

Department of Business and Professional Regulation
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By: Brandon M. Nichol

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF PARI-MUTUEL WAGERING

FILED
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DIVISION OF
ADMINISTRATIVE
HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF PARI-MUTUEL)
WAGERING,)
)
Petitioner,)
)
vs.)
)
JOSE PARADELO,)
)
Respondent.)
)

DBPR Case No. 2004053858
DOAH Case No. 06-0736PL

FINAL ORDER

Pursuant to notice, a formal hearing was conducted in this case on May 2, 2006, in Ocala, Florida, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Stefan Thomas Hoffer, Esquire
Department of Business and
Professional Regulation
Division of Pari-Mutuel Wagering
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Larry Collins, Esquire
4326 Northeast County Highway 329
Anthony, Florida 32617

STATEMENT OF THE ISSUE

Whether Petitioner committed the offenses alleged in the Administrative Complaint and, if so, what discipline should be imposed against Respondent's Pari-Mutuel Wagering Occupational License?

PRELIMINARY STATEMENT

On December 14, 2005, Petitioner issued an Administrative Complaint against Respondent which charged Respondent with falsifying his license application in violation of Sections 559.791 and 550.105(10), Florida Statutes. Respondent disputed the material facts in the Administrative Complaint and requested a hearing pursuant to Section 120.57(1), Florida Statutes.

Petitioner transmitted the case to the Division of Administrative Hearings on or about February 28, 2006. The case was assigned to Administrative Law Judge ("ALJ") Charles C. Adams. On March 28, 2006, Judge Adams issued a Notice of Hearing scheduling the final hearing for May 2, 2006.

Prior to the hearing, Petitioner instituted discovery. Petitioner sought to shorten the time for responses to the discovery. On April 4, 2006, an Order was entered requiring Respondent to provide answers and responses to the pending discovery no later than April 24, 2006. On April 25, 2006, Petitioner filed a Motion to Relinquish Jurisdiction. Respondent filed a response in opposition. On April 27, 2006,

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an Order was entered denying the Motion to Relinquish Jurisdiction.

At hearing Petitioner presented the testimony of Steven Toner. Petitioner offered Exhibits numbered 1 through 3. Petitioner's Exhibits 1 and 3 were admitted into evidence. Respondent testified on his own behalf and did not offer any exhibits into evidence.

A Transcript consisting of one volume was filed on May 26, 2006. On June 12, 2006, the parties filed proposed recommended orders, which were considered in the preparation of the Recommended Order. On July 10, 2006, the ALJ submitted a Recommended Order which found the Respondent not guilty of the allegation in the administrative complaint. All references to the Florida Statutes are to 2005 unless otherwise indicated.

RULINGS ON EXCEPTIONS

1. Petitioner timely filed exceptions to the ALJ's Recommended Order on July 25, 2006.
2. Respondent did not file exceptions to the ALJ's Recommended Order or the Petitioner's exceptions.
3. Petitioner's first exception related to paragraph 11 of the ALJ's recommended order. After reviewing the complete record, and being duly advised, the Division has determined that there is no competent, substantial evidence to sustain the ALJ's finding that the Respondent's description of his criminal

conviction was not false. Petitioner's exception in this regard is accepted and incorporated herein by reference. The Respondent's failure to disclose his conviction of Bank Larceny and Theft is a falsification of his license application.

4. Petitioner's second exception related to paragraph 13 of the ALJ's recommended order. After reviewing the complete record, and being duly advised, the Division has determined that a substituted conclusion of law is more reasonable than the ALJ's conclusion of law in paragraph 13. The ALJ's conclusion of law in paragraph 13 is hereby rejected. Petitioner's exception is more reasonable than the ALJ's conclusion of law because the record is clear that the Division met its burden in proving the allegations in the administrative complaint by clear and convincing evidence.

5. Petitioner's third exception related to paragraph 14 of the ALJ's recommended order. After reviewing the complete record, and being duly advised, the Division has determined that a substituted conclusion of law is more reasonable than the ALJ's conclusion of law in paragraph 13. The ALJ's conclusion of law in paragraph 14 is hereby rejected. Petitioner's exception is more reasonable than the ALJ's conclusion of law because the record is clear that the Respondent did falsify his application by stating that his conviction was for Tax Evasion when it was actually for Bank Larceny & Theft.

