STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KIRK ZIADIE,

Petitioner,

vs. Case No. 15-5037

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

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge F. Scott Boyd for final hearing by video teleconference on September 30 and October 1, 2015, at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Bradford J. Beilly, Esquire
Bradford and Strohsahl, P.A.
1144 Southeast Third Avenue
Fort Lauderdale, Florida 33316

For Respondent: Caitlin R. Mawn, Esquire
Marisa G. Button, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 40
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STATEMENT OF THE ISSUE

The issue is whether Petitioner's application for renewal of his professional occupational license as a thoroughbred horse trainer should be granted.

PRELIMINARY STATEMENT

By letter dated August 26, 2015, the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Division or Respondent), notified Mr. Kirk Ziadie (Mr. Ziadie or Petitioner) that his application for renewal of his pari-mutuel professional occupational license would be denied based upon alleged violations of Florida Statutes and implementing administrative rules.

Petitioner disputed material facts alleged in the denial and timely requested an administrative hearing on August 28, 2015. The case was forwarded to the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge on September 14, 2015.

The parties stipulated to certain facts, which were accepted at hearing and are included among those set forth below. Petitioner testified and presented the live testimony of Mr. Kevin Scheen, a state steward of the Division; and Mr. Kent Stirling, the executive director of the Florida Horsemen's Benevolent and Protective Association. Petitioner offered two exhibits at hearing, P-1 and P-2, and late-filed Exhibit P-3

(the stipulated testimony of Dr. Steven A. Barker, a neurochemist and section head of the Louisiana Animal Disease Diagnostic Laboratory at the Louisiana State University School of Veterinary Medicine, unavailable as a witness), all of which were admitted into evidence. Respondent presented the live testimony of Division employees: Ms. Tammie Erskine, a detention barn supervisor; Dr. William Milton Watson, III, veterinary manager; Ms. Jill Blackman, chief operations officer; and Mr. Ivan Irrutia, a chief veterinarian's assistant. Respondent offered ten exhibits, R-1 (a transcript of former testimony and curriculum vitae of Dr. Cynthia Cole, a veterinarian pharmacologist and director of research and development at Mars Veterinary, admitted by stipulation) through R-10, all of which were admitted into evidence. Official recognition was given to the provisions of chapter 550, Florida Statutes, and Florida Administrative Code Rules 61D-2.002, 61D-6.005, 61D-6.008, and 61D-6.011.

The two-volume Transcript of the hearing was filed at DOAH on October 7, 2015. Both parties timely filed proposed recommended orders that were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Division is the state agency charged with regulating pari-mutuel wagering in the state of Florida, pursuant to chapter 550, Florida Statutes (2015).[1/]

2. At all times material hereto, Mr. Ziadie held a pari-mutuel wagering individual occupational license, number 426775-1021, issued by the Division.

3. At all times material hereto, Mr. Ziadie raced horses at Gulfstream Park, a facility operated by a permitholder authorized to conduct pari-mutuel wagering.

4. At all times material hereto, Mr. Ziadie was subject to chapter 550 and implementing rules in Florida Administrative Code Chapter 61D-6.

5. Mr. Zaidie applied for renewal of his professional occupational license. That application was denied by the Division by letter dated August 26, 2015. The letter stated that denial was based on Mr. Ziadie's violation of section 550.2415(1)(a)(relating to the racing of animals with restricted drugs) and rule 61D-6.002(1)(holding the trainer of record as an "absolute insurer" of the condition of his horses) on February 6, 2015, April 24, 2015, and May 9, 2015.

6. As stipulated by the parties at hearing, but for the alleged offenses, Mr. Ziadie met all requirements for renewal, and the Division would have renewed his license.

7. Mr. Ziadie will be unable to continue as a thoroughbred horse trainer in Florida if his license is not renewed. He is substantially affected by the Division's intended action.

8. The equine detention barn is the site at each licensed racetrack in Florida where employees of the Division obtain urine and blood samples from racehorses.

9. At all times material hereto, the 2010 Equine Detention Barn Procedures Manual (the Manual) was in effect.

10. The Manual prescribes detailed procedures for collecting blood samples from race horses, spinning the blood in the centrifuge to extract the serum, pouring of the serum into the evergreen tube, sealing of the evergreen tube with evidence tape, and mailing of the specimen to the laboratory for testing.

11. The Division publishes the Manual under the direction of its deputy director and distributes it to every employee that works at a detention barn, including the state veterinarian, the chief veterinary assistant, other veterinary assistants, detention barn security guards, and detention barn supervisors. The Manual is not made available to the general public. The Manual is an official publication of the Division used at all horse racing facilities in the state of Florida and was last updated on June 25, 2010.

12. At all times material hereto, Mr. Ziadie was the trainer of record of the thoroughbred horse "GET CREATIVE."

13. On or about February 6, 2015, "GET CREATIVE" finished in first place in the third race at Gulfstream Park.

14. As stipulated at hearing, a blood sample was taken from "GET CREATIVE" after the race using the procedures described in the Manual. After processing, extracted serum from the blood was numbered as sample number 798044.

15. The lab tested serum sample number 798044 and found that it contained phenylbutazone, an anti-inflammatory and a class 4 drug under the Uniform Classification Guidelines for Foreign Substances, as promulgated by the Association of Racing Commissioners International.

16. The concentration of phenylbutazone in sample number 798044 was 3.4 micrograms per milliliter, which is in excess of the 2 micrograms per milliliter threshold established in rule 61D-6.008.[2/]

17. The results of the lab's analysis of sample number 798044 were issued to Mr. Ziadie in a report dated February 26, 2015.

