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

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

Petitioner,

v.

HAMILTON DOWNS HORSETRACK, LLC,

Respondent.
_____/

DOAH Case No. 15-3866
DBPR Case No. 2014-026021

FINAL ORDER

Pursuant to § 120.60(l), Florida Statutes (2015), the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division") files the following Final Order. This cause came before the Division for the purpose of considering the Recommended Order issued by Administrative Law Judge, E. Gary Early ("ALJ Early") on May 26, 2016, in DOAH case number 15-3866, a copy of which is attached as Exhibit A. The Department of Business and Professional Regulation ("Petitioner") filed exceptions to the Recommended Order, to which Hamilton Downs ("Respondent") filed a response and those exceptions and response are attached as composite Exhibit B. Respondent also filed exceptions to the Recommended Order to which Petitioner filed a response and those exceptions and response are attached as composite Exhibit C.

Background

On August 15, 2014, the Division filed an Amended Administrative Complaint against Respondent for violations of the Florida Statutes. On August 27, 2014, Respondent filed a Request for Formal Hearing, disputing the facts alleged in the Administrative Complaint. On

October 15, 2014, the Division filed a three count Amended Administrative Complaint alleging the Respondent failed to operate all performances specified on its license on the dates and times specified (Count I); the Respondent failed to have a number of its wagering terminal window that matched the totalisator reports (Count II); and that one or more horses racing in the performances were owned by an unlicensed owner. Respondent filed its Amended Request for Formal Administrative Hearing on January 15, 2016 (Count III).

A formal administrative hearing was convened on April 25, 2016.[1] The ALJ issued a Recommended Order on May 26, 2016, recommending the Division dismiss the Amended Administrative Complaint against Respondent. Both parties filed exceptions to ALJ Early's Recommended Order. After a complete review of the record in this matter, the Division rules as follows:

AGENCY STANDARD FOR REVIEW

Pursuant to § 120.57(1)(l), Fla. Stat., the Division may not reject or modify findings of fact unless it first determines, from a review of the entire record, and states with particularity, that the findings of fact were not based on competent substantial evidence. "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)).

Pursuant to § 120.57(1)(l), Fla. Stat., when rejecting or modifying conclusions of law or interpretations of administrative rules, the Division must state with particularity its reasons for rejecting or modifying such conclusions of law or interpretation of administrative rules and must

[1] Counts II and III of the Amended Administrative Complaint were dismissed at the formal hearing.

make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable that that which was rejected or modified.

RULINGS ON DEPARTMENT'S EXCEPTIONS

Exception to Finding of Fact Paragraph #10

1. Petitioner takes exception to the finding of fact set forth in Paragraph #10, in which ALJ Early found, "[n]onetheless, Hamilton Downs did its best to fulfill its permitted slate of races."

2. The Division rejects Petitioner's Exception to Paragraph #10.

Exception to Findings of Fact Paragraph #30

3. Petitioner takes exception to the finding of fact set forth in Paragraph #30 in which ALJ Early found, "Mr. Richards also proposed calling a "no-contest" which would allow Hamilton Downs to request an additional race from the Division."

4. Petitioner also takes exception to the finding of fact set forth in Paragraph #30 in which ALJ Early found, "[a]n additional race is not a re-run of the disputed race, but is a replacement race to be run at a different time during the meet."

5. The Division rejects Petitioner's Exceptions to Paragraph #30.

Exception to Finding of Fact Paragraph #31

6. Petitioner takes exception to the finding of fact in Paragraph #31 in which ALJ Early found, "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."

7. The Division rejects Petitioner's Exception to Paragraph #31.

Exception to Finding of Fact Paragraph #32

8. Petitioner takes exception to the finding of fact in Paragraph #32 in which ALJ Early found, "[r]ather he decided to make the race "official." As a result, Hamilton Downs could not request a make-up race."

9. Upon review of the record, the Division grants Petitioner's Exception to Paragraph #32 because the finding in Paragraph #32 of the Recommended Order that "[a]s a result, Hamilton Downs could not request a make-up race" is not based on competent substantial evidence.