6. Petitioner's fourth exception related to paragraph 17 of the ALJ's recommended order. After reviewing the complete record, and being duly advised, the Division has determined that the ALJ's conclusion of law is not supported by the facts presented at hearing or applicable case law. The ALJ's conclusion of law in paragraph 17 is hereby rejected. The Division does not find it necessary to accept the Petitioner's exception to paragraph 17 and it is hereby rejected. The time that the conviction occurred is not a material issue in determining whether or not a false statement was made. Respondent falsified his application by failing to disclose his conviction for Bank Larceny and Theft.

7. Petitioner's final exception related to the recommendation issued by the ALJ. After reviewing the complete record, and being duly advised, the Division has determined that the ALJ's recommendation is not supported by the findings of fact and conclusions of law as adopted in this Final Order. Petitioner's exception is more reasonable than the ALJ's recommendation because the record is clear that the Respondent did falsify his application by stating that his conviction was for Tax Evasion when it was actually for Bank Larceny & Theft. The appropriate penalty is revocation of Respondent's license.

FINDINGS OF FACT

1. The Administrative Law Judge's findings of fact that have not been rejected or modified are approved, adopted, and incorporated herein by reference.

2. There is competent, substantial evidence to support the ALJ's findings of fact as adopted by the Division.

CONCLUSIONS OF LAW

1. The Division has jurisdiction over this matter pursuant to the provisions of Section 120.57(1), Florida Statutes, and Chapter 550, Florida Statutes.

2. The ALJ's conclusions of law that have not been rejected or modified are approved, adopted, and incorporated herein by reference.

3. There is competent, substantial evidence to support the ALJ's conclusions of law as adopted by the Division.

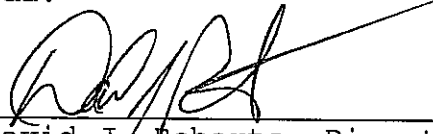
ORDER

Upon consideration of the facts found and the conclusions of law reached, it is

ORDERED:

The Respondent's pari-mutuel wagering occupational license is hereby revoked for violation of Section 559.791, Florida Statutes, Respondent is ineligible to apply for a pari-mutuel wagering occupational license for a period of five (5) years, and Respondent is fined one thousand dollars (\$1,000).

DONE AND ENTERED this 6th day of September, 2006, in Tallahassee, Leon County, Florida.




David J. Roberts, Director
Division of Pari-Mutuel Wagering
1940 North Monroe Street
Tallahassee, Florida 32399-1035

NOTICE OF RIGHT TO APPEAL

Unless expressly waived, any party substantially affected by this Final Order may seek judicial review by filing an original Notice of Appeal with the Clerk of the Department of Business and Professional Regulation, and a copy of the notice, accompanied by the filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal within thirty days rendition of this Order, in accordance with Fla. App. P. 9.110, and section 120.68, Florida Statutes.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been provided by U.S. Certified Mail to Larry Collins, Esquire, 4326 Northeast County Highway 329, Anthony, FL 32617, this 6th day of September, 2006.



Sarah Wachman, Agency Clerk
Department of Business and
Professional Regulation

COPIES FURNISHED:

Office of Operations
Licensing Section
Office of Investigations
General Manager, Ocala Jai-Alai
Chief Inspector, Ocala Jai-Alai

Stefan Thomas Hoffer, Esquire
Department of Business and
Professional Regulation
Division of Pari-Mutuel Wagering
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Josefina Tamayo, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Barbara J. Staros
Administrative Law Judge
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF PARI-MUTUEL WAGERING

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

Petitioner,

vs.

DBPR Case No. 2004053858
DOAH Case No. 06-0736PL

JOSE PARADELO,

Respondent.

PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

COMES NOW, the Petitioner, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (hereinafter "Division"), by and through the undersigned Counsel, and files these Exceptions to the Recommended Order in the above entitled matter and states as follows:

BACKGROUND:

1. Pursuant to notice, a formal hearing was conducted in this case before Barbara J. Staros, an Administrative Law Judge (hereinafter "ALJ") of the Division of Administrative Hearings, on May 2, 2006, in Ocala, Florida.
2. On July 10, 2006, a Recommended Order was issued by Judge Staros. The parties were advised that written exceptions could be filed with the Director of the Division of Pari-Mutuel Wagering within 15 days of the date of the Recommended Order.

