STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner, Case No. 15-3866

vs.

HAMILTON DOWNS HORSETRACK, LLC,

Respondent.
_____/

RECOMMENDED ORDER

A final hearing was conducted in this case on April 25 and 26, 2016, in Tallahassee, Florida, before E. Gary Early, an administrative law judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Caitlin R. Mawn, Esquire
Thomas J. Izzo, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 40
Tallahassee, Florida 32399

For Respondent: Seann M. Frazier, Esquire
Mark Ito, Esquire
Parker, Hudson, Rainer and Dobbs, LLP
215 South Monroe Street, Suite 750
Tallahassee, Florida 32301

Richard Earl Gentry, Esquire
2305 Braeburn Circle
Tallahassee, Florida 32309

STATEMENT OF THE ISSUES

The issues for disposition in this case are whether Hamilton Downs violated section 550.01215(3), Florida Statutes (2013), by failing to operate all performances specified on its license on the date and time specified, and whether the Division should be estopped from prosecuting Hamilton Downs.

PRELIMINARY STATEMENT

On or about August 13, 2014, Petitioner, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Petitioner" or "Division"), served its Administrative Complaint in Case No. 2014-026021 on Respondent, Hamilton Downs Racetrack, LLC ("Respondent" or "Hamilton Downs"). On August 27, 2014, Respondent filed its Request for Formal Administrative Hearing by which it disputed the facts alleged in the Administrative Complaint.

On October 15, 2014, the Division entered its Amended Administrative Complaint. The three-count Amended Administrative Complaint alleged that Hamilton Downs failed to operate all performances specified on its license on the date and time specified; that Hamilton Downs failed to have a number on its wagering terminal window that matched the totalisator reports; and that one or more horses racing in the performances were owned by an unlicensed owner.

On January 15, 2015, Hamilton Downs filed its Amended Request for Formal Administrative Hearing. The matter was referred to the Division of Administrative Hearings on July 9, 2015.

The final hearing was scheduled for October 2, 2015. It was continued several times, with the hearing being finally scheduled to convene on April 25, 2016.

The case was transferred to the undersigned on April 11, 2016, and the final hearing was thereafter held as scheduled.

The parties filed a Joint Pre-hearing Stipulation in which they identified stipulated facts for which no further proof would be necessary. The stipulated facts have been accepted and considered in the preparation of this Recommended Order.

The Joint Prehearing Stipulation also identified the nature of the controversy as being "whether Hamilton Downs violated Section 550.01215(3), Florida Statutes, by failing to operate all performances specified on its license on the date and time specified." Upon inquiry at the commencement of the hearing, the parties agreed that Counts Two and Three of the Amended Administrative Complaint were no longer at issue.

At the final hearing, the Division presented the testimony of Louis Haskell, Jr., who was at all times relevant to this proceeding the state steward charged with overseeing the Hamilton Downs meet; Glenn Richards, managing member and

majority owner of Hamilton Downs; Charles Taylor, an investigative specialist for the Division; and Derek Washington, the Division's investigative supervisor for the central/northern region. Petitioner's Exhibits 1, 2, 4, and 5 were received in evidence.

Hamilton Downs presented the testimony of L.P. Stallings, the Division's northern regional manager; Donald Carter, Jr., a representative of Amtote and the data entry clerk for race results at Hamilton Downs; Sammy McCoy, vice-president of the Hamilton Downs Quarter Horse Association; and Glenn Richards. Respondent's Exhibits F, K through P, S, V, and W were received in evidence. Respondent's Exhibit V is the deposition transcript of Jonathan Zachem, the designated agency representative pursuant to Florida Rule of Civil Procedure 1.310(b)(6). Respondent's Exhibit W is the deposition transcript of JoEllen Kelly who was the Division's chief auditing officer, and who was determined to reside more than 100 miles from the location of the final hearing. Both deposition transcripts have been given the evidentiary weight as if the deponents offered live testimony at the final hearing.

A two-volume Transcript of the proceedings was filed on May 10, 2016. The parties timely filed Proposed Recommended Orders, which have been duly considered in the preparation of this Recommended Order.

