

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

FILED	
Department of Business and Professional Regulation Deputy Agency Clerk	
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Date	4/10/2012
File #	2012-02231

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

Petitioner,

v.

NEIL E. WAIGAND, JR.,

Respondent.

DBPR CASE NOS. 2010020189
2010024143

DOAH Case No. 11-002779

FINAL ORDER

The State of Florida, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Division), hereby enters this Final Order for the above styled matter.

PRELIMINARY STATEMENT

1. On November 9, 2011, the Honorable Robert E. Meale, Administrative Law Judge, issued the Recommended Order (RO) of the Division of Administrative Hearings in this matter. That Recommended Order, DOAH Case No. 11-002779, is attached to this Final Order and incorporated herein by reference.
2. The Petitioner ("Division") filed Exceptions to the Recommended Order on November 21, 2011, which are attached hereto and incorporated by reference.
3. The Respondent filed Exceptions to the Recommended Order on December 15, 2011, which are attached hereto and incorporated by reference.

FINDINGS OF FACT

4. A thorough review of the entire record of this matter reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the Findings were based complied with the essential requirements of the law. As a result, the Findings of Fact contained in the Recommended Order are hereby adopted as the Findings of Fact of the Division.

5. The Division filed two exceptions to the Recommended Order. The exceptions raised were with respect to the amount of the RO's recommended penalty and the ALJ's *sua sponte* dismissal of Count II of the Administrative Complaint at the hearing.

6. With regard to the Division's exception to the RO's recommended fine of one thousand dollars (\$1000.00), the Division argues that in its Administrative Complaint, the Division only requested that a total fine of five hundred dollars (\$500) be imposed on the Respondent. The Respondent was not on notice that a penalty greater than \$500 was sought, therefore the Division requests an exception to the RO that the fine imposed be reduced to \$500. Although this exception should be rejected on its face because it fails to comply with the requirement in Uniform Rule 28-106.217(1), Florida Administrative Code (that parties must identify the disputed portion of the RO by page number and paragraph), in the interests of substantial justice and fair play, the Division will order the reduction of the recommended fine to \$500 total.

7. With regard to the Division's taking exception with the ALJ's *sua sponte* dismissal of Count II as defective, the Division's exception candidly admits it is in fundamental agreement with the Recommended Order's recommendation to dismiss Count II. Therefore the matter is ruled to be moot requiring no further discussion;

8. The Respondent filed seven listed exceptions to the Recommended Order. All seven Exceptions should be rejected on their face because they fail to comply with the requirement in

Uniform Rule 28-106.217(1), that parties must identify the disputed portion of the RO by page number and paragraph.

9. Respondent's Exception no. 1 only asserts that it was "unconscionable" to assign a new ALJ to this case five days prior to the hearing without the Respondent's knowledge. Since Exception no.1 does not challenge a particular portion of the RO as erroneous, no response is required by the Division.

10. Respondent's Exception no. 2 asserts that it was "unconscionable" for the ALJ to "use" Rule 61D-14.023(2), Florida Administrative Code, because the rule "has no reference to a log of a slot machine door except if found open." Although no response is required by the Division because this exception does not challenge a particular portion of the RO as erroneous, paragraph 13 of the RO's Conclusions of Law specifically cites verbatim Rule 61D-14.023(2), FAC, which clearly makes reference to a log being kept inside a locked slot machine compartment for the purpose of recording door openings and closings; therefore the Respondent is either in error as to the Rule cited or Respondent's intent is unclear.

11. Respondent's Exception no. 3 asserts that it was "unconscionable" for the Division's Administrative Complaint to fail to report that the Respondent's pari-mutuel occupational license has two occupation codes, requiring (according to Respondent), that Respondent defend both occupations. Since Exception no.3 does not challenge a particular portion of the RO as erroneous, no response is required by the Division.

12. Respondent's Exception no. 4 asserts that it was "unconscionable" for the ALJ to permit the hearing to proceed because the Administrative Complaint's use of the phrase "accessed the logic compartment" was factually incorrect and prejudiced the Respondent because he had actually accessed the *main* compartment. However, at the hearing the ALJ held the foregoing to be a

non-prejudicial error and permitted the Division to amend the Administrative Complaint over the Respondent's objection, as is referenced in paragraph 9 of the RO's Findings of Fact.

13. Respondent's Exception no. 5 appears to substantially re-state Exception no. 4, with the additional charge that permitting the hearing to proceed after curing the error discussed in paragraph 10 above amounted to a defacto "rewriting" of Rule 61D-14.023, FAC. As was already stated above, at the hearing the ALJ held the foregoing to be a non-prejudicial error and permitted the Division to amend the Administrative Complaint over the Respondent's objection, as is referenced in paragraph 9 of the RO's Findings of Fact.

14. Respondent's Exception no. 6 asserts that it was "unconscionable" for the ALJ to "deny his due process right by not enforcing" Rule 61D-14.087, FAC. Since exception no. 6 does not challenge a particular portion of the RO as erroneous, no response is required by the Division.

15. Respondent's Exception no.7 asserts that it was "unconscionable" that the ALJ used "Isle of Capri Performance Documents as fact in determining this order when if look[ed] at thoroughly it was ordered by DBPR". The Respondent then specifies "DBPR Exhibit 11" as the basis for the exception. A review of the record indicates that at the hearing, the Division's Exhibit 11 was admitted into evidence without objection by Respondent (Transcript 127:7), and is referenced in paragraph 6 of the RO's Findings of Fact.

CONCLUSIONS OF LAW

16. A thorough review of the entire record in this matter indicates that the Conclusions of Law contained in the Recommended Order are reasonable and correct interpretations of the law based on the Findings of Fact. As a result, the Conclusions of Law contained in the Recommended Order are hereby adopted as the Conclusions of Law of the Division.

17. As noted above, the Division filed Exceptions to the Recommended Order. Based on the reasoning set forth above addressing each exception, including those exceptions in which a spe-

cific paragraph of the Recommended Order is not identified, the Division hereby adopts the aforementioned exception requesting a reduction in the RO's recommended penalty and rejects any and all remaining exceptions.

18. As noted above, the Respondent filed Exceptions to the Recommended Order. Based on the reasoning set forth above addressing each exception, including those exceptions in which a specific paragraph of the Recommended Order is not identified, the Division rejects all the aforementioned exceptions.


ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law adopted from the Recommended Order of the Division of Administrative Hearings and the Division's request to reduce the recommended penalty, the Recommended Order of the Administrative Law Judge, excepting the penalty amount, is hereby adopted, and the Respondent's exceptions are rejected in whole.

ORDERED: Respondent is hereby found GUILTY of Count I of the Administrative Complaint; Count II of the Administrative Complaint is hereby DISMISSED; and an administrative penalty in the amount of FIVE HUNDRED DOLLARS (\$500.00) is assessed against the Respondent, to be paid within 30 days of the date this Order is filed with the Agency Clerk.

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DONE AND ORDERED this 5th day of April, 2012, in Tallahassee, Florida.



Leon M. Biegalski, Director
Division of Pari-Mutuel Wagering
Department of Business & Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1035

NOTICE OF RIGHT TO APPEAL UNLESS WAIVED

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 (30) 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 10th day of April, 2012, that a true copy of the foregoing "Final Order" has been provided by U.S. Certified Mail to the Respondent, Neil E. Weigand, Jr., 906 Riverside Drive, Apt. 8, Pompano Beach, Florida 33062.



Agency Clerk's Office
Department of Business & Professional Regulation

Copies furnished to:
Ralf E. Michels, Asst. Gen. Counsel