EXCEPTIONS TO FINDINGS OF FACT:

STANDARD OF REVIEW:

1. Section 120.57(1)(l), Florida Statutes, states in pertinent part that "...[t]he agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law."

2. The standard by which an agency, when determining whether to reject or modify findings of fact in the ALJ's recommended order, is bound holds that the agency, the Petitioner in this matter, "is not permitted to weigh the evidence, judge the credibility of the witnesses, or interpret the evidence to fit its ultimate conclusions." Gross v. Department of Health, 819 So.2d 997 (Fla. Dist. Ct. App. 5th Dist. 2002).

I. The ALJ, in the paragraph 11, page 7, of the Recommended Order stated: "While Respondent's description of his criminal conviction was imprecise, it was not false."

1. Section 550.105(5)(b), Florida Statutes, states:

The division may deny, suspend, revoke, or declare ineligible any occupational license if the applicant for or holder thereof has violated the provisions of this chapter or the rules of the division governing the conduct of persons connected with racetracks and frontons. In addition, the division may deny, suspend, revoke, or declare ineligible any occupational license if the applicant for such license has been convicted in this state, in any other state, or under the laws of the United States of a capital felony, a felony, or an offense in any other state which would be a felony under the laws of this state involving arson; trafficking in, conspiracy to traffic in, smuggling, importing, conspiracy to smuggle or import, or delivery, sale, or distribution of a controlled substance; or a crime involving a lack of good moral character, or has had a pari-mutuel license revoked by this state or any other jurisdiction for an offense related to pari-mutuel wagering. [Emphasis supplied.]

2. The Legislature has the authority to determine the qualifications necessary for persons to hold licenses for occupations related to the public welfare. Lambert v. State ex rel. Mathis, 77 So. 2d 869 (Fla. 1955).

3. Legalized gambling is an area in which the state has a strong police power interest to regulate. Division of Pari-Mutuel Wagering, Department of Business Regulation, State of Florida, v. Caple, 362 So. 2d 1350, 2355 (Fla. 1978); and Hialeah Racing Ass'n, Inc. v. Gulfstream Park Racing Ass'n, Inc., 37 So.2d 692 (Fla. 1949), *appeal dismissed*, 336 U.S. 948, 69 S.Ct. 885, 93 L.Ed. 1104 (1949). In particular, the Florida Supreme Court, in Hialeah, held that:

Authorized gambling is a matter over which the state may exercise greater control and exercise its police power in a more arbitrary manner because of the noxious qualities of the enterprise as distinguished from those enterprises not affected with a public interest and those enterprises over which the exercise of police power is not so essential for the public welfare.

See also, Solimena v. State of Fla., Dep't of Bus. Regulation, Div. of Pari-Mutuel Wagering, 402 So.2d 1240 (Fla. 3rd DCA 1981)

4. As evidenced by the long standing legal principle set forth above, the Division's ability to protect the public welfare is conditioned upon the exercise of its police power in a more arbitrary manner. In pursuit of this, and in a very non-intrusive use of the police power, the Division asks applicants to accurately disclose their criminal histories so that the Division can determine whether or not an applicant is eligible for a pari-mutuel wagering occupational license. The ALJ's addition of a threshold level of inaccuracy that must be reached in order for an applicant to falsify an application is not only unsupported by the facts, but it is also contrary to the law.

5. Requiring an applicant to accurately disclose his criminal history allows the Division to

to determine whether or not there are any reasons, as set forth in Section 550.105(5)(b), Florida Statutes, for which the applicant's license might be denied, suspended, or revoked. Among the crimes for which the Division can deny a license are felony convictions and a conviction for a crime involving a lack of good moral character.

6. As stated by Section 550.105(5)(b), Florida Statutes, not every criminal conviction would subject an applicant to possible license denial, suspension, or revocation. Rather, the material issue is the nature of the crime for which the applicant was convicted. In this case, Respondent was convicted of Bank Larceny & Theft which is a crime involving a lack of good moral character. See, Coleman v. State ex rel. Caver, 119 So. 2d 89 (Fla. 1935)(holding that larceny is an immoral crime). Section 550.105(5)(b), Florida Statutes, allows the Division to deny, suspend, or revoke a license if the applicant has been convicted of a crime involving a lack of good moral character.