18. At all times material hereto, Mr. Ziadie was the trainer of record of the thoroughbred horse "AT LARGE."

19. On or about April 24, 2015, "AT LARGE" finished in first place in the first race at Gulfstream Park.

20. As stipulated at hearing, a blood sample was taken from "AT LARGE" after the race using the procedures described in

the Manual. After processing, extracted serum from the blood was numbered as sample number 028949.

21. The lab tested serum sample number 028949 and found that it contained phenylbutazone, an anti-inflammatory and a class 4 drug under the Uniform Classification Guidelines for Foreign Substances, as promulgated by the Association of Racing Commissioners International.

22. The concentration of phenylbutazone was 2.3 micrograms per milliliter, which is in excess of the 2 micrograms per milliliter threshold established in rule 61D-6.008.

23. The results of the lab's analysis of sample number 028949 were issued to Mr. Ziadie in a report dated May 6, 2015.

24. At all times material hereto, Mr. Ziadie was the trainer of record of the thoroughbred horse "CREATIVE LICENSE."

25. On or about May 9, 2015, "CREATIVE LICENSE" finished in first place in the seventh race at Gulfstream Park.

26. As stipulated at hearing, a blood sample was taken from "CREATIVE LICENSE" after the race using the procedures described in the Manual. After processing, extracted serum from the blood was numbered as sample number 031421.

27. The lab tested serum sample number 031421 and found that it contained clenbuterol, a bronchodilator and a class 3 drug under the Uniform Classification Guidelines for Foreign

Substances, as promulgated by the Association of Racing Commissioners International.

28. The concentration of clenbuterol in serum sample number 031421 was 8.9 picograms per milliliter. Rule 61D-6.008 does not permit clenbuterol in the body of a racing animal on race day.

29. The results of the lab's analysis of sample number 031421 were issued to Mr. Ziadie in a report dated May 20, 2015.

30. At the time of these races, rule 61D-6.005, effective November 19, 2001,[3/] governed the procedures for the taking of urine and blood samples from the horses. Subsection (3) provided in part:

> The specimen shall be sealed in its container, assigned an official sample number which is affixed to the specimen container, and the correspondingly numbered information portion of the sample tag shall be detached and signed by the owner, trainer, groom, or the authorized person as a witness to the taking and sealing of the specimen.

31. Subsection 4.5 of the Manual describes the sample tag in greater detail:

> RL 172-03 is a self-adhesive sequentially numbered bar-coded, three part form (blood label, urine label and card) provided by the University of Florida Racing Laboratory that is used to catalog specimens by assigning them "Specimen Numbers." As specimens are collected, information regarding the animal

> from which the sample was collected is written on the bottom of this form. The top two portions of the form (Blood, Urine) are completed with the Track Number and Collection Date. The applicable top portions of the form are then separated and applied to the urine specimen cup and/or evergreen blood tube. The bottom portion, or Specimen Card is completed and appropriately signed and is sent to the Tallahassee Office of Operations to be filed.

32. The sample tag thus consists of three portions: the numbered portion designated for the blood specimen ("blood label"), the numbered portion designated for the urine specimen ("urine label"), and the numbered portion containing information about the animal and trainer that is to be signed by the witness ("card"). In the sampling procedures followed in this case, the blood label was not affixed to the collection tube. The blood label, from which the card portion was "detached," was affixed to the evergreen blood tube. This was consistent with the governing rule as well as the Manual. The evergreen tube is the specimen container for the serum.

33. The sampling procedures followed on February 6, 2015, April 24, 2015, and May 9, 2015, were in compliance with the procedures set forth in the Manual.

34. As stated in subsection 4.4 of the Manual, "[s]ealing the sample ensures the specimen does not spill during shipment to the laboratory and assures all parties that the sample has

not been tampered with." The same purposes are served by sealing the serum specimen.

35. After the blood samples were taken by the veterinarian, they were not "sealed" in the collection tubes. The fact that the collection tubes are air tight prior to and after the taking of the blood and initially contain a partial vacuum to facilitate collection, does not constitute "sealing" of the specimen in its container for purposes of the rule. The three collection tubes are not the specimen container, but the last three digits of the number from the blood label affixed to the specimen container were also written on each blood collection tube with a black "Sharpie" type marking pen to ensure control of the sample.

36. After the blood was centrifuged, and the serum was poured into the evergreen tube, the serum was sealed with evidence tape, as described in subsection 4.6 of the Manual, and the chief veterinary assistant put his initials over the seal. This constituted "sealing" of the specimen in its container. Subsection 4.6 of the Manual provides:

> Serum is poured into applicable (numbered) "evergreen" tubes. Each "evergreen" tube is immediately properly sealed with evidence tape.

37. Rule 61D-6.005 does not make any reference to spinning the blood in the centrifuge to extract serum, the pouring of

serum into an evergreen tube, the sealing of the evergreen tube with evidence tape, or the freezing of the specimen. Subsection 4.6 of the Manual establishes additional Division policies and procedures not contained in the rule.

38. The serum must be separated from the blood because whole blood cannot be frozen without damage that would affect its usefulness in laboratory testing. Centrifuging facilitates the separation of the serum from the whole blood. The transfer of the serum from the glass collection tubes to the plastic evergreen tube saves shipping weight and reduces the incidence of breakage during shipping.

39. As testified to by Mr. Urrutia, a chief veterinarian's assistant, the centrifuged collection tubes are stored in a locked refrigerator, the opening of the centrifuged collection tubes and the pouring of the serum into a correspondingly numbered evergreen specimen container is carefully performed with the intent to avoid cross-contamination, and the sealed evergreen specimen containers remain in a locked freezer until they are shipped to the laboratory. The evidence was clear and convincing that the serum specimens in the evergreen containers with the full "Specimen Number" marked on them were derived from the blood sample tubes bearing the same last three numbers. The serum specimens came from Mr. Ziadie's horses.