Exception to Conclusion of Law Paragraph # 52

10. Petitioner takes exception to conclusion of law in Paragraph #52, in which ALJ Early found, "[t]hat allegation [that Hamilton Downs failed to operate all performances at the date and time specified on its license] 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 appears to be inadequate speed, "breaking" ability, or competitiveness of any given race."

11. The Division rejects Petitioner's Exception to Paragraph #52.

Exception to Conclusion of Law Paragraph #53

12. Petitioner takes exception to conclusion of law in Paragraph #53, in which ALJ Early found, "[e]ven if the Amended Administrative Complaint pled the quality of races, which it did not..."

13. The Division rejects Petitioner's Exception to Paragraph #53.

Exception to Conclusion of Law Paragraph #56

14. Petitioner takes exception to the conclusion of law in Paragraph #56, in which ALJ Early found, "[i]ssues 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."

15. The Division rejects Petitioner's Exception to Paragraph #56.

Exceptions to Conclusions of Law Paragraph #60

16. Petitioner takes exception to the conclusion of law set forth in Paragraph #60, in which ALJ Early found, "[w]hat 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 the basis alone."

17. Petitioner also takes exception to the conclusion of law set forth in Paragraph #60, in which ALJ Early found, "[a]gain, 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 statues authorizing penal relief be strictly construed, with any ambiguity construed against the Division."

18. The Division grants Petitioner's exceptions to the conclusions of law in Paragraph #60 of the Recommended Order.

19. While Rule 61D-7.001(12), F.A.C., does not define coupled entries as "per se illegal," it does define coupled entries 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."

20. It is axiomatic that to be considered a pari-mutuel event, the event must have more than one betting interest so the public can wager accordingly. Section 550.002(22), Fla. Stat., defines "pari-mutuel" in relevant part as, "a system of betting on races...in which the winners divide the total amount of the bet...in proportion to the sums they have wagered individually and with regard to the odds assigned to particular outcomes."

21. It is unambiguous that the public cannot wager on a single betting interest.

22. Accordingly, a race that has entries in addition to the coupled entry is considered a pari-mutuel event because there are multiple betting interests, while a race that only contains a coupled entry is not considered a pari-mutuel event because it only contains a single betting interest.

23. The Amended Administrative Complaint properly pleaded, and it was undisputed, that during race 2 of Hamilton Downs' performance 1 on June 18, 2014, race 2 only contained a coupled entry – a single betting interest.

24. Therefore, a more reasonable conclusion of law and interpretation than that of the ALJ is that if a race does not contain multiple betting interests, it cannot be considered a valid pari-mutuel event for the public to wager on, and cannot count toward a performance under § 550.01215, Fla. Stat., and because race 2 of Respondent's performance 1 on June 18, 2014 only contained a coupled entry – a single betting interest – Hamilton Downs failed to operate performance 1 and violated § 550.01215(3), Fla. Stat., which requires each permit holder to operate all performances at the date and time specified in its license.

25. Accordingly, due to Respondent's failure to operate performance 1 on June 18, 2014, pursuant to § 550.0251(10), Fla. Stat., the Division may impose an administrative fine of not more than $1,000.00 for each count or separate offense, or suspend or revoke a permit.

Exception to Conclusion of Law Paragraph #61

26. Petitioner takes exception to the conclusion of law in Paragraph #61, in which ALJ Early found, "[b]ased 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."

27. The Division grants Petitioner's Exception to Paragraph #61.

28. A more reasonable conclusion of law and interpretation than that of the ALJ is that because race 2 of Respondent's performance 1 on June 18, 2014 only contained a coupled entry – a single betting interest – the Division proved by clear and convincing evidence that Hamilton Downs failed to operate all performances at the date and time specified in its license in violation of § 550.01215(3), Fla. Stat.

Exceptions to Conclusions of Law Paragraph #67

29. Petitioner takes exception to the conclusion of law in Paragraph #67, in which ALJ Early found, "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."