7. The ALJ, in paragraph 3 of her Recommended Order, acknowledged that an applicant for a pari-mutuel wagering occupational license is asked whether or not they have "ever been convicted of a crime, found guilty, or entered a plea of guilty or nolo contendere (no contest) to....." [Rec. Ord. pg. 4] The ALJ continued, in paragraph 4 of her Recommended Order, and stated that "if an applicant answers 'yes' to the above question, he or she is then required to complete form 0050-1." In this case, the Respondent disclosed that he had been convicted of a crime and, as a result, was required to submit form 0050-1. [Pet. Ex. 1]

8. During the hearing, the Division offered the 0050-1 form completed by Respondent as part of his pari-mutuel wagering occupational license application. [Tr. at pg. 10; Pet. Ex. 1] The form was submitted into evidence. On the 0050-1 form, the Respondent was asked to list the offense, the county and state where the offense was committed, the penalty/disposition, whether or not all

not all sanctions have been satisfied, and a description of the offense. [P. Ex. 1] In completing the form, Respondent listed "Tax Evasion" as the offense for which he was convicted. [P. Ex. 1; Rec. Ord. pg. 4]

9. The evidence presented at hearing clearly shows that the Respondent was convicted of Bank Larceny & Theft. [Pet. Ex. 3] Respondent offered no evidence to support Respondent's contention that he was convicted of Tax Evasion, as he stated on his application. Therefore, there is no evidence, let alone clear and convincing evidence, upon which the ALJ could conclude that the Respondent did not falsify his application. See, Section 120.57(1)(l), Florida Statutes (holding that an agency may reject findings of fact that are not based upon competent, substantial evidence.).

10. The crime of Bank Larceny & Theft is materially different from the crime of Tax Evasion. See, e.g., 18 U.S.C. § 2113(b)(making it a violation to take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association); and 26 U.S.C. § 7201 (making it a felony to willfully attempt to evade or defeat any tax imposed by Title 26 or the payment thereof). In Coleman, 119 So. 2d 89, the Florida Supreme Court stated:

Crimes from early days have been divided into things that are criminal because they are mala in se and crimes which are such because they are prohibited by statute or mala prohibita. The former class embraces those acts which are immoral or wrong in themselves such as burglary, larceny, arson, rape, murder, and breaches of the peace, while the latter embraces those things which are prohibited by statute because they infringe upon the rights of others, though no moral turpitude may attach, and they are crimes only because they are prohibited by statute. [Emphasis Supplied.]

As evidenced by the Supreme Court's ruling, larceny is a crime involving a lack of moral character.

Id. Furthermore, and as stated herein, Section 550.105(5)(b), Florida Statutes, authorizes the Division

Division to deny, suspend, or revoke a license if the holder of such has been convicted of a crime involving a lack of good moral character.

11. Conversely, evasion of taxes is not a crime involving a lack of good moral character.

Blue v. State, 716 So. 2d 567 (Miss. 1998). In Blue, 716 So. 2d 567, the Supreme Court of Mississippi held that:

Evasion of income taxes is a malum prohibitum crime as opposed to a malum in se crime. *Blacks Law Dictionary* defines malum prohibitum as a wrong prohibited; a thing which is wrong because prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law; an act involving illegality resulting from positive law.

Therefore, Bank Larceny & Theft is materially different from Tax Evasion—the latter is not a crime involving a lack of moral character—and the Respondent’s disclosure of Tax Evasion, in lieu of the crime for which he was actually convicted, constitutes a false material statement on his application for a pari-mutuel wagering license as a matter of law.

12. In this case, the ALJ correctly stated, in paragraph 6 of her Recommended Order, that Respondent was convicted of Bank Larceny & Theft. [Rec. Ord. pg. 5] Additionally, the ALJ, in paragraph 5 of her Recommended Order, correctly found that Respondent disclosed Tax Evasion as the offense for which he was convicted. [Rec. Ord. pgs. 4 – 5] However, despite making findings that the Respondent failed to accurately disclose the crime for which he was convicted, the ALJ made a finding that Respondent did not falsify his application. [Rec. Ord. pg. 7] Such a statement is supported neither by the evidence nor by the ALJ’s very own findings of fact. Furthermore, it is irrational to conclude that someone did not falsify his or her application for licensure when it is already determined that the crime disclosed was not in fact the crime for which that person was convicted.

