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

FT. MYERS REAL ESTATE HOLDINGS, LLC.,

Petitioner,

v.

DBPR Case No. 2010001477
DOAH Case No. 11-1495

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

Respondent,

_____/

FINAL ORDER

The above-styled matter has come before the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, ("the Division") for the purpose of considering Administrative Law Judge ("ALJ") R. Bruce McKibben's Recommended Order, a copy of which is attached hereto as Exhibit A. Ft. Myers Real Estate Holdings, LLC's ("Ft. Myers") Exceptions and the Responses thereto are attached as Exhibits B and C respectively. Ft. Myers' Amended Petition for a Formal Administrative Hearing is attached as Exhibit D.

In the course of preparing this Final Order, it was discovered that Ft. Myers failed to properly file its Exceptions with the Clerk for the Department of Business and Professional Regulation. See Fla. Admin. Code R. 28-106.217(1)(providing in relevant part that "[p]arties may file exceptions to findings of fact and conclusions of law

contained in recommended orders with the agency responsible for rendering final agency action within 15 days of entry of the recommended order . . ."). That error (in and of itself) could potentially justify denying and/or striking all of Ft. Myers' Exceptions. See generally Colonnade Medical Center, Inc. v. AHCA, 847 So. 2d 540, 542 (Fla. 4th DCA 2003)(holding the appellant's argument was unpreserved for appellate review after its untimely exceptions were stricken). Nevertheless and in an abundance of caution, the Division will address all of Ft. Myers' Exceptions.

After a review of the complete record in this matter, including the Recommended Order and the subsequent pleadings, the Division makes the following determinations.

A. Rulings on Ft. Myers' Exceptions to the ALJ's Findings of Fact.

Section 120.57(1)(*l*), Florida Statutes (2013), governs the Division's review of the Findings of Fact in the Recommended Order. The statute mandates 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 on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." "Competent substantial evidence is such evidence that is 'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.'" Comprehensive Medical Access, Inc. v. Office of Ins. Regulation, 983 So. 2d 45, 46 (Fla. 1st DCA 2008)(quoting DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957)).

The Division's review is also governed by well-established precedent dictating that "[f]actual issues susceptible of ordinary methods of proof that are not infused with

policy considerations are the prerogative of the hearing officer as the finder of fact." Heifetz v. Dep't of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). "It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Id.

Ruling on Exception # 1: Ft. Myers asserts that paragraph 23 of the Recommended Order erroneously refers to section 550.055(2), Florida Statutes, rather than to section 550.0555(2), Florida Statutes. After reviewing the complete Record, the Division can find no competent, substantial evidence indicating section 550.055(2) is the correct statutory reference. In fact, no such statute exists. Accordingly, the Division finds this exception to be well-taken and grants it.

Ruling on Exception #'s 2 and 3: In Exception #'s 2 and 3, Ft. Myers asserts the findings of fact in paragraphs 26 and 38 will be incomplete and unsupported by competent, substantial evidence unless the aforementioned paragraphs are supplemented by additional findings supplied by Ft. Myers. However, these Exceptions must be stricken because they fail to "identify the legal basis for the exception" as required by section 120.57(1)(k), Florida Statutes (2013). See also Fla. Admin. Code R. 28-106.217(1)(mandating that "[e]xceptions shall identify the disputed portion of the recommended order by page number or paragraph, **shall identify the legal basis for the exception**, and shall include any appropriate and specific citations to the record.")(emphasis added).

Moreover, these Exceptions must be denied because the findings of fact at issue are supported by competent, substantial evidence, and the Division is not authorized to make new or supplemental findings. See Rogers v. Dep't of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005)(stating that "[i]f there is competent substantial evidence in the record to support the ALJ's findings of fact, the agency may not reject them, modify them, substitute its findings, **or make new findings**.")(emphasis added). Indeed, administrative law judges (rather than agencies) are responsible for making findings of fact. See generally Boyd v. Dep't of Rev., 682 So. 2d 1117, 1118 (Fla. 4th DCA 1996)(noting "it is the hearing officer's function to consider all evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact.").[1]

Ruling on Exception #4: Ft. Myers asserts in this Exception that the last sentence in paragraph 40 of the Recommended Order is not supported by competent, substantial evidence. However and as discussed in the Division's Response to this Exception, the portion of paragraph 40 at issue is supported by competent, substantial evidence. As a result, the Division is precluded from rejecting it and this Exception must be denied. See §120.57(1)(*l*), Fla. Stat. 2013 (mandating "[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 . . ."). See also Lantz v. Smith, 106 So. 3d 518,

[1] The Division asserted in its Response to Ft. Myers' second Exception that line 6 of paragraph 26 in the Recommended Order erroneously refers to "Roberts" rather than "Ross." However, it is not clear that this reference by the ALJ is erroneous. Accordingly, the Division rejects any suggestion that paragraph 26 contains a scrivener's error.