This proceeding is governed by the law in effect at the time of the commission of the acts alleged to warrant discipline. See McCloskey v. Dep't of Fin. Servs., 115 So. 3d 441 (Fla. 5th DCA 2013). Thus, references to statutes are to Florida Statutes (2013), unless otherwise noted.[1/]

FINDINGS OF FACT

1. The Division is the state agency charged with regulating pari-mutuel wagering activities in Florida pursuant to chapter 550, Florida Statutes.

2. At all times material to the Amended Administrative Complaint, Hamilton Downs held a Quarter Horse Racing pari-mutuel permit issued by the Division, number 0000547-1000, that authorized Hamilton Downs to conduct pari-mutuel wagering on quarter horse races pursuant to chapter 550.

3. On or about March 15, 2013, the Division issued a Permitholder Annual License & Operating Day License (the "operating license"), number 0000547-1001, to Hamilton Downs, which authorized Hamilton Downs to perform 20 regular quarter horse performances from June 18 through 22, 2014, at a rate of four performances a day. Each performance consisted of eight individual races. Thus, the operating license authorized a total of 160 races.

4. In 2012 and 2013, Hamilton Downs conducted licensed quarter horse barrel match races at its facility. When the 2014

operating license was issued, Hamilton Downs intended to conduct a meet consisting of barrel match races.

5. As a result of litigation that culminated several months before the commencement of the Hamilton Downs 2014 racing meet, the Division advised Hamilton Downs that it would not be able to conduct barrel match racing under its quarter horse racing operating permit. However, Hamilton Downs was permitted to conduct "flag-drop" racing during that period of time.

6. From June 18 through 22, 2014, Hamilton Downs conducted the quarter horse "flag drop" racing meet pursuant to its operating license.

7. Flag drop racing as performed at Hamilton Downs involved two horses racing[2/] simultaneously on a crude dirt "track" approximately 110 yards in length. The track was straight for about 100 yards, with a pronounced rightward turn to the finish line, and was haphazardly lined with white stakes. The race was started by a person who waved a red cloth tied to a stick whenever it appeared that both horses were in the general vicinity of what the starter perceived to be the "starting line." There was no starting box or gate.

8. The track was in the middle of an open field. There was no grandstand, though there was a covered viewing area on "stilts" from which the state steward and track stewards could observe the races. The track had one betting window and tote

machine in an on-site shed. The only window in the shed was, mercifully, occupied by a window-unit air conditioner. As stated by Mr. Haskell, "nothing about Hamilton Downs is real in terms of racetrack standards."

9. For several years prior to the 2014 meet, Hamilton Downs shared horses and riders with the racetrack in Gretna, Florida, and the North Florida Horsemen's Association. Several weeks prior to the commencement of the Hamilton Downs 2014 meet, a schism developed between the groups. As a result, the Gretna racetrack and North Florida Horsemen's Association prohibited its horses and riders from competing in Hamilton Downs meets. That action stripped Hamilton Downs of most of the horses and riders that it was relying upon to perform in its meet.

10. Mr. Richards had the permitted dates, and was required to race on those dates to remain in compliance. He was able to make arrangements for horses "way down on the eligible list." They were, for the most part, older horses of lesser quality. Nonetheless, Hamilton Downs did its best to fulfill its permitted slate of races.

11. The pool from which the races were set included 19 horses and six riders. The horses and riders were supplied to Hamilton Downs by the Hamilton Downs Quarter Horse Association (HDQHA). The HDQHA believed it could provide enough horses to handle the meet.

12. The horses, and their owners, were:

Precious N Fritz --	Stardust Ranch, LLC
Skippers Gold Tupelo --	Stardust Ranch, LLC
Business Official --	Stardust Ranch, LLC
Cutter With A Twist --	Stardust Ranch, LLC
Dun It Precious Gal --	Stardust Ranch, LLC
Heavens Trick --	Stardust Ranch, LLC
Dancer Blue Ghost --	Amie Peacock
Starpion N Skip --	Amie Peacock
Twist N to Stardust --	Amie Peacock
Docs Lil Jose --	Amie Peacock
Dandees Bay Apache --	Amie Peacock
Kings Hollywood Moon --	Amie Peacock
Lassies Last Chance --	Elaine Tyre
Sugars Daisy Bar --	Elaine Tyre
Touch of Leaguer --	Elaine Tyre
Joys Winning Touch --	Elaine Tyre
Jazz Potential --	Emma McGee
Sonney Dees Diamond --	Emma McGee
Royal King Princess --	Richard McCoy