13. A review of the law clearly shows that there is no statutorily established threshold of dishonestly that an applicant must exceed in order to violate Section 559.791, Florida Statutes.

14. Section 559.791, Florida Statutes, states:

Any license issued by the Department of Business and Professional Regulation which is issued or renewed in response to an application upon which the person signing under oath or affirmation has falsely sworn to a material statement, including, but not limited to, the names and addresses of the owners or managers of the licensee or applicant, shall be subject to denial of the application or suspension or revocation of the license, and the person falsely swearing shall be subject to any other penalties provided by law.

15. As evidenced by the very language of Section 559.791, Florida Statutes, it a violation for an applicant to make any false material statement on his or her application. As stated in paragraphs 2 and 3 herein, the crime for which a person is convicted is clearly material in that Section 550.105(5)(b), Florida Statutes, specifically limits the Division's authority to deny, suspend, or revoke a license to certain kinds of criminal convictions that have been specified by the Florida Legislature. Therefore, Respondent, by failing to disclose his actual criminal conviction on his application, clearly made a false material statement, and, therefore, violated Section 559.791, Florida Statutes.

16. Based upon the lack of any evidence to support the ALJ's finding of fact in paragraph 11 of the Recommended Order, the ALJ's finding must be rejected in lieu of a finding of fact that is actually premised upon facts and evidence presented at hearing.

17. Therefore, the ALJ's Finding of Fact in paragraph 11 should be rejected, and, in its place, a Finding of Fact should be made that Respondent falsified his application for a pari-mutuel wagering occupational license by failing to accurately disclose his correct criminal history.

EXCEPTIONS TO THE CONCLUSIONS OF LAW:

STANDARD OF REVIEW:

1. An agency, at its discretion, may disagree with and reject or modify an Administrative Law Judge's Conclusions of Law to reflect the agency's understanding and interpretation of the law. Florida Public Employees Council 79, AFSCME v. Daniels, 646 So. 2d 813, 19 F.L.W. D2589 (Fla. Dist. Ct. App. 1st Dist. 1994); University Community Hosp. v. Department of Health and Rehabilitative Services, 610 So. 2d 1342, 18 F.L.W. D178 (Fla. Dist. Ct. App. 1st Dist. 1992); Munch v. Department of Professional Regulation, Div. of Real Estate, 592 So. 2d 1136, 17 F.L.W. D200 (Fla. Dist. Ct. App. 1st Dist. 1992); Harloff v. City of Sarasota, 575 So. 2d 1324, 16 F.L.W. 548 (Fla. Dist. Ct. App. 2d Dist. 1991), review denied, 583 So. 2d 1035 (Fla. 1991).

2. "When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified." Section 120.57(1)(l), Florida Statutes.

I. The ALJ in paragraph 13, page 7 of the Recommended Order, stated:

Because Petitioner seeks to impose disciplinary action against Respondent's license, Petitioner has the burden of proving the allegations of the Administrative Complaint by clear and convincing evidence. [Citations omitted] Petitioner has not met its burden

1. As stated above, in the Division's Exceptions to the Findings of Fact, the nature of

of an applicant's criminal conviction is a material question on the application for a pari-mutuel wagering occupational license due to the Legislature having limited the Division's authority to deny, suspend, or revoke a license to only those convictions specified in Section 550.105(5)(b), Florida Statutes.

2. An applicant makes a false material statement if he or she fails to completely and correctly disclose his or her criminal history. In this case, considering both the exception to the Findings of Fact set forth above, and the ALJ's factual determination that the Respondent was convicted of Bank Larceny & Theft, but decided to disclose a conviction for Tax Evasion for which there is no evidentiary support, it is more appropriate to conclude that Petitioner met its burden of proof.

3. Based upon the foregoing, the final sentence of the Conclusion of Law contained in paragraph 13 should be changed to "[p]etitioner has met its burden."