521 (Fla. 1st DCA 2013)(noting that "[i]f the ALJ's findings of fact are supported by competent, substantial evidence, the agency cannot reject them even to make alternate findings that are also supported by competent, substantial evidence.").

Ruling on Exception #5: Ft. Myers takes issue with paragraph 41 in the Recommended Order. However, Ft. Myers fails to set forth any legal basis for this Exception as required by section 120.57(1)(k), Florida Statutes (2013) and Rule 28-106.217(1) of the Florida Administrative Code. Moreover, Ft. Myers does not assert the finding of fact at issue is unsupported by competent, substantial evidence. Accordingly, this Exception is denied.

Ruling on Exception #6: Ft. Myers asserts in this Exception that a portion of paragraph 43 in the Recommended Oder is "incomplete, misleading and lacking support in competent substantial evidence because it does not recognize" what Ft. Myers characterizes as an "undisputed fact." However, asserting that a finding of fact does not account for an undisputed fact is not equivalent to asserting the finding of fact at issue is unsupported by competent, substantial evidence. As a result, Ft. Myers has failed to identify a proper legal basis for this Exception and it must be denied. See §120.57(1)(k), Fla. Stat. (2013). Moreover and as explained in the Division's Response to this Exception, paragraph 43 is supported by competent, substantial evidence. Thus, the Division is precluded from rejecting it. See §120.57(1)(*l*), Fla. Stat. (2013). See also Haines v. Dep't of Children & Families, 983 So. 2d 602, 608 (Fla. 5th DCA 2008)(noting that "[i]n reviewing the record, neither the agency nor the appellate court is permitted to re-weigh the evidence presented, judge the credibility of the witnesses, or otherwise interpret the evidence to fit a desired ultimate conclusion."). Finally, the Division is not

authorized to make additional findings. See Lantz v. Smith, 106 So. 3d 518, 521 (Fla. 1st DCA 2013)(noting that "[i]f the ALJ's findings of fact are supported by competent, substantial evidence, the agency cannot reject them even to make alternate findings that are also supported by competent, substantial evidence.").

Ruling on Exception #7: Ft. Myers asserts that a portion of paragraph 45 is unsupported by competent, substantial evidence. Ft. Myers then uses this Exception to argue that the Division's interpretation of section 550.334, Florida Statutes, changed on December 22, 2009 rather than on or about the time when Ft. Myers filed the Amended Application. However and as explained in the Division's Response to this Exception, paragraph 45 is supported by competent, substantial evidence. Accordingly, the Division is precluded from rejecting it and this Exception must be denied. See §120.57(1)(*l*), Fla. Stat. (2013). Moreover, to whatever extent there is conflicting evidence in the Record, the Division is not authorized to resolve that conflict. That is the administrative law judge's task. See Heifetz, 475 So. 2d at 1281 (instructing that "[i]f, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other.").

Ruling on Exception #8: Ft. Myers takes issue with paragraph #47 of the Recommended Order "[t]o the extent that the finding of fact in this paragraph [47] can be read or interpreted to provide that the SB 788 contingency was first disclosed to the Division in the purchase contract submitted to the Division on November 13, 2009 and not in the letter of intent submitted to the Division on August 12, 2009 . . ." However, this assertion is not equivalent to stating paragraph #47 is unsupported by competent, substantial evidence. Thus, Ft. Myers fails to set forth a valid basis for rejecting this

finding of fact and this Exception must be denied. See §120.57(1)(k), Florida Statutes (2013). Moreover and as explained in the Division's Response, this finding of fact is supported by competent, substantial evidence. Thus, the Division is precluded from rejecting it. See §120.57(1)(*l*), Fla. Stat. (2013).

