the rule making process, the Department held a workshop, received written comments from the public, and held a hearing to receive comments from the public after the Proposed Rules were first noticed. The Department considered the comments it received and modified the Proposed Rules as noticed in the Notice of Change published on August 6, 2004, to accommodate some of the comments.

12. Calder did not submit a good faith, written proposal for a lower cost regulatory alternative within 21 days after the notice of the Proposed Rules was published in the Florida Administrative Weekly on May 21, 2004, or after the Notice of Change was published.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.56(1) and 120.56(2), Fla. Stat.

14. Calder has challenged the validity of the Proposed Rules and has the burden of going forward and stating its objections to the proposed rules. § 120.56(2)(a), Fla. Stat. Calder alleges that the Proposed Rules are invalid exercises of delegated legislative authority pursuant to Subsection 120.52(8), Florida Statutes, in that the Department exceeded its grant of rulemaking authority; that the Proposed Rules enlarge, modify, or contravene the laws implemented; and that the Proposed Rules are arbitrary and capricious. The Department has the burden to prove by a preponderance of the evidence that the Proposed Rules are not an invalid delegation of legislative authority as to the objections raised. § 120.56(2)(a), Fla. Stat.

15. Subsection 120.52(8), Florida Statutes, provides that a rule is an invalid exercise of delegated legislative authority if the agency promulgating the rule has exceeded its grant of rulemaking authority and further provides:

> 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 or interpret

> the specific powers and duties generated 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 legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, 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 implementing or interpreting the specific powers and duties conferred by the same statute.

16. In Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, (Fla. 1st DCA 2000), the court discussed the statutory requirement that rules must implement or interpret specific powers and duties granted by the enabling statute.

> In the absence of a special statutory definition, we may assume that the word "specific" was used according to the ordinary dictionary definition. The ordinary meaning of the term "specific" is "limiting or limited; specifying or specified; precise, definite, [or] explicit." "Specific" is used as an adjective in the 1999 version of section 120.52(8) to modify the phrase "powers and duties." In the context of the entire sentence, it is clear that the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute. Otherwise, the rule is not a valid exercise of delegated legislative authority. . . . [T]he term "specific" was not used in the 1999 version of the statute as a synonym for the term

> "detailed." . . . The new law gives the agencies authority to "implement or interpret" specific powers and duties contained in the enabling statute. A rule that is used to implement or carry out a directive will necessarily contain language more detailed than that used in the directive itself. Likewise, the use of the term "interpret" suggests that a rule will be more detailed than the applicable enabling statute. There would be no need for interpretation if all of the details were contained in the statute itself.
>
> It follows that the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Either the enabling statute authorizes the rule at issue or it does not. . . [T]his question is one that must be determined on a case-by-case basis. (citations omitted)

Id. at 599.

17. The Proposed Rules list Subsections 550.025(3), (7), 550.155(1), and 550.495(4), (5), Florida Statutes, as the specific authority for the Proposed Rules and Sections 550.251, 550.155, 550.2633, and 550.495, Florida Statutes, as the laws being implemented.

18. Subsections 550.025(3) and (7), Florida Statutes, provide:

> (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 their application and

> effect, and the duty of exercising this control and power is made mandatory upon the division.
>
> * * *
>
> (7) The division may oversee the making of, and distribution from all pari-mutuel pools.

19. Subsection 550.155(1), Florida Statutes, provides:

> (1) Wagering on the results of a horserace, dograce, or on the scores or points of a jai alai game and the sale of tickets or other evidences showing an interest in or a contribution to a pari-mutuel pool are allowed within the enclosure of any pari-mutuel facility licensed and conducted under this chapter but are not allowed elsewhere in this state, must be supervised by the division, and are subject to such reasonable rules that the division prescribes.

20. Subsection 550.495(4), Florida Statutes, provides that "[e]ach totalisator company shall conduct operations in accordance with rules adopted by the division, in such form, content, and frequency as the division by rule determines."

21. The Proposed Rules deal with the method of cashing tickets more than 30 days after their purchase and the requirements of totalisator systems to identify such tickets. The Department has the authority to adopt reasonable rules that govern the regulation of racetracks, that govern wagering and the sale of tickets, and that control, supervise, and direct all permittees and licensees. Specifically, the Department is given the authority to oversee the distribution from all pari-mutuel pools.