40. Dr. Barker's testimony indicated that the "free pour" of the serum was the point at which the specimen was most vulnerable, and that contamination or tampering was possible. He stated he would have preferred more supervision, witnessing, and documentation as to who was doing what, at what time. Dr. Cole concurred that there is always a possibility of contamination when a sample is transferred from one container to another. However, the free-pour method used to transfer the serum from the collection tubes into the evergreen specimen container is one of the better approaches, as opposed to using a pipette or method that would put something into the sample. Contamination from the free pour of the serum is unlikely. There was no evidence introduced to suggest that any tampering with, or contamination of, the specimens was likely or probable.

41. The state veterinarian who took the blood sample from each horse signed PMW Form 504, a Daily Record of Sample Collection, indicating that this was done. After centrifuging the whole blood in the collection tubes, at the end of the day the state veterinarian usually leaves the collection tubes with the chief veterinary assistant, who pours the separated serum from each collection tube into the correspondingly numbered evergreen container and seals it. Sometimes, the state veterinarian stays to observe the transfer of the serum to the evergreen specimen container.

42. There is no signature indicating the time the state veterinarian leaves the samples at the detention barn or the time that the chief veterinary assistant opens the collection tubes and transfers the serum. The custody of the samples remains with Division personnel throughout this process. No transfer of custody takes place until the specimen containers are shipped to the laboratory.

43. In each instance of sampling in this case, the owner's witness signed the card portion of the sample tag (Form RL 172-03) after the taking of the urine and blood samples.

44. In each instance of sampling in this case, the owner's witness signed the card portion of the sample tag (Form RL 172-03) after the sealing of the urine specimen in its container, but before the sealing of the serum specimen in its container, the evergreen tube.

45. In each instance of sampling in this case, the owner's witness did not observe the extraction of the serum or the sealing of the serum specimen in its container with the evidence tape. The witnesses could have remained to watch those procedures had they requested to do so. Subsection 4.6 of the Manual states, "the owner, trainer of record or designated authorized witness may leave with the released animal or may elect to witness the conclusion of the collected blood specimen processing and sealing cycle." Two signs posted in the

detention barn similarly advise owner's witnesses that they may remain to witness the centrifuge process and sealing of the sample.

46. Mr. Urrutia credibly testified that in the six years he performed the duties of the chief veterinary assistant, no one ever stayed to watch him transfer the serum or sealing of the specimen container. The pouring of the collection tubes into the specimen container takes place at the end of the racing day, after all of the horses have departed from the detention barn. It would be very inconvenient for an authorized witness to remain until the serum specimens were sealed.

47. The procedures that were followed--set forth in the Manual--which allowed the owner's witness to sign the sample tag after witnessing the taking of the blood but before the sealing of the specimen, were not in compliance with rule 61D-6.005(3), quoted above, which required the owner's representative to sign as a witness to both the taking and sealing of the specimen. The posting of signs advising that the owner's representative was allowed to stay and witness the sealing of the specimen container did not bring the procedure being followed into compliance with rule 61D-6.005(3). The requirement that the authorized representative must witness not only the taking, but also the sealing of specimens, is a provision directly related to maintaining integrity in the sample collection process. Such

deliberate disregard of the plain language of the rule directly affects the fairness of the entire sampling procedure.

48. The Manual is applicable to every horseracing facility within the state of Florida. It has been in effect in its current form since 2010 and, by its own terms, is mandatory. It provides that veterinary assistants, chief veterinary assistants, detention barn security guards, and detention barn supervisors "study, become completely familiar with, and put into practice" the procedures outlined in the Manual. It describes seven steps in chain-of-custody procedures, three of which are "collecting the specimen, sealing the specimen, and completing the required forms," and describes detailed procedures in this "strict sequence of events that must be followed."

49. Testimony at hearing confirmed that Division employees are required to follow the procedures it sets forth. Although some employees stated that the Manual was a "guideline," to the extent that this testimony was intended to suggest that employees need not comply with the Manual's provisions, it is rejected as not credible. As Ms. Erskine, a detention barn supervisor, testified, employees do not have discretion not to follow the procedures set forth in the Manual. She testified that if employees did not follow the procedures, they would be subject to sanctions. Ms. Blackman similarly testified that the

provisions of the Manual are mandatory and that regional managers of the Division had the responsibility to visit racetracks to ensure that each track was following the Manual. This testimony of Ms. Erskine and Ms. Blackman is credited.

50. As Ms. Blackman testified, the sampling procedures set forth in the Manual are important to the Division, to the trainers, and to the public.

51. State Steward Scheen credibly testified that, although he has acted as a judge in hearings before the Board of Stewards in cases alleging violations of section 550.2415 for ten years, he was unaware of the process that was routinely followed to centrifuge blood and extract the serum to create a specimen for shipment to the laboratory.

52. Mr. Stirling credibly testified that in his capacity as executive director of the Florida Horseman's Benevolent and Protective Association, a position he has held for 20 years, he was an advocate for the horsemen. He attended all of the workshops for rules relating to medication overages as one of his primary duties. The centrifuging process, extraction of the serum, and sealing of the serum specimen as described in detail in subsection 4.6 of the Manual were never discussed at a rulemaking hearing. These procedures are not a part of rule 61D-6.005, adopted in 2001. As he testified, Mr. Stirling was not even aware of these procedures until a month or two

before the final hearing in this case. Subsection 4.6 of the Manual has not been adopted under the procedures of section 120.54, Florida Statutes.

53. Subsection 4.6 of the Manual is an unadopted rule.

54. Rule 61D-6.005(8) provided:

> The division may proceed when other evidence exists that an illegal or impermissible legend or proprietary drug, medication, or medicinal compound (natural or synthetic) may have been administered to a racing animal. Otherwise, no action shall be taken unless and until the laboratory under contract with the division has properly identified the legend or proprietary drug, medication, or medicinal compound (natural or synthetic) in a sample or specimen collected pursuant to this chapter. (Emphasis added).