30. Petitioner also takes exception to the conclusion of law in Paragraph #67, in which ALJ Early found, "[a] no-contest ruling by the state steward would have allowed for a request for an amended date to be made."

31. Finally, Petitioner takes exception to the conclusion of law in Paragraph #67, in which ALJ Early found, "Mr. Haskell understood that if he had declared the race to be a no contest, Hamilton Downs could have requested a replacement race."

32. The Division grants all of Petitioner's Exceptions to Paragraph #67 because the Petitioner's proposed substituted conclusions of law are more reasonable than those set forth by ALJ Early.

33. Specifically, § 550.01215(3), Fla. Stat., does not indicate that a race must be declared "no-contest" before a permitholder can apply to the Division for a change to its racing dates, or for additional racing dates.

34. The record reflects that the designation of a race by the Division as "official" only serves to permit the payment of winnings on wagers for the particular race, and allows the totalisators to advance to the next wagering opportunity.

35. The ALJ's conclusion would mean that declaring a race "official" forecloses any administrative enforcement against the permitholder for violations relates to such a race. Such an interpretation is not reasonable.

36. A more reasonable conclusion of law is that Mr. Haskell declaring race 2 of performance 1 as "official" did not prevent Respondent from requesting an amendment to its racing dates or operating license.

Exception to Conclusion of Law Paragraph #68

37. Petitioner takes exception to the conclusion of law in Paragraph #68, in which ALJ Early found, "[b]y [declaring race two of performance one official], 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 as a "minor change in racing dates after a license has been issued."

38. The Division grants Petitioner's Exception to Paragraph #68 because the proposed substituted conclusion of law is more reasonable than that set forth by ALJ Early.

39. Specifically, § 550.01215(3), Fla. Stat., does not indicate that a race must be declared "no-contest" before a permitholder can apply to the Division for a change to its racing dates, or for additional racing dates.

40. The record reflects that the designation of a race by the Division as "official" only serves to permit the payment of winnings on wagers for the particular race, and allows the totalisators to advance to the next wagering opportunity.

41. The ALJ's conclusion would mean that declaring a race "official" forecloses any administrative enforcement against the permitholder for violations relates to such a race. Such an interpretation is not reasonable.

42. A more reasonable conclusion of law is that race 2 of performance 1 never became one of the 160 races required by the Respondent's license, and that the declaration of the race as "official" did not foreclose Respondent's ability to request an amendment to its operating license.

Exception to Conclusion of Law Paragraph #69

43. Petitioner takes exception to the conclusion of law in Paragraph #69, in which ALJ Early found, "[b]ased 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 the proceeding."

44. The Division grants Petitioner's Exception to Paragraph #69 because the proposed substituted conclusion of law set forth by the Petitioner is more reasonable than that set forth by ALJ Early.

45. Specifically, § 550.01215(3), Fla. Stat., does not indicate that a race must be declared "no-contest" before a permitholder can apply to the Division for a change to its racing dates, or for additional racing dates.

46. The record reflects that the designation of a race by the Division as "official" only serves to permit the payment of winnings on wagers for the particular race, and allows the totalisators to advance to the next wagering opportunity.

47. The ALJ's conclusion would mean that declaring a race "official" forecloses any administrative enforcement against the permitholder for violations related to such a race. Such an interpretation is not reasonable.

48. A more reasonable conclusion of law is that Mr. Haskell never represented to Respondent that race 2 of performance 1 would be counted toward the races required under the terms of Respondent's license.

Exception to Conclusion of Law Paragraph #70

49. Petitioner takes exception to the conclusion of law in Paragraph #70, in which ALJ Early found, "[t]he fact that the Division's action foreclosed an available and effective remedy for any alleged non-compliance, 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 therein."

50. The Division grants Petitioner's Exception to Paragraph #70 because Petitioner's proposed substituted conclusion of law is more reasonable that that set forth by ALJ Early.

51. Specifically, § 550.01215(3), Fla. Stat., does not indicate that a race must be declared "no-contest" before a permitholder can apply to the Division for a change to its racing dates, or for additional racing dates.