II. The ALJ in paragraph 14, page 7 of the Recommended Order, stated:

The Administrative Complaint charges Respondent with violating Sections 559.791 and 550.105(10), Florida Statutes, by falsifying his license application. Respondent disclosed his conviction and described it in sufficient detail. He did not falsely swear to a material statement and, therefore, did not falsify his application.

1. The degree of truthfulness or the sufficiency of detail, in regards to an applicant's disclosure of his or her criminal history, is not the standard that is applied in determining whether or not an application contained false material statements. See, Section 559.791, Florida Statutes.

2. When an applicant applies for a pari-mutuel wagering occupational license, they are asked to fill out an application and, if required, any supplemental sheets. [Rec. Ord. pg. 4] In the case of Respondent, he submitted his application indicating that he was convicted of Tax Evasion. [Pet.

[Pet. Ex. 1] When an application is received, it is reviewed to determine whether or not the applicant is eligible for licensure. [Tr. at pg. 8, line 10 – pg. 9, line 10] In particular, the Division checks the application to see whether the applicant disclosed any crimes specified in Section 550.105(5)(b), Florida Statutes, for which the Division could deny the application for licensure. [Tr. at pg. 8, line 10 – pg. 9, line 10] In this case, Respondent disclosed the crime of Tax Evasion. [Pet. Ex. 1] As stated above, Tax Evasion is not a crime involving a lack of good moral character. Coleman, 119 So. 2d 89; and Blue, 716 So. 2d 567. Therefore, Respondent's failure to correctly and accurately disclose his criminal history was a material false statement that resulted in the Division issuing a license to Respondent.

3. Section 559.791, Florida Statutes, provides:

Any license issued by the Department of Business and Professional Regulation which is issued or renewed in response to an application upon which the person signing under oath or affirmation has falsely sworn to a material statement, including, but not limited to, the names and addresses of the owners or managers of the licensee or applicant, shall be subject to denial of the application or suspension or revocation of the license, and the person falsely swearing shall be subject to any other penalties provided by law.

4. As seen by the very language of Section 559.791, Florida Statutes, it is a violation of Florida law for an applicant to make any false material statement on his or her application. As stated herein, the crime for which a person was convicted is material in that Section 550.105(5)(b), Florida Statutes, specifically limits the Division's authority to deny, suspend, or revoke a license to certain kinds of crimes which have been specifically set forth by the Florida Legislature. Therefore, Respondent, by failing to disclose his actual criminal conviction on his application clearly made a false material statement, and, therefore, violated Section 559.791, Florida Statutes.

5. Based upon the foregoing, paragraph 14 should be amended to read:

The Administrative Complaint charges Respondent with violating Sections 559.791 and 550.105(10), Florida Statutes, by falsifying his license application. Respondent failed to disclose his conviction for Bank Larceny & Theft. Therefore, Respondent falsified his application.

III. The ALJ in paragraph 17, page 8 and 9 of the Recommended Order, stated:

Moreover, the 1995 conviction occurred nine years prior to the Division's issuance of the license to Respondent. No evidence was presented that Petitioner inquired about Respondent's criminal conviction prior to the issuance of the license. Having failed to prove falsification on Respondent's part in obtaining the license, the Division cannot now discipline him for an act committed prior to his licensure. [Citations omitted.]

1. The ALJ states that there was no evidence presented that the Division inquired about Respondent's criminal history. [Rec. Ord, pgs. 9 – 9] This is a true statement. However, the reason the Division did not inquire is because of Respondent's falsification of his license application. At the time the Division received Respondent's application, the Division had no information that Respondent had a criminal history that would authorize the Division to deny his application for licensure because the Respondent falsified his application, and, in doing so, Respondent failed to disclose his disqualifying conviction. [Pet. Ex. 1].

2. Furthermore, the ALJ is assuming that Bank Larceny & Theft and Tax Evasion are the same crime. Apparently, the ALJ expected the Division to review Respondent's application, to which Respondent swears all responses are true and correct, and realize that Respondent, by disclosing Tax Evasion, means to disclose Bank Larceny & Theft. As stated ad nauseam herein, the crime of Bank Larceny & Theft is materially different from Tax Evasion.