55. As discussed, the serum specimens were not collected pursuant to the requirements of chapter 61D-6. Other than the sample testing, no other evidence was introduced that an illegal drug or medication had been administered to the horses.

56. In the absence of the test results, the Division failed to show even by a preponderance of the evidence that horses trained by Mr. Ziadie were raced with drugs on February 6, 2015, April 24, 2015, and May 9, 2015.

CONCLUSIONS OF LAW

57. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this

proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015).

58. The substantial interests of Petitioner are being determined by Respondent, and Petitioner has standing in this proceeding.

59. Petitioner has the initial burden of proving by a preponderance of the evidence that he meets the requirements to have his pari-mutuel wagering occupational license renewed. However, since Respondent proposes to deny renewal based on alleged misconduct, Respondent assumes the burden of proving the specific acts of misconduct that it contends demonstrate Petitioner's lack of fitness. Dep't of Banking & Fin. v. Osborne, Stern & Co., 670 So. 2d 932, 934 (Fla. 1996); Dept. of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

Standard of Proof

60. The standard of proof that Respondent must meet is not completely settled, however. In Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987), the court determined that the revocation of a professional license required evidence that was clear and convincing, stating that, "where the proceedings implicate the loss of livelihood, an elevated standard is necessary." On the other hand, in Osborne Stern, supra at 934, the court determined that in an initial license application

proceeding, preponderance of the evidence was the appropriate standard, stating that "an agency has broad discretion in determining the fitness of applicants seeking to engage in an occupation the conduct of which is a privilege rather than a right." An agency decision not to renew an existing license based upon alleged misconduct that took place during the previous period of licensure is a "hybrid" which involves both of these important principals to some extent.

61. Respondent asserts that it has proved the alleged misconduct by a preponderance of the evidence, but offers no argument or citation to authority to show that this is the standard of proof that should be applied. The court in M.H. v. Department of Children and Family Services, 977 So. 2d 755, 761 (Fla. 2d DCA 2008), did find that in rejecting the renewal of a foster care license, the Department of Children and Family Services had the burden of proving the alleged misconduct by only a preponderance of the evidence. Some DOAH recommended orders have determined likewise. Rising Stars & Roslyn Smith v. Dep't of Child. & Fams., Case No. 11-4315 (Fla. DOAH Nov. 4, 2015), adopted with modification, Case No. DCF-12-045FO (Fla. DCF Feb. 8, 2012); Robert's Large Fam. Daycare Home v. Dep't of Child. & Fam. Servs., Case No. 08-3027 (Fla. DOAH Sep. 5, 2008; DCF Jan. 5, 2009).

62. In Department of Children and Families v. Davis Family Day Care Home, 160 So. 3d 854, 856 (Fla. 2015), the court set forth an important principle distinguishing a license application from a revocation. The court, quoting Osborne Stern, noted that it had declined to extend the clear and convincing standard to license application proceedings:

> In so holding, we explained that the denial of the application based upon violations of a statute governing the profession "is not a sanction for the applicant's violation of the statute, but rather the application of a regulatory measure," and that applying the clear and convincing evidence standard would be "inconsistent with the discretionary authority granted by the Florida legislature to administrative agencies responsible for regulating professions under the State's police power."

The court also cited Astral Liquors, Inc. v. Department of Business Regulation, 463 So. 2d 1130, 1132 (Fla. 1985), for the proposition that such discretionary authority is particularly necessary where an agency regulates occupations which are practiced by privilege, rather than by right, and which are potentially injurious to the public welfare. A pari-mutuel horse racing trainer is such an occupation.

63. Petitioner contends that Respondent has failed to prove its allegations by clear and convincing evidence, but cites no authority to show that this is the appropriate standard of proof. The court in Coke v. Department of Children and

Family Services, 704 So. 2d 726 (Fla. 5th DCA 1998), did find that in denying the renewal of a family day care license, the agency had the burden of proving allegations of wrongdoing by clear and convincing evidence. Some DOAH recommended orders have determined likewise. Senior Lifestyles, LLC v. Ag. for Health Care Admin., Case No. 13-4660 (Fla. DOAH June 10, 2014), rejected in part, Case No. 2013009388 (Fla. AHCA Jul. 29, 2014); Ag. for Pers. with Disab. v. Help Is On The Way, Inc., Case No. 11-1620 (Fla. DOAH Feb. 2, 2012; Fla. APD Apr. 16, 2012).

64. Some court cases have given consideration to the fact that after a license has been issued, there is at least some degree of expectation that it will be renewed. Vocelle v. Riddell, 119 So. 2d 809, 811 (Fla. 2d DCA 1960), involved the renewal of a license to operate a private employment agency. The governing statute provided in part:

> License for the next succeeding year shall be issued upon written request on the form prescribed by the commission and it shall be accompanied by the required fee. When made in proper form such request shall not be denied or unreasonably delayed.

The court, relying on the policy and intention of that statute, concluded that under the facts of that case that "once an applicant becomes licensed, the annual renewal of his license follows as a ministerial duty of the Commission and a matter of

right; and that if violations occur the Commission is required to resort to the provisions for revocation."

65. In Wilson v. Pest Control Commission, 199 So. 2d 777 (Fla. 4th DCA 1967), the court recognized that there was no property interest[4/] in a license to conduct a business, but stressed that once issued, a business license took on some qualities of property. Reviewing the provisions of the licensing act, and especially the provisions of Florida's (pre-1975) Administrative Procedure Act, the court determined that a license should be renewed unless the licensee by its conduct has forfeited the privilege. The court concluded that "the decision of the commission not to renew petitioner's license was tantamount to imposing upon the petitioner a penalty." Wilson v. Pest Control Com., 199 So. 2d 777, 781 (Fla. 4th DCA 1967).