52. The record reflects that the designation of a race by the Division as "official" only serves to permit the payment of winnings on wagers for the particular race, and allows the totalisators to advance to the next wagering opportunity.

53. The ALJ's conclusion would mean that declaring a race "official" forecloses any administrative enforcement against the permitholder for violations related to such a race. Such an interpretation is not reasonable.

54. A more reasonable conclusion of law is that Mr. Haskell's declaring race 2 of performance 1 as "official" did not foreclose any remedies available to Respondent to cure its non-compliance.

Exceptions to Conclusions of Law Paragraph #71

55. Petitioner takes exception to the conclusion of law in Paragraph #71, in which ALJ Early found, "Hamilton Downs demonstrated that the affirmative conduct of the Division's representative went beyond mere negligence, and that the foreclosure of the statutory remedy would cause serious injustice."

56. Petitioner also takes exception to the conclusion of law set forth in Paragraph #71 in which ALJ Early found, "[f]urthermore, 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."

57. The Division grants Petitioner's Exceptions to Paragraph #71 because Petitioner's proposed substituted conclusions of law are more reasonable than those set forth by ALJ Early.

58. Specifically, § 550.01215(3), Fla. Stat., does not indicate that a race must be declared "no-contest" before a permitholder can apply to the Division for a change to its racing dates, or for additional racing dates.

59. The record reflects that designation of a race by the Division as "official" only serves to permit the payment of winnings on wagers for the particular race, and allows the totalisators to advance to the next wagering opportunity.

60. The Division did not engage in any affirmative conduct representing to Respondent that race 2 of performance 1 would be counted among those required under the terms of Respondent's operating license, nor did the Division represent to Respondent that no statutory remedy was available to Respondent.

61. The ALJ's conclusion would mean that declaring a race "official" forecloses any administrative enforcement against the permitholder for violations related to the race. Such an interpretation is not reasonable

62. A more reasonable conclusion of law is that Hamilton Downs failed to establish that estoppel should be applied to the Division's conduct regarding the coupled race entry from race 2 performance 1 on June 18, 2014.

Exception to Conclusion of Law Paragraph #72

63. Petitioner takes exception to the conclusion of law in Paragraph #72 in which ALJ Early found, "[b]ased 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."

64. The Division grants Petitioner's Exception to Paragraph #72 because Petitioner's proposed substitute conclusion of law is more reasonable than that set forth by ALJ Early.

65. Specifically, § 550.01215(3), Fla. Stat., does not indicate that a race must be declared "no-contest" before a permitholder can apply to the Division for a change to its racing dates, or for additional racing dates.

66. The record reflects that designation of a race by the Division as "official" only serves to permit the payment of winnings on wagers for the particular race, and allows the totalisators to advance to the next wagering opportunity.

67. A more reasonable conclusion of law is that the Division should not be estopped from maintaining an action against Respondent based on the allegation that, as a result of the coupled entry in race 2 of Performance 1, Respondent failed to operate all performances at the date and time specified on the license. The violation is unambiguous.

Exceptions to Conclusions of Law Paragraph #73

68. Petitioner takes exception to the conclusion of law in Paragraph #73, in which ALJ Early found, "[a]s 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 the license."

69. Petitioner also takes exception to the conclusion of law in Paragraph #73, in which ALJ Early found, "[t]hus, 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."

70. The Division grants Petitioner's Exceptions in Paragraph #73 because Petitioner's proposed substitute conclusions of law are more reasonable than those set forth by ALJ Early.

71. Specifically, § 550.01215(3), Fla. Stat., does not indicate that a race must be declared "no-contest" before a permitholder can apply to the Division for a change to its racing dates, or for additional racing dates.

72. The record reflects that designation of a race by the Division as "official" only serves to permit the payment of winnings on wagers for the particular race, and allows the totalisators to advance to the next wagering opportunity.

73. The Amended Administrative Complaint properly pleaded, and it was undisputed, that during race 2 of Hamilton Downs' performance 1 on June 18, 2014, race 2 only contained a coupled entry – a single betting interest.