22. Subsection 550.155(3), Florida Statutes, requires that a pari-mutuel pool be redistributed to the contributors, i.e. the ticketholders, after the takeouts and breaks are deducted. The permitholders, having control of the money in the pari-mutuel pool pursuant to Subsection 550.2633, Florida Statutes, are the entities which redistribute the pari-mutuel pool to the contributors. The cashing of a ticket is a distribution of a pari-mutuel fund. It is done at the racetracks, either through a machine furnished by the permitholders or by personnel hired by the permitholders. Thus, the Department has the authority to adopt rules which deal with the cashing of tickets by permitholders at race tracks. Subsection 550.495(4), Florida Statutes, authorizes the Department to promulgate rules governing the operations of the totalisator companies relating to the cashing of tickets.

23. Calder alleges that the Proposed Rules are invalid because they exceed, enlarge, or modify the laws implemented. Calder argues that the Department cannot prohibit tickets that are over 30 days old from being cashed at a patron-operated machine or terminal because the only statutory time frames connected with cashing tickets are contained in Sections 550.1645 and 550.2633, Florida Statutes. Those statutes provide that tickets which are not cashed within a year of the purchase are no longer valid, and the money or

property represented by the ticket will escheat to the state or will be paid to others as set forth in Section 550.2633, Florida Statutes. "Uncashed tickets and breaks on live racing conducted by thoroughbred permitholders shall be retained by the permitholder conducting the live race." § 550.2633(3), Fla. Stat.

24. The statutes cited by Calder do not deal with the methods through which tickets may be cashed, only with the period for which a ticket is valid. It does not prohibit the Department from requiring certain tickets to be cashed by a live person rather than by a patron-operated device. The Proposed Rules do not enlarge, exceed, or modify the laws implemented.

25. Calder claims that the Proposed Rules are arbitrary and capricious. "A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational . . . ." § 120.52(8)(e), Fla. Stat.; Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243 (Fla. 1st DCA 2002); Board of Trustees of the Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359 (Fla. 1st DCA 1995).

26. The Proposed Rules are neither arbitrary nor capricious. The purpose of the Proposed Rules is to deter fraud, and it cannot be said that the Proposed Rules will not deter fraud. Requiring a thief to confront a live teller

without knowing whether the valid ticket has been cashed could deter fraud. It is not necessary that the method sought by the Department to deter fraud be the only method which could be used nor does it matter that there may be methods which others feel may be more effective. If the record supports the rule, the rule cannot be arbitrary or capricious. See General Telephone Co. of Florida v. Florida Public Service Commission, 446 So. 2d 1063, 1067 (Fla. 1984).

27. The Department held a workshop and a public hearing and received written and verbal comments from the public, including a totalisator company, and representatives of pari-mutuel facilities. The comments were considered by the Department, so it cannot be said that the Proposed Rules were made without thought. The fraud case which occurred in Florida and prompted the promulgation of the Proposed Rules occurred several months after the valid tickets had been issued, and self-service machines were used to redeem the tickets. Thus, it cannot be said that the Proposed Rules were promulgated without reason or are irrational.

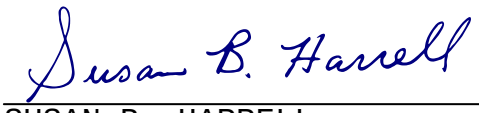
28. The Department has established that the Proposed Rules are valid exercises of delegated legislative authority.

FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the Amended Petition for Administrative Hearing is DISMISSED.

DONE AND ORDERED this 2nd day of February, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 2nd day of February, 2005.

ENDNOTES

1/ At the time of the final hearing, Administrative Law Judge Susan B. Harrell was named Susan B. Kirkland.

2/ Unless otherwise indicated all references in this Final Order are to the Florida Statutes shall be to the 2004 version.

3/ Subsections 5(f) and (g) were originally noticed in the Administrative Law Weekly, Volume 30, Number 21, May 21, 2004. A Notice of Changes was published in the Administrative Law Weekly, Volume 30, Number 32, August 6, 2004, in which changes were made to Subsection (5)(f), but not to Subsection (5)(g). Calder filed its petition challenging the proposed amendments on

August 26, 2004. The Department has not raised the issue of whether Calder's challenge to Subsection (5)(g) is timely since the subsection was not challenged when it was noticed on May 21, 2004, and the subsection was not changed by the Notice of Changes published on August 6, 2004. Thus, the issue of timeliness will not be addressed.

4/ The self-service machines do not actually give cash for the tickets, but do give vouchers which may be redeemed by a teller for cash. The voucher that is given would be the same for fraudulent tickets as well as valid tickets. Thus, the teller could not tell if the voucher were for a fraudulent ticket or a valid ticket.

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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 the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a 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.