66. In Dubin v. Department of Business Regulation, 262 So. 2d 273 (Fla. 1st DCA 1972), the Department notified a horse trainer that the reason his license was not being renewed was that he "lacked the integrity required to be had by all applicants" but set forth no specific charges as the basis for denial. At hearing, the agency put on no evidence, relying on the well-accepted principle that Mr. Dubin, as an applicant for licensure, had the burden to demonstrate his qualifications. The court remanded, finding that the Department had the burden

to prove the misconduct and stating that a revocation proceeding should have been initiated.

67. Neither party here has cited to any provision of chapter 550 prescribing the standard of proof applicable in a license renewal proceeding, and no such provision was found. Section 120.57(1)(j) provides that findings of fact shall be "based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute."

68. It may not be possible to categorically conclude either that all denials of licensure renewal are penal or disciplinary in nature or that none of them are. The nature of the license involved and the provisions of the applicable licensing statute must be carefully examined.

69. Section 550.105, entitled "Occupational licenses of racetrack employees; fees; denial, suspension, and revocation of license; penalties and fines," provides in paragraph (5):

> (a) The division may:
>
> 1. Deny a license to or revoke, suspend, or place conditions upon or restrictions on a license of any person who has been refused a license by any other state racing commission or racing authority;
>
> 2. Deny, suspend, or place conditions on a license of any person who is under suspension or has unpaid fines in another jurisdiction; if the state racing commission or racing authority of such other state or

jurisdiction extends to the division reciprocal courtesy to maintain the disciplinary control.

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

(c) The division may deny, declare ineligible, or revoke any occupational license if the applicant for such license has been convicted of a felony or misdemeanor in this state, in any other state, or under the laws of the United States, if such felony or misdemeanor is related to gambling or bookmaking, as contemplated in s. 849.25, or involves cruelty to animals. If the applicant establishes that she or he is of good moral character, that she or he has been rehabilitated, and that the crime she or he was convicted of is not related to pari-mutuel wagering and is not a capital offense, the restrictions excluding offenders may be waived by the director of the division.

(d) For purposes of this subsection, the term "convicted" means having been found guilty, with or without adjudication of guilt, as a result of a jury verdict, nonjury trial, or entry of a plea of guilty or nolo contendere. However, the term "conviction" shall not be applied to a crime committed prior to the effective date of this subsection in a manner that would invalidate any occupational license issued prior to the effective date of this subsection or subsequent renewal for any person holding such a license.

(e) If an occupational license will expire by division rule during the period of a suspension the division intends to impose, or if a license would have expired but for pending administrative charges and the occupational licensee is found to be in violation of any of the charges, the license may be revoked and a time period of license ineligibility may be declared. The division may bring administrative charges against any person not holding a current license for violations of statutes or rules which occurred while such person held an occupational license, and the division may declare such person ineligible to hold a license for a period of time. The division may impose a civil fine of up to $1,000 for each violation of the rules of the division in addition to or in lieu of any other penalty provided for in this section. In addition to any other penalty provided by law, the division may exclude from all pari-mutuel facilities in this state, for a period not to exceed the period of suspension, revocation, or ineligibility, any person whose occupational license application has been denied by the division, who has been declared ineligible to hold an occupational license, or whose occupational license has been suspended or revoked by the division.

These provisions of section 550.105 do not clearly distinguish denials from revocations, suspensions, restrictions, administrative charges, or fines when authorizing these agency actions, yet do consider licensees seeking renewal as "grandfathered in" for purposes of the definition of conviction in paragraph (d).

70. Although not cited by Respondent in its letter of denial or in its Proposed Recommended Order, section 550.2415(3)(a) must also be considered. It provides:

> Upon the finding of a violation of this section, the division may revoke or suspend the license or permit of the violator or deny a license or permit to the violator; impose a fine against the violator in an amount not exceeding $5,000; require the full or partial return of the purse, sweepstakes, and trophy of the race at issue; or impose against the violator any combination of such penalties. The finding of a violation of this section in no way prohibits a prosecution for criminal acts committed.

71. Taken as a whole, the provisions of chapter 550, when considered in light of the language of section 120.57(1)(j), are interpreted to require proof of violations of section 550.2415 that form the basis for denial of renewal of a professional occupational license by clear and convincing evidence.[5/]

72. The clear and convincing standard of proof has been described by the Florida Supreme Court:

> 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 Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

73. Section 550.2415(1)(a) provides in part:

> The racing of any animal with any drug, medication, stimulant, depressant, hypnotic, local anesthetic, or drug-masking agent is prohibited. It is a violation of this section for any person to administer or cause to be administered any drug, medication, stimulant, depressant, hypnotic, narcotic, local anesthetic, or drug-masking agent to an animal which will result in a positive test for such substance based on samples taken from the racing animal immediately prior to or immediately after the racing of the animal.

74. Section 550.2415(1)(c) provides that "[t]he finding of a prohibited substance in a race-day specimen constitutes prima facie evidence that the substance was administered and was carried in the body of the animal while participating in the race." If Respondent proves that these prohibited substances were found in race-day specimens, this prima facie case will be sufficient. Respondent will have proved a violation of section 550.2415(1)(a), for there was no contrary evidence at hearing to

show that phenylbutazone and clenbuterol were not administered or that these substances were not carried in the bodies of the horses in their respective races.

75. The statute also provides that when a race horse has been impermissibly medicated or drugged, action may be taken "against an occupational licensee responsible pursuant to rule of the division" for the horse's condition. § 550.2415(2), Fla. Stat. Consistent with this statute, Respondent has adopted rule 61D-6.002, the "absolute insurer rule," making trainers strictly responsible.