13. The riders were:

Amie Peacock
Elaine Tyre
Emma McGee
Richard McCoy
Nicholas McCoy
Christine Bradley

14. Each of the owners was licensed by the Division.

15. The riders were mainly local riders.

16. The breeds of the horses complied with state law regarding horses allowed to run in quarter horse races.[3/]

17. The horses had their ownership records and identifying tattoos, and their current Coggins forms, which are required to substantiate that they have tested negative for diseases.

18. Mr. Stallings testified that there were no problems regarding the ages of the horses since "that is not something DBPR worries about."

19. The animal detention areas checked out and were secure. Mr. Taylor inspected the track and found no violations of track setup under the current rules.

20. The horses and riders had access to the track for the three days prior to the meet for purposes of training and acclimating the horses to the track.

21. The races at Hamilton Downs during June 2014 were conducted in the presence of a state steward.

22. The races must be seen to be believed. The 14 events for which video evidence was received show a series of races involving -- as a rule -- tired, reluctant, skittish, or disinterested horses moving at a slow pace down the dust-choked path. There was no marked starting line or finish line. The horses were often yards apart when the red rag-on-a-stick was waved. With one exception (performance 2, race 7), the gait of the "racing" horses ranged between a slow walk and a canter. Horses often simply stood at the starting line before slowly plodding down the track. In one instance, a horse actually

backed up, until a bystander took it by the lead, thereafter giving the horse a congratulatory slap on the rump when it began to move in a forward direction. Mr. Haskell noted races in which riders fell off of their horses, or in which a horse left the course. He described numerous races, aptly, as non-competitive because one or both of the entrants walked, including one race (day 3, card 3, race 5) in which the racing steed took 1 minute and 45 seconds to cover the 110-yard course. The overall quality of the videotaped races was about what one would expect of an entry-level campers' horse show held at the conclusion of a two-week YMCA summer camp.

23. The interest in the series of races by the betting public was commensurate with the quality of the races. Wagers were of the $2.00 variety. Over the course of the 160-race meet, a total of 10 bets were placed, with two of those reportedly placed by a representative of a competing facility in an effort to substantiate wrongdoing on the part of Hamilton Downs. Given the competitive level of the races, a $20 handle seems about right.

24. Mr. Haskell testified that the same horses just kept racing over and over. However, his steward's report noted that he "refer[ed] to the 'rule book' numerous times in the five days pertaining to ages of horses, number of races a horse may race in a limited time, etc., but the rules just didn't exist."

25. Mr. Taylor expressed similar concerns with the failure of the horses to "break" at the start of the races, their slow pace, and other issues. He did not make a point of them or bring them to the attention of Hamilton Downs because there was "no rule violation."

26. Despite the bemused, occasionally embarrassed expressions on the faces of the riders as their horses ambled slowly down the track, the witnesses, including Mr. Haskell and Mr. Taylor, uniformly testified that the riders tried to make sure the races were competitive. Thus, the poor quality of the races cannot be attributed to a lack of effort on their part.

27. "Coupled entries" are those in which horses owned by the same owner compete against one another in the same race.

28. On the second race of the meet, it was discovered that the two horses scheduled to race were both owned by Amie Peacock. Although the racing program had been distributed to all race officials involved, including the state steward, no one noticed the coupled entry. The preponderance of the evidence indicates that the coupled entry was discovered immediately before the start of the race. The racing secretary attempted to alert the starter, but was unsuccessful. Therefore, the race was run.[4/]

29. When the coupled entry was discovered, and before the race was made official, a post-race meeting of roughly 30

minutes was held to determine how to proceed. A preponderance of the evidence indicates that the meeting participants included, among others, the state steward, the track stewards, the state investigative specialist, the racing secretary, and the track owner.