74. Therefore, a more reasonable conclusion of law and interpretation than that of the ALJ is that if a race does not contain multiple betting interests, it cannot be considered a valid pari-mutuel event for the public to wager on, and cannot count toward a performance under § 550.01215, Fla. Stat., and because race 2 of Respondent's performance 1 on June 18, 2014 only contained a coupled entry – a single betting interest – Hamilton Downs failed to operate performance 1 and violated § 550.01215(3), Fla. Stat., which requires each permit holder to operate all performances at the date and time specified in its license. The violation is unambiguous.

75. Based on the record, a more reasonable conclusion of law would be that Petitioner proved, by clear and convincing evidence, that Respondent failed to operate all performances at the date and time specified on its license during the June 2014 meet.

RULINGS ON RESPONDENT'S EXCEPTIONS

Exceptions to Conclusions of Law Paragraphs #63 & #72

76. Respondent takes exception to the conclusion of law at Paragraph #63, in which ALJ Early found, "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."

77. Respondent takes exception to the conclusion of law at Paragraph #72, in which ALJ Early found, "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 couples entry race, Hamilton Downs failed to operate all performances at the date and time specified on the license."

78. Respondent takes exception to ALJ Early's conclusion that the issue of estoppel was preserved only as to a single coupled entry race.

79. The Division rejects Respondent's exceptions to Paragraphs #63 and #72.

FINDINGS OF FACT

80. ALJ Early's Findings of Fact in Paragraphs #1-31 and #33-39, as set forth in Exhibit A are approved adopted and incorporated to the Final Order by reference. Those findings are supported by competent and substantial evidence.

81. ALJ Early's Findings of Fact in Paragraph #32 is rejected because upon a review of the record, the finding that "[a]s a result, Hamilton Downs could not request a make-up race" is not based on competent substantial evidence.

CONCLUSIONS OF LAW

82. ALJ Early's Conclusions of Law in Paragraphs #40-59 and #62-66 as set forth in Exhibit A are approved, adopted, and incorporated to this Final Order by reference.

83. Based on the record, the Conclusions of Law in Paragraphs 60, 61, 67, 68, 69, 70, 71, 72, and 73 are rejected and substituted with the more reasonable conclusions of law set forth in the rulings on Petitioner's Exceptions to the aforementioned Conclusions of Law set forth herein. Those substituted conclusions of law are approved, adopted, and incorporated to this Final Order by reference.

WHEREFORE, IT IS ORDERED AND ADJUDGED THAT:

1. The Respondent violated Count I of the Amended Administrative Complaint.

2. Respondent is ordered to pay an administrative fine to the Division in the amount of One Thousand dollars ($1,000.00), due 30 days after the effective date of this Order.

3. This order shall become effective on the date of the filing with the Department's Agency Clerk.

Signed this 24th day of August, 2016 in Tallahassee, Leon County, Florida.

ANTHONY J. GLOVER, DIRECTOR
Division of Pari-Mutuel Wagering
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399-1035
(850) 488-9130

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail and electronic mail to: (1) Richard Gentry, Esq., rgentry@comcast.net; 2305 Braeburn Circle, Tallahassee, Florida 32309; (2) Sean Frazier, Esq. sfrazier@phrd.com; Marc Ito, Esq. mito@phrd.com; Parker, Hudson, Rainer & Dobbs, L.L.P., 215 South Monroe Street, Suite 750, Tallahassee, Florida 32301; and by electronic mail to (3) Caitlin Mawn, Esq., caitlin.mawn@myfloridalicense.com and Thomas J. Izzo, Esq., tj.izzo@myfloridalicense.com, Department of Business and Professional Regulation, 2601 Blair Stone Road, Tallahassee, Florida 32399-2202 on this the 24th day of August, 2016.

RONDA L. BRYAN, Agency Clerk

Agency Clerk's Office
Department of Business & Professional Regulation

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, Fla. R. App. P., and section 120.68, Florida Statutes.