License Denial and Penalties

76. Petitioner argues that the alleged violations of section 550.2415 are not a sufficient legal basis for Respondent to deny the license renewal application. More specifically, Petitioner maintains that Respondent may not base licensure denial on alleged statutory violations for which disciplinary guidelines only authorize fines, but must instead follow a disciplinary process, citing Dubin v. Department of Business Regulation, supra.

77. Florida's Administrative Procedure Act affords a hearing on an agency's intended action to deny a license renewal and cases decided since Dubin have determined that when such action is based upon specifically alleged violations in the prior licensure period, an agency is not required to institute a

separate disciplinary proceeding. However, in a chapter 120 hearing challenging the intended agency action to deny renewal of the license, the agency bears the burden to prove the violations. Coke v. Dep't of Child. & Fam. Servs., 704 So. 2d 726 (Fla. 5th DCA 1998).

78. Unlike Mr. Dubin, Petitioner here has been advised of the specific charges, been given notice of hearing, been allowed to call and cross-examine witnesses, and otherwise been afforded a quasi-judicial hearing at which the burden to prove the alleged violations by clear and convincing evidence was placed upon Respondent. Under these circumstances, the concern of Dubin that no less process be afforded for denial of a trainer's license renewal than for a disciplinary proceeding has been addressed.

79. Petitioner extends his argument further, arguing that denial of licensure is not authorized because it is not listed among the penalties for violation of section 550.2415 in Respondent's disciplinary guidelines.

80. Section 550.2415(12) authorizes Respondent to adopt a classification system for prohibited substances and a corresponding penalty schedule for violations. Cf. § 455.2273, Fla. Stat. Respondent has done so in rules 61D-6.008 and 61D-6.011. In so explicating the way in which it will exercise its statutory authority, an agency becomes bound to follow those

guidelines in disciplinary proceedings. Fernandez v. Bd. of Nursing, 82 So. 3d 1202 (Fla. 4th DCA 2012).

81. However, Respondent has not chosen to institute disciplinary proceedings and has not included denial of licensure renewal as a possible penalty in its guidelines for violation of section 550.2415, but instead has chosen to pursue denial of renewals outside of disciplinary proceedings. It may do so. The provisions of section 550.105(5)(b) explicitly provide that Respondent may "deny . . . any occupational license if the applicant for or holder thereof has violated the provisions of this chapter or the rules of the division governing the conduct of persons connected with racetracks and frontons." Petitioner's argument that a hearing challenging the denial of a license is transformed into a disciplinary proceeding requiring application of the disciplinary guidelines is rejected.

Chain-of-Custody

82. Petitioner argues that Respondent failed to show that the serum samples that were tested came from Petitioner's horses because the chain-of-custody from the whole blood samples was broken. However, the testimony regarding the procedures that were followed in taking the blood samples, centrifuging them, and pouring the extracted serum from the numbered blood collection tubes into the correspondingly numbered specimen

container was clear and convincing. While Dr. Barker's testimony indicated that contamination or tampering was possible, he never concluded that either of these things was likely or probable. The mere possibility of tampering or contamination is not sufficient to require proof of a strict chain-of-custody; there must be a probability. Hildwin v. State, 141 So. 3d 1178, 1187 (Fla. 2014); Armstrong v. State, 73 So. 3d 155, 171 (Fla. 2011); Murray v. State (Murray I), 838 So. 2d 1073, 1082-83 (Fla. 2002).

Violation of Rule 61D-6.005(3)

83. Petitioner maintains that Respondent did not follow the procedures set forth in rule 61D-6.005 for collecting, sealing, and testing the samples, as required by rule 61D-6.005(8). Any suggestion that the taking of the blood sample in a partial vacuum tube constituted the "sealing" of the specimen required by the rule has been rejected. The rule refers to the sealing of the specimen in its container, which has the "blood label" affixed. Petitioner clearly showed that the sampling procedures followed here, as set forth in the Manual, had the witness sign the card before the sealing of the serum specimen.

84. A procedural error in agency action is not necessarily fatal to agency action unless the "fairness of the proceedings or the correctness of the action" may have been impaired. Cases consider errors made before, as well as during, quasi-judicial

proceedings. Putnam Cnty. Envtl. Council v. St. Johns River Water Mgmt. Dist., 136 So. 3d 766, 768 (Fla. 1st DCA 2014)(action by Secretary rather than FLWAC in determining whether a request for review met statutory jurisdictional grounds affected the correctness of the action and so was not harmless error); Matar v. Fla. Int'l Univ., 944 So. 2d 1153, 1158 (Fla. 3d DCA 2006)(university's failure to strictly comply with its rule requiring that student be given a specific waiver form was harmless error where university substantially complied by advising the student of his rights).

85. It is beyond question that Respondent must exercise broad powers to regulate and control the unique challenges of legalized pari-mutuel racing activities. The courts have long and consistently held that Respondent has authority to adopt necessary rules, including the "absolute insurer" rule, rule 61D-6.002:

> The trainer of record shall be responsible for and be the absolute insurer of the condition of the horses or racing greyhounds, he/she enters to race. Trainers, kennel owners and operators are presumed to know the rules of the division.

Hennessey v. Dep't of Bus. & Prof'l Reg., 818 So. 2d 697 (Fla. 1st DCA 2002); Solimena v. State, 402 So. 2d 1240 (Fla. 3d DCA 1981); State ex rel. Mason v. Rose, 165 So. 347 (1936).

86. However, attendant with the broad power to adopt rules heavily regulating races and imposing such strict accountability is the necessary obligation on Respondent to precisely and fairly abide by those same rules.