30. During the meeting, Mr. Richards offered that the race could be "re-run," an option that was rejected since there is no authority for re-running a race. Mr. Richards also proposed calling a "no-contest," which would allow Hamilton Downs to request an additional race from the Division. An additional race is not a re-run of the disputed race, but is a replacement race to be conducted at a different time during the meet. Mr. Richards was familiar with the procedure for requesting an additional replacement race, and was fully prepared to do so. It is not uncommon for such requests to be made in all types of pari-mutuel activities.

31. Mr. Haskell acknowledged the possibility of declaring a no-contest for the coupled entry, and agreed that if he had declared a no-contest, Hamilton Downs could have requested a "make-up date" to be approved by the Division.

32. At the conclusion of the meeting, Mr. Haskell did not declare a no-contest. Rather, he decided to make the race "official." As a result, Hamilton Downs could not request a make-up race.

33. Mr. Taylor discussed the incident with management of Hamilton Downs, and promised to keep an eye out to make sure a coupled entry did not recur. After the second race of the meet, there were no further instances of coupled entries.

34. Over the course of the meet, Mr. Haskell declared all of the 160 races, including the coupled entry race, to be official, whereupon the winner of the race was determined and results were entered by an Amtote employee into the computer and transmitted to the "hub." At that point, wagers (if any) were paid out, and the tote was allowed to roll over to the next race.

35. During the June 2014 races at Hamilton Downs, a purse, stake, or reward was offered for the owner of each horse to cross the finish line first.

36. Mr. Richards was frank in his admission that the 2014 race season was important because it allowed Hamilton Downs to qualify for a cardroom license and, if ultimately allowed, slot machines. However, the reason for conducting the meet is of no consequence to the outcome of this proceeding.

37. Hamilton Downs has, subsequent to the 2014 meet, conducted flag drop races at its facility pursuant to operating permits issued by the Division.

38. Within the past five years, the Division has never filed an administrative complaint, suspended a pari-mutuel

permitholder, or fined a pari-mutuel permitholder due to a failure to conduct a race at any particular speed.

39. Within the past five years, the Division has never suspended a pari-mutuel permitholder for a violation of section 550.01215 that pertained to a race or races that were made official by a state steward.

CONCLUSIONS OF LAW

A. Authority

40. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2015).

41. "[I]t is well established that the legislature has broad discretion in regulating and controlling pari-mutuel wagering and gambling under its police powers." Div. of Pari-Mutuel Wagering, Dep't of Bus. Reg. v. Fla. Horse Council, Inc., 464 So. 2d 128, 130 (Fla. 1985). Thus, the Division has the authority as conferred by the Legislature to adopt pari-mutuel rules to establish standards for "holding, conducting, and operating of all racetracks, race meets, and races held in this state."

B. Legal Standards

42. Section 550.01215(3), which forms the basis for the violation alleged in Count One of the Amended Administrative Complaint, provides, in pertinent part, that "[e]ach

permitholder shall operate all performances at the date and time specified on its license."

43. A "performance" is defined in section 550.002(25) as "a series of events, races, or games performed consecutively under a single admission charge."

44. The Division alleges, in Count One of the Amended Administrative Complaint, that Hamilton Downs' failure to operate all performances at the date and time specified on its license subjected it to section 550.01215(4), which provides, in pertinent part, that:

> In the event that a permitholder fails to operate all performances specified on its license at the date and time specified, the division shall hold a hearing to determine whether to fine or suspend the permitholder's license, unless such failure was the direct result of fire, strike, war, or other disaster or event beyond the ability of the permitholder to control.

45. The Division further alleges, in Count One of the Amended Administrative Complaint, that Hamilton Downs' failure to operate all performances at the date and time specified on its license subjected it to section 550.0251(10), which provides, in pertinent part, that:

> The division may impose an administrative fine for a violation under this chapter of not more than $1,000 for each count or separate offense, except as otherwise provided in this chapter, and may suspend or

> revoke a permit, a pari-mutuel license, or an occupational license for a violation under this chapter.

46. In addition to the foregoing, the following clause of section 550.01215(3) is relevant to the issues in this proceeding:

> The division shall have the authority to approve minor changes in racing dates after a license has been issued.