Ruling on Exception #9: Rather than demonstrating that paragraph 48 is unsupported by competent, substantial evidence, Ft. Myers sets forth a long series of supposedly undisputed facts "material to the outcome of this case . . ." That is not a valid basis for rejecting paragraph 48. See §120.57(1)(k), Florida Statutes (2013). Moreover and as explained in the Division's Response, this finding of fact is supported by competent, substantial evidence. Thus, the Division is precluded from rejecting it and this Exception must be denied. See §120.57(1)(*l*), Fla. Stat. (2013). Finally, the Division is not authorized to make additional findings. See Lantz v. Smith, 106 So. 3d 518, 521 (Fla. 1st DCA 2013)(noting that "[i]f the ALJ's findings of fact are supported by competent, substantial evidence, the agency cannot reject them even to make alternate findings that are also supported by competent, substantial evidence.").

Ruling on Exception #10: Ft. Myers asserts that the portion of paragraph 49 at issue "does not completely and adequately describe the whole of the relevant circumstances and therefore is not supported by competent substantial evidence." However, arguing that a finding of fact does not completely and adequately describe all of the relevant circumstances is not equivalent to arguing the finding of fact is unsupported by competent, substantial evidence. Thus, Ft. Myers has failed to set forth a valid basis for rejecting paragraph 49 and this Exception must be denied. See §120.57(1)(k), Florida Statutes (2013). Moreover and as explained in the Division's

Response, this finding of fact is supported by competent, substantial evidence. Thus, the Division is precluded from rejecting it. See §120.57(1)(*l*), Fla. Stat. (2013). In addition, the Division is not authorized to make additional findings. See Lantz, 106 So. 3d at 521.

Ruling on Exception #11: Ft. Myers takes issue with paragraph 57 by asserting "[c]ompetent substantial evidence does not support the attempts to minimize the believability of the testimony of Mr. Husband about the information provided to Mr. Husband by one member of the upper management team at the Division . . ." Obviously, Ft. Myers disagrees with the factual findings in paragraph 57, but that disagreement (by itself) is not a valid basis for rejecting paragraph 57. See §120.57(1)(k), Florida Statutes (2013). In addition, the ALJ weighed the evidence to reach this finding of fact, and the Division is precluded from reweighing that evidence. See Heifetz, 475 So. 2d at 1281. Thus, this Exception is denied.

Ruling on Exception #12: Ft. Myers asserts paragraph 60 is incomplete and unsupported by competent, substantial evidence unless it is supplemented to include certain testimony from Mr. John Lockwood. As discussed in the rulings on Exception #'s 2 and 3, this is not a valid exception. See §120.57(1)(k), Florida Statutes (2013). Moreover, the Division is not at liberty to supplement the ALJ's Findings of Fact with additional findings offered by Ft. Myers. See Rogers, 920 So. 2d at 30 (stating that "[i]f there is competent substantial evidence in the record to support the ALJ's findings of fact, the agency may not reject them, modify them, substitute its findings, **or make new findings**.")(emphasis added). Moreover, the findings within paragraph 60 are supported by competent, substantial evidence. Therefore, this Exception must be rejected.

Ruling on Exception #13: Ft. Myers asserts paragraph 62 is incomplete and will not be supported by competent substantial evidence unless additional findings proffered by Ft. Myers are included. For the reasons stated directly above in the ruling on Exception #12, the Division denies Exception #13.

Ruling on Exception #14: Ft. Myers asserts paragraph 64 is unsupported by competent, substantial evidence because it "fails to take into consideration that DOAH has an obligation to expedite a hearing if requested by a party under section 120.569(2)(o) . . ." Ft. Myers' assertion is contrary to the plain language of section 120.569(2)(o) of the Florida Statutes. Even if that were not the case, Ft. Myers' Exception fails to demonstrate that the findings in paragraph 64 are unsupported by competent, substantial evidence. Finally, this finding of fact appears to be a permissible inference drawn by the ALJ. See Boyd v. Dep't of Revenue, 682 So. 2d 1117, 1118 (Fla. 4th DCA 1996)(noting "it is the hearing officer's function to consider all evidence presented, resolve conflicts, judge credibility of witnesses, **draw permissible inferences from the evidence**, and reach ultimate findings of fact."). As a result, this Exception must be denied. See §120.57(1)(*l*), Fla. Stat. (2013).

Ruling on Exception #15: Ft. Myers takes issue with the Recommended Order as a whole because the Findings of Fact do not include certain findings set forth in this Exception. However, this Exception must be denied because Ft. Myers fails to set forth any legal basis for this Exception as required by section 120.57(1)(k), Florida Statutes (2013) and Rule 28-106.217(1) of the Florida Administrative Code. Moreover and as stated above, the Division is not at liberty to supplement the Recommended Order with additional findings. See Rogers, 920 So. 2d at 30 (stating that "[i]f there is competent

substantial evidence in the record to support the ALJ's findings of fact, the agency may not reject them, modify them, substitute its findings, **or make new findings**.")(emphasis added).