3. Based upon the preceding exceptions contained herein, paragraph 17 should be

be amended to read:

Moreover, the 1995 conviction occurred nine years prior to the Division's issuance of the license to Respondent.

EXCEPTIONS TO THE RECOMMENDATION:

STANDARD OF REVIEW:

1. Section 120.57(1)(l), Florida Statutes, states that "[t]he agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore [sic] in the order, by citing to the record in justifying the action."

I. The ALJ's Recommendation on page 9 of the Recommended Order stated:

Upon consideration of the facts found and the conclusions of law reached, it is

RECOMMENDED:

That a final order be entered dismissing the Administrative Complaint filed against Respondent.

1. Based upon the preceding exceptions to the ALJ's Recommended Order, in particular the ALJ's incorrect conclusion that Petitioner failed to meet its burden, the Recommended Penalty proposed by the ALJ is not appropriate.

2. Section 559.791, Florida Statutes, states:

Any license issued by the Department of Business and Professional Regulation which is issued or renewed in response to an application upon which the person signing under oath or affirmation has falsely sworn to a material statement, including, but not limited to, the names and addresses of the owners or managers of the licensee or applicant, shall be subject to denial of the application or suspension or revocation of the license, and the person falsely swearing shall be subject to any other penalties provided by law.

3. In DBPR vs. Bonett, Case No. 04-3039PL, Florida Division of Administrative Hearings – September 2, 2005, Bonett disclosed on his application convictions for trespassing, suspended license, and cashed check. However, like in the present case, Bonett failed to accurately disclose his criminal history and was actually convicted of three felonies, to-wit: Forgery, Uttering a Forged Check, and two counts of Grand Theft. In making his recommendation, the ALJ in the Bonett case treated facts similar to the facts in this case as mitigation of the Division’s proposed penalty rather than using them as a basis for stating that the application was “imprecise,” and concluded that the Respondent did not intend to mislead the Division. Much like the case at bar, the issue in a case involving a violation of Section 559.791, Florida Statutes, is never the level of preciseness of Respondent’s application or the intent of the Respondent. Rather, and as set forth herein, the issue is whether or not the applicant made a false material statement on his or her application. See, Section 559.791, Florida Statutes. After receiving the ALJ’s Recommended Order, the Division issued a Final Order that modified the recommended penalty of the ALJ and revoked Bonett’s pari-mutuel wagering occupational license after making a finding that Bonett falsified his application by failing to accurately disclose his convictions.

4. As indicated by the Final Order in the Bonett case, the Division has previously, and consistently, held that where a Respondent makes a false material statement on his or her application, the appropriate penalty is revocation.

5. In this case, taking into consideration the above exceptions, Respondent’s license should be revoked due to his falsification of his application for a pari-mutuel wagering occupational license. Such modification is appropriate, as more fully explained above, given the

evidence in the record supporting a finding that the Respondent made a false material statement on his application for licensure when he failed to disclose his conviction for Bank Larceny & Theft.

6. Based upon the foregoing, the Recommendation, on page 9 of the Recommended Order, should be amended to read:

Upon consideration of the facts found and the conclusions of law reached, it is

RECOMMENDED:

That a final order be entered revoking Respondent's pari-mutuel wagering occupational license.

WHEREFORE, and based upon the foregoing, it is respectfully requested that the Director of the Division of Pari-Mutuel Wagering adopt the Recommended Order, as modified and described herein, as the Final Order of the Division of Pari-Mutuel Wagering in this matter.

Respectfully submitted this 25TH day of JULY, 2006.

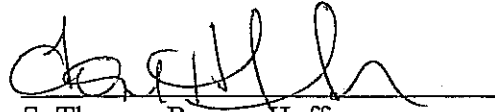


S. Thomas Peavey Hoffer
Assistant General Counsel
Florida Bar No.: 0935921
Department of Business and
Professional Regulation
1940 North Monroe Street
Suite 40
Tallahassee, Florida 32399-2202
Tele. No.: 850.414.8133
Fax No.: 850.921.1311

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been provided by U.S. Mail to Larry Collins, Esq., 4326 Northeast County Highway 329, Anthony, Florida 32617, this 25TH day of JULY, 2006.


S. Thomas Peavey Hoffer