C. Burden of Proof

47. The Division bears the burden of proving the specific allegations of fact that support the charges alleged in the Amended Administrative Complaint by clear and convincing evidence. § 120.57(1)(j), Fla. Stat.; Dep't of Banking & Fin., Div. of Sec. and Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); see also Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Fox v. Dep't of Health, 994 So. 2d 416 (Fla. 1st DCA 2008); Kany v. Fla. Eng'rs Mgmt. Corp., 948 So. 2d 948 (Fla. 5th DCA 2007); Dieguez v. Dep't of Law Enf., Crim. Just. Stds. & Training Comm'n, 947 So. 2d 591 (Fla. 3d DCA 2007); Pou v. Dep't of Ins. and Treas., 707 So. 2d 941 (Fla. 3d DCA 1998).

48. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). The clear and convincing evidence level of proof:

> entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.
>
> > Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "Although [the clear and convincing] standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

49. The allegations set forth in the Amended Administrative Complaint are the grounds upon which this proceeding is predicated. Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); see also Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Thus, the scope of this

proceeding is properly restricted to those matters as framed by the Division. M.H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 763 (Fla. 2d DCA 2008).

50. Section 550.01215(4) is penal in nature, and must be strictly construed, with any ambiguity construed against the Division. Penal statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden the application of such statutes. Elmariah v. Dep't of Bus. & Prof'l Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990); see also Beckett v. Dep't of Fin. Servs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008); Whitaker v. Dep't of Ins., 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Dyer v. Dep't of Ins. & Treas., 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991); Davis v. Dep't of Prof'l Reg., 457 So. 2d 1074, 1076 (Fla. 1st DCA 1984).

D. Count One of the Amended Administrative Complaint

51. Count One of the Amended Administrative Complaint simply alleges that Hamilton Downs failed to "operate all performances at the date and time specified on its license."

52. That allegation which, on its face, is targeted to the number, date, and time of performances, and not to the quality of performances, is insufficient to support a disciplinary sanction based on what the Division perceives to be inadequate speed, "breaking" ability, or competitiveness of any given race.

53. Even if the Amended Administrative Complaint pled the quality of the races, which it did not, the Division was candid in its Proposed Recommended Order that "[n]o rule or statute explicitly sets forth the particular speed at which a horse race must be conducted to count towards a permitholder's license requirements." However, in support of its position that the allegation in Count One could be expanded to include speed as an "inherent" element of the violation as alleged, the Division cites to "interrelated" definitions of "race" and "contest" in rules 61D-2.001(5) and 61D-2.001(15).

54. Rule 61D-2.001(5) defines a "contest" as "a race . . . between horses . . . for purses, stakes, or reward on any licensed race course . . . and conducted in the presence of judges or stewards."

55. Rule 61D-2.001(15) defines a "race" as "a contest for purse, stakes or entry fees, on an approved course, and in the presence of duly appointed racing officials."

56. The evidence in this case establishes that Hamilton Downs conducted its licensed meet for purses or stakes on an approved course, and in the presence of duly-appointed racing officials. Issues of the quality of the races being sub-par were not specifically pled in Count One, and were not proven to be violative of any specific statute or rule administered by the Division.

E. Coupled Entry

57. The Division has argued that the coupled entry race, in which both horses were owned by Amie Peacock, resulted, in essence, in the race being a nullity. If that race is not considered, Hamilton Downs would have conducted only 159 races during its meet, not the 160 races that were permitted, and thus would not have "operate[d] all performances . . . specified on its license."

58. Rule 61D-7.001(12) defines a "coupled entry" as "two or more horses having the same owner entered to run in the same race. A coupled entry is considered a single betting interest for purposes of wagering."

59. As stipulated by the parties, the Division has no rule defining a coupled entry as a single betting interest for any purpose other than wagering; has no rule defining a coupled entry as a single betting interest for the purposes of determining whether an event is a race or contest; has no rule that prohibits coupled entries during a horse race; and has no rule that excludes any coupled entry from the definition of a "contest."

60. Chapter 61D-7 contains numerous provisions that recognize the legality of coupled entries in licensed horseraces, and prescribes how those coupled entries are to be handled for purposes of paying out winning wagers. What is missing in the rules of the division is any suggestion that coupled entries are,

per se, illegal, or that races with coupled entries are subject to invalidation on that basis alone. Again, the Division's efforts to cobble together various statutory and regulatory definitions to create a standard by which coupled entry races are to be nullified does not meet the requirements that violations of law be limited to those pled, and that statutes authorizing penal relief be strictly construed, with any ambiguity construed against the Division.