B. Rulings on the Petitioner's Exceptions to the ALJ's Conclusions of Law.

The Division's review of the ALJ's Conclusions of Law are governed by section 120.57(1)(*l*), Florida Statutes (2013), which provides in pertinent part that

> The agency in its final order may reject or modify the conclusions of law **over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction**. When rejecting or modifying such conclusions 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. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

(emphasis added).

Ruling on Exception #16: The ALJ cited Lavernia v. Dep't of Prof'l Regulation, 616 So. 2d 53 (Fla. 1st DCA 1993) for the proposition set forth in paragraph 71 that "Florida follows the general rule that a change in the licensure statute that occurs during the pendency of an application for licensure is operative as to the application, so that the law as changed, rather than as it existed at the time of the application was filed, determines whether the license should be granted." Ft. Myers argues that paragraph 72's analysis of the exceptions to the Lavernia Rule is incomplete. Because this issue implicates a conclusion of law outside the Division's substantive jurisdiction, the Division is precluded by section 120.57(1)(*l*), Florida Statutes (2013), from rejecting or modifying it. See generally G.E.L. Corp. v. Dep't of Envtl. Protection, 875 So. 2d 1257,

1264 (Fla. 5th DCA 2004)(approving DEP's determination that it did not have substantive jurisdiction over "technical matters of law concerning jurisdictional issues that arise under statutory provisions relating to awards of attorney's fees."). In the alternative, even if the Division did have jurisdiction over this conclusion of law, then it would deny this Exception based on the rationale set forth in the Division's Response.

Ruling on Exception #17: Ft. Myers takes issue with the ALJ's determination in paragraph 74 that the unreasonable delay exception to the Lavernia rule is inapplicable to the instant case. While the ALJ classified this determination as a conclusion of law, it could also be characterized as an ultimate factual determination that the Division is precluded from rejecting. See generally Crawley v. Dep't of Highway Safety & Motor Vehicles, 616 So. 2d 1061, 1063 (Fla. 1st DCA 1993)(noting "[t]he determination of whether appellant's violation of policy was willful is a factual determination to be made by the hearing officer."). In the alternative, one could also correctly state that this is a conclusion of law over which the Division possesses no special expertise. Id. (stating "[t]he determination of whether a violation of policy was willful is susceptible to ordinary methods of proof and is not infused with policy considerations; PERC could claim no special expertise in determining whether a violation of policy was willful."). Moreover, the Division adopts the reasoning set forth in the Response to this Exception. Accordingly, this Exception is denied.

Ruling on Exception #18: Ft. Myers takes issue with paragraphs 76, 77, 78, 79, and 80 to the extent the ALJ concludes in those paragraphs that the "bad faith" exception to the Lavernia rule requires that a governmental entity act with malice. Because this issue implicates a conclusion of law outside the Division's substantive jurisdiction, the

Division is precluded by section 120.57(1)(*l*), Florida Statutes (2013), from rejecting or modifying it. See generally G.E.L. Corp., 875 So. 2d at 1264. In the alternative, if the Division did have substantive jurisdiction over this conclusion of law, then it would deny this Exception based on the rationale set forth in the Division's Responses.

Ruling on Exception #19: Ft. Myers asserts that the conclusions of law in paragraphs 77 through 79 "are clearly erroneous because the administrative law judge has incorrectly applied the rulings in the cited cases to the undisputed facts in the record." However, the conclusions of law at issue are outside the Division's substantive jurisdiction. See generally G.E.L. Corp., 875 So. 2d at 1264. Even if that were not the case, the Division adopts the reasoning set forth in the Response to this Exception. Accordingly, this Exception is denied.

Ruling on Exception #20: For the reasons set forth in the Ruling on Exception #19, the Division also denies Exception #20. Also, the question of whether there was clear intent to delay the application process is an ultimate factual determination that the Division is precluded from rejecting. See generally Crawley, 616 So. 2d at 1063.

Ruling on Exception #21: For the reasons set forth in the Rulings on Exception # 19, the Division also denies Exception #21.

Ruling on Exception #22: For the reasons set forth in the Ruling on Exception # 19, the Division also denies Exception #22. The Division would also add that the ALJ's determination that there was no bad faith is an ultimate finding that the Division is precluded from rejecting. See Crawley, 616 So. 2d at 1063 (stating "[t]he determination of whether a violation of policy was willful is susceptible to ordinary methods of proof

and is not infused with policy considerations; PERC could claim no special expertise in determining whether a violation of policy was willful.").