87. Rule 61D-6.005(8), quoted above, expressly states that in the absence of other evidence that an illegal drug has been administered to a race horse, no action shall be taken unless the laboratory identifies the drug in a sample or specimen collected "pursuant to this chapter" (chapter 61D-6).

88. Respondent's argument that it cannot "force" the authorized representative to witness the sealing of the specimen is unpersuasive. The rule clearly states that "the sample tag shall be detached and signed by the owner, trainer, groom, or the authorized person as a witness to the taking and sealing of the specimen." A witness's refusal to do so would be one thing, but here the procedure followed--as established in great detail by the Manual--routinely secures the signature of the witness long before the serum is even extracted.

89. Under all of the circumstances of this case, it is not difficult to conclude that the systematic and regular violation of the rule's requirement that the authorized representative witness the sealing of the serum sample constituted a significant procedural error that affected the fairness of the proceeding.

90. The evidence was clear that Respondent failed to identify restricted drugs in specimens collected in the manner required by its rules.

Unadopted Rule

91. Petitioner finally contends that the intended agency action to deny the renewal of his pari-mutuel wagering individual occupational license is based upon the Manual, that the Manual is an unadopted rule, and that the test results may therefore not be considered.[6/]

92. Section 120.52(20) provides that an unadopted rule is an agency statement that meets the definition of the term "rule," but has not been adopted pursuant to the requirement of section 120.54.

93. Section 120.52(16), in relevant part, defines the term "rule" as follows:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

94. The courts have considered several elements of this statutory definition in determining whether a statement constitutes an unadopted rule. Perhaps the most fundamental element is that it must be an "agency" statement, that is, an

expression of policy by the agency. First, it must be a statement of the agency as an institution, not merely the position of a single employee. It must be properly attributable to the agency head or some duly-authorized delegate. Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81, 87 (Fla. 1st DCA 1997)(Benton, J., concurring and dissenting). Second, to be a statement attributable to the agency, it must go beyond the mere reiteration or restatement of policy already established by a properly adopted rule or by the implemented statute. St. Francis Hosp., Inc. v. Dep't of HRS, 553 So. 2d 1351 (Fla. 1st DCA 1989). Here, the general policy of taking blood and urine samples for testing to determine possible violations of section 550.2415 is established by the statute and by properly adopted rules. The Manual adds mostly technical or administrative detail necessary to execution of that policy.

95. However, as noted earlier, the rule explicitly requires that the owner's representative witness the sealing of the sample and says nothing of serum extraction procedures. Because the witnessing of the sealing of the sample is not merely a matter of technical implementation, the Manual's restructuring of this important rule requirement constitutes an important policy change that constitutes an "agency statement."

96. While rare, courts have recognized that de facto policy established by procedures may constitute an unadopted

rule. See Dep't of Bus. & Prof'l Reg. v. Harden, 10 So. 3d 647, 649 (Fla. 1st DCA 2009)(committee procedure by which license applications were reviewed was unadopted rule); Dep't of Rev. v. Vanjaria Enters., Inc., 675 So. 2d 252, 254 (Fla. 5th DCA 1996) (assessment procedure to determine tax exemption contained in training manual was unadopted rule). Subsection 4.6 of the Manual is an agency statement.

97. The requirement that a statement be "generally applicable" involves the field of operation of the statement. Dep't of Com. v. Matthews Corp., 358 So. 2d 256 (Fla. 1st DCA 1978)(wage rates applicable to public works contracts held not to be rules because they applied only to the construction of a particular public building and did not establish wages elsewhere in the state into the future). Subsection 4.6 of the Manual applies to every state licensed horseracing facility in the state of Florida.

98. The concept of general applicability also involves the force and effect of the statement itself. An agency statement that requires compliance, creates or adversely affects rights, or otherwise has the direct and consistent effect of law is a rule. State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010). Subsection 4.6 of the Manual describes procedures that directly affect a trainer accused of racing thoroughbred horses that are impermissibly medicated or drugged.

These procedures directly affect the rights of a trainer charged with a violation, especially given that the statutory presumption, in conjunction with the "absolute insurer" rule, instills the test results with such a significant, almost determinative, effect. Subsection 4.6 of the Manual directly affects rights and has the effect of law.

99. An agency statement must also be consistently applicable. In Department of Highway Safety and Motor Vehicles v. Schluter, supra, the court found three of the challenged policies not to be generally applicable because an employee's supervisor was not required to apply them, and therefore they could not be considered to have the "direct and consistent effect of law." See also, Coventry First, LLC v. Off. of Ins. Reg., 38 So. 3d 200, 205 (Fla. 1st DCA 2010)(examination manual provided to examiners of the Office of Insurance Regulation not generally applicable because examiners had discretion not to follow it). The Manual by its own terms requires compliance by Respondent's employees. The employees of the detention barn would be subject to discipline if they did not follow the procedures set out in the Manual. Subsection 4.6 of the Manual is generally applicable.

100. Subsection 4.6 of the Manual has not been adopted under the rulemaking process set forth in section 120.54.

101. Petitioner clearly showed that subsection 4.6 of the Manual is an agency statement of general applicability that describes the procedure requirements of Respondent and constitutes an unadopted rule.

102. Section 120.57(1)(e)1., Florida Statutes (2015), provides:

> An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule. The administrative law judge shall determine whether an agency statement constitutes an unadopted rule. This subparagraph does not preclude application of adopted rules and applicable provisions of law to the facts.

103. In Department of Revenue v. Vanjaria Enterprises, supra, the Department of Revenue assessed tax based on a square footage comparison pursuant to a procedure set forth in its sales and use tax training manual. The court rejected the Department of Revenue's argument that the audit calculation formula merely represented a direct application of the statute and concluded that the training manual constituted an unadopted rule, stating at page 255:

> Furthermore, the tax assessment procedure creates DOR's entitlement to taxes while adversely affecting property owners. The Training Manual was created to be used as the sole guide for auditors in their assessment of multiple-use properties. In determining exempt versus nonexempt uses of multiple-use properties, DOR's auditors strictly comply with the procedure set forth

> in the Training Manual for all audits performed. Moreover, DOR auditors are not afforded any discretion to take action outside the scope of the Training Manual.