61. Based on the foregoing, the Division failed to prove, by clear and convincing evidence, that Hamilton Downs failed to operate all performances at the date and time specified on its license.

F. Estoppel

62. In the event the Division determines that its regulatory authority, as prescribed by statute and rule, allows it to find a violation of section 550.01215(3) under the facts of this case, the issue of estoppel, as raised by Hamilton Downs, must be addressed.

63. The undersigned agrees with the Division that estoppel against the Division is not warranted due to the alleged lack of prior administrative action in similar circumstances, or due to the loss or destruction of documents. Thus, the issue of estoppel is limited to that pled or reasonably inferred from the Amended Request for Administrative Hearing, i.e., whether

estoppel as to the coupled entry race is warranted as a result of the effect of the 30-minute meeting held after the second race, and the decision by Mr. Haskell to declare the race to be "official."[5/]

64. It is well established that:

> The elements which must be present for application of estoppel are: "(1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." As a general rule, estoppel will not apply to mistaken statements of the law, but may be applied to erroneous representations of fact.
>
> Equitable estoppel will apply against a governmental entity "only in rare instances and under exceptional circumstances." . . . The reasonable expectation of every citizen "that he will be dealt with fairly by his government," can form the basis for application of equitable estoppel against a governmental entity.
>
> One seeking to invoke the doctrine of estoppel against the government first must establish the usual elements of estoppel, and then must demonstrate the existence of affirmative conduct by the government which goes beyond mere negligence, must show that the governmental conduct will cause serious injustice, and must show that the application of estoppel will not unduly harm the public interest. (internal citations omitted).

Council Bros. v. City of Tallahassee, 634 So. 2d 264, 266 (Fla. 1st DCA 1994).

65. Whether the coupled entry was noticed before or after the second race was run is not important, though the evidence suggests that an unsuccessful effort to stop the race was made. However, once the race was completed, the evidence establishes that a lengthy meeting was held between representatives of the Division and Hamilton Downs to discuss the course of action to be taken.

66. The facts of this case establish that Mr. Richards offered to "re-run" the race, an offer that was, correctly, refused.

67. Mr. Richards, who knew the procedures for obtaining a replacement race from the Division, testified convincingly that he also offered to accept the race as a no-contest, which would have allowed him to request an amendment to the racing date, a procedure allowed by statute and which was, by all accounts, not uncommon. A "no-contest" ruling by the state steward would have allowed for a request for an amended date to be made.
Mr. Haskell understood that if he had declared the race to be a "no contest," Hamilton Downs could have requested a replacement race.

68. After the lengthy discussion, Mr. Haskell elected to declare the race to be official, thus allowing wagers to be paid, and the tote to roll over to the next race. By so doing, the race became one of the 160 races required under the permit,

and effectively foreclosed Hamilton Downs' available statutory remedy of requesting the Division to approve an additional substitute race as a "minor change[] in racing dates after a license has been issued." § 550.01215(3), Fla. Stat.

69. Based on the foregoing, the undersigned concludes that, by declaring the race to be official, the Division represented to Hamilton Downs that the race would be counted among those required under the terms of its permit, a representation of material fact that is contrary to the Division's position in this proceeding.

70. The fact that the Division's action foreclosed an available and effective remedy for any alleged non-compliance,[6/] a remedy that was suggested by Hamilton Downs and which Hamilton Downs was prepared to request, meets the substance and intent of the requirements established in Council Brothers and the cases cited therein, i.e., that Hamilton Downs relied on the Division's representation, i.e., that the race was "official," and that Hamilton Downs changed its position, i.e., forfeited its ability to seek a "minor change," in reliance thereon.

71. Hamilton Downs demonstrated that the affirmative conduct of the District's representative went beyond mere negligence, and that the foreclosure of the statutory remedy would cause serious injustice. Furthermore, the Division has continued to license performances at Hamilton Downs subsequent

to the events at issue, offering support to the conclusion that the application of estoppel will not unduly harm the public interest.