Ruling on Exception #23: Ft. Myers takes issue with paragraphs 84 through 88 by arguing that "[t]he correct interpretation of section 120.60(1) is that if the agency intends on denying an application for a reason not stated in the initial section 120.60 letter, then issuance of a second or third or fourth section 120.60 letter is nonetheless required identifying any application stopper since permit denial cannot be based on any reasons not identified in a section 120.60 letter." However, interpreting section 120.60 of the Florida Statutes amounts to a conclusion of law outside the Division's substantive jurisdiction. See generally G.E.L. Corp., 875 So. 2d at 1264. Moreover, the Division also adopts the reasoning set forth in the Response to this Exception. As a result, this Exception is denied.

Ruling on Exception #24: Ft. Myers appears to take issue with the ALJ's conclusion that there was no legal requirement for the Division to notify Ft. Myers that "the purchase agreement/land ownership issue was an approval stopper." Again, this involves a conclusion of law outside the Division's substantive jurisdiction. See generally G.E.L. Corp., 875 So. 2d at 1264. Even if that were not the case, the Division would deny this Exception based on the reasoning set forth in the Response.

Ruling on Exception #25: Ft. Myers takes issue with the ALJ's determination that it was unnecessary to consider Ft. Myers' unadopted rule argument because the current version of section 550.054(2), Florida Statutes, applies to Ft. Myers' application. Because that argument implicates a conclusion of law outside the Division's substantive jurisdiction, this Exception is denied. See generally G.E.L. Corp., 875 So. 2d at 1264.

The Division also agrees with the Response to the extent it asserts this Exception "should be rejected because absent a finding of bad faith requiring application of pre-2010 law, there is no reason to consider whether the Division was correct in its denial of Ft. Myers' application or whether it applied an unadopted rule in denying the application."

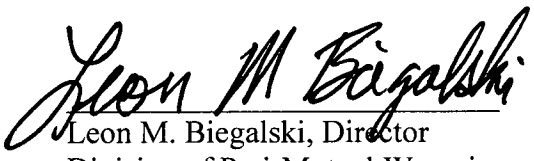
Ruling on Exception #26: Ft. Myers takes issue with the ALJ's determination that "the failure to have a non-contingent purchase agreement in place would be sufficient basis for denying the application." For the reasons set forth in the Response to this Exception, the Division cannot make a conclusion of law "more reasonable" than the one at issue. See §120.57(1)(*l*), Fla. Stat. (2013). Accordingly, this Exception must be denied.

Ruling on Exception #27: Ft. Myers takes issue with all of the ALJ's Conclusions of Law because they do not address the applicability of equitable estoppel to the instant case. The Division denies this Exception based on the reasoning set forth in the Response to this Exception.

WHEREFORE, IT IS ORDERED AND ADJUDGED THAT:

Other than as explained in the ruling on Exception #1, the Division adopts the Recommended Order *in toto* and denies all of Ft. Myers' Exceptions thereto other than Exception #1. Accordingly, Ft. Myers' application for a quarter horse racing permit shall be governed by section 550.334, Florida Statutes (2010).

DONE AND ORDERED this 7th of November, 2013, in Tallahassee, Florida.



Leon M. Biegalski, Director
Division of Pari-Mutuel Wagering
Dep't of Business & Prof'l Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1035

NOTICE OF RIGHT TO JUDICIAL REVIEW

Any party substantially affected 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 with the filing fee prescribed by law, with the clerk of the appropriate District Court of Appeal within thirty days of rendition of this order, in accordance with Rule 9.110, Florida Rules of Appellate Procedure, and section 120.68, Florida Statutes.

CERTIFICATE OF SERVICE

I hereby certify this 7th day of November, 2013, that a true copy of the foregoing "Final Order" has been provided by U.S. Mail to the following:

Brian Newman, Esquire
Pennington, Moore, Wilkinson, Bell & Dunbar, P.A.
215 South Monroe Street, 2nd Floor
Tallahassee, Florida 32301

William E. Williams, Esquire
Amy W. Schrader, Esquire
Gray Robinson, P.A.
301 South Bronough Street, Suite 600
Tallahassee, Florida 32302

Brandon M. Nichols

Agency Clerk's Office
Dep't of Business & Prof'l Regulation