The court affirmed the decision below that the training manual procedure was void and could not increase appellee's tax liability.

104. The public in general, and trainers in particular, in light of their "absolute liability," have a right to be fully advised of all of the basic procedures that are to be followed, and through the rulemaking process, even participate in their formulation. Denial of Petitioner's application for license renewal may not be based upon the test results of serum obtained pursuant to the unadopted procedures of subsection 4.6 of the Manual and not pursuant to the adopted rule.

105. Failing to follow the procedures set forth in rule 61D-6.005(3) for collecting and sealing the blood specimen, and instead relying upon an unadopted rule, Respondent is foreclosed from reliance on the test results, and failed to prove, even by a preponderance of the evidence, that Petitioner violated section 550.2415(1)(a) or rule 61D-6.002(1) on February 6, April 24, or May 9, 2015, as alleged in the letter of denial dated August 26, 2015.

106. The parties stipulated that, but for the allegations that Petitioner was in violation of section 550.2415(1), Petitioner meets all requirements for license renewal.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED:

That the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, enter a final order granting Mr. Kirk Ziadie's application for renewal of his pari-mutuel professional occupational license.

DONE AND ENTERED this 25th day of November, 2015, in Tallahassee, Leon County, Florida.

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of November, 2015.

ENDNOTES

[1/] Except as otherwise indicated, statutory references in this Recommended Order are to the 2014 Florida Statutes.

[2/] Except as otherwise indicated, references to Florida Administrative Code rules are to the rules in existence at the time the alleged violations occurred in early 2015. Petitioner's application for license renewal is governed by the law in effect at the time the final licensure decision is made. See Agency for Health Care Admin. v. Mount Sinai Med. Ctr., 690 So. 2d 689, 691 (Fla. 1st DCA 1997), where specific allegations of misconduct are the basis of denial, it is Respondent's burden to show violations of the statutes or rules that were in existence at the time of the alleged misconduct.

[3/] Rule 61D-6.005 was amended, effective June 15, 2015. The amended rule is not applicable to this proceeding.

[4/] A few Florida cases involving revocation or denial of permits have cited constitutional concerns. The United States Supreme Court has noted that, in some contexts, individuals may have constitutionally-protected property interests in "state-issued licenses essential to pursuing an occupation or livelihood." Cleveland v. United States, 531 U.S. 12, 25, n. 4, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000). Due process applies to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property--i.e., interests to which a person has a legitimate claim of entitlement, as opposed to a mere unilateral expectation. Bd. of Regents v. Roth, 408 U.S. 564, 566, 92 S. Ct. 2701, 2703 (1972)(U.S. Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision somehow deprived him of a protected interest in continued employment). If a Florida licensing statute creates a protected interest, a person may not be deprived of that interest except pursuant to constitutionally adequate procedures. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541, 105 S. Ct. 1487, 1493 (1985). Constitutionally adequate procedures do not necessarily require application of the clear and convincing standard of proof at hearing, however. As explained in Herman and Maclean v. Huddleston, 459 U.S. 375, 389-90, 103 S. Ct. 683, 691 (1983):

> Thus, we have required proof by clear and convincing evidence where particularly important individual interests or rights are

> at stake. See, *e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982) (proceeding to terminate parental rights); Addington v. Texas, supra (involuntary commitment proceeding); Woodby v. INS, 385 U.S. 276, 285-286 (1966) (deportation). By contrast, imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence. See, *e.g.*, United States v. Regan, 232 U.S. 37, 48-49 (1914) (proof by a preponderance of the evidence suffices in civil suits involving proof of acts that expose a party to a criminal prosecution). Thus, in interpreting a statutory provision in Steadman v. SEC, supra, we upheld use of the preponderance standard in SEC administrative proceedings concerning alleged violations of the antifraud provisions. The sanctions imposed in the proceedings included an order permanently barring an individual from practicing his profession.

In the last referenced case, Steadman v. SEC, 450 U.S. 91, 92, 101 S. Ct. 999, 1003 (1981), there had been a disciplinary hearing before an Administrative Law Judge, followed by review by the Securities and Exchange Commission, in which the preponderance-of-the-evidence standard was employed. The Commission found that petitioner had violated antifraud, reporting, conflict of interest, and proxy provisions of the federal securities laws, and entered an order permanently barring petitioner from associating with any investment adviser or affiliating with any registered investment company. The Court affirmed the Fifth Circuit's determination that in an administrative disciplinary proceeding by the Commission, violations could be established by preponderance of the evidence. The Court noted that courts had supplied standards of proof in various proceedings, but concluded that wherever Congress had established the standard, it was controlling. In the absence of countervailing constitutional considerations, the Federal Administrative Procedure Act's preponderance standard applied.

[5/] Department of Children and Families v. Davis Family Day Care Home, 160 So. 3d 854 (Fla. 2015), does not dictate otherwise. A careful reading of that case, which involved not only the

renewal of a family day care home license, but also the initial application for a large family child care home license, indicates that application of the clear and convincing standard of proof in adjudicating the administrative fine and misconduct in the license renewal action was not contested. The Florida Supreme Court reaffirmed that an agency must prove alleged violations of law that form the basis of an initial license application denial by a preponderance of the evidence.

[6/] No petition under section 120.56(4) was filed, and the arguments made in Petitioner's Proposed Recommended Order that are appropriate to such a rule challenge proceeding are instead considered under section 120.57(1)(e), to the extent applicable.

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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.