72. Based on the foregoing, the undersigned concludes that the Division is estopped from maintaining an action against Hamilton Downs based on the allegation that, as a result of the coupled entry race, Hamilton Downs failed to operate all performances at the date and time specified on its license.

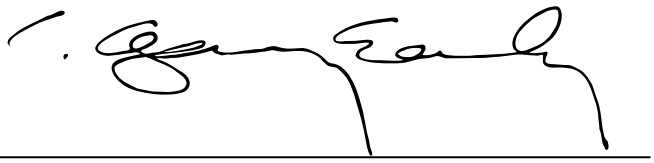
Conclusion

73. As set forth in the Findings of Fact herein, the Division failed to prove by clear and convincing evidence that, during the Hamilton Downs 2014 permitted meet, Hamilton Downs failed to operate all performances at the date and time specified on its license. Thus, the allegation in Count One of the Amended Administrative Complaint that Hamilton Downs violated section 550.01215(3) was not sustained and must be dismissed.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is RECOMMENDED that a final order be entered dismissing the Amended Administrative Complaint.

DONE AND ENTERED this 26th day of May, 2016, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of May, 2016.

ENDNOTES

[1/] Only a single section of chapter 550, section 550.2415 dealing with medication of racing animals and prohibited substances, has been amended since 2013.

[2/] Despite the conclusion reached herein, the undersigned fully agrees with Mr. Haskell, who expressed amazement that the June 18 through 22, 2014, performances could be construed as horse racing. Indeed, the videos of the events in Petitioner's Exhibit 5 must be viewed in order to capture the flavor of the event. This case has been decided on the failure of the Division to prove, by clear and convincing evidence, that a standard applicable to quarter horse racing was violated. In all likelihood, the Division probably believed it to be unnecessary to establish a "standard" that would define a "race" as something other than horses ambling slowly down a crude dirt path through a field. While the "races" in this case violated no established standard for the conduct of a contest between horses, the video establishes that the "races" occurring on June 18 through 22, 2014 were more evocative of an Our Gang comedy short than the undercard at Pimlico.

[3/] Section 550.002(28) defines "quarter horse" as "a breed of horse developed in the western United States which is capable of high speed for a short distance and used in quarter horse racing registered with the American Quarter Horse Association." While the horses entered in the Hamilton Downs race meet may have been bred for speed, they exhibited little of their breeding during the meet.

[4/] The steward's report for the race indicates that the rider of horse No. 1, Dancin Blue Ghost, fell off, and the horse did not finish the race.

[5/] It should also be noted that the issue of estoppel was identified in the Joint Prehearing Stipulation in the section entitled "Statement of the Nature of the Controversy," and was discussed in greater detail in Hamilton Downs' statement of position. As a rule,

> any previous skirmishes or dust-ups or contentious pretrial issues become mostly irrelevant once the parties prepare and stipulate as to the final agreed-upon "executive summary" as to what the impending trial is about and the specific issues that remain on the table. The Pretrial Stipulation is surely one of the most coveted and effective pretrial devices enjoyed by the trial court and all involved parties . . . . "Pretrial stipulations prescribing the issues on which a case is to be tried are binding upon the parties and the court, and should be strictly enforced." (citations omitted).

Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc., 174 So. 3d 1037, 1038-1039 (Fla. 4th DCA 2015).

[6/] As indicated herein, the Division did not establish, and its rules do not support a conclusion that a coupled entry race is subject to invalidation.

COPIES FURNISHED:

Richard Earl Gentry, Esquire
2305 Braeburn Circle
Tallahassee, Florida 32309
(eServed)

Seann M. Frazier, Esquire
Marc Ito, Esquire
Parker, Hudson, Rainer and Dobbs, LLP
215 South Monroe Street, Suite 750
Tallahassee, Florida 32301
(eServed)

Caitlin R. Mawn, Esquire
Thomas J. Izzo, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 40
Tallahassee, Florida 32399
(eServed)

Jonathan Zachem, Director
Division of Pari-Mutuel
Wagering
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 40
Tallahassee, Florida 32399
(eServed)

Jason Maine, General Counsel
Department of Business and
Professional Regulation
Capital Commerce Center
2601 Blair Stone Road
Tallahassee, Florida 32309
(eServed)

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.