

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

FILED	
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KIRK ZIADIE,

Petitioner,

DOAH Case No. 15-5037

v.

DBPR Case No. 2015-037730

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

Respondent.

_____ /

FINAL ORDER

Pursuant to section 120.60(1), Florida Statutes (2015) and Rule 28-106.103 of the Florida Administrative Code, 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 F. Scott Boyd (“ALJ Boyd”) on November 25, 2015, in DOAH case number 15-5037, a copy of which is attached as Exhibit A. The Department of Business and Professional Regulation (“Respondent”) filed exceptions to the Recommended Order, to which Kirk Ziadie (“Petitioner”) filed a response and those exceptions and response are attached as composite Exhibit B. Petitioner also filed exceptions to the Recommended Order to which Respondent filed a response and those exceptions and response are attached as composite Exhibit C.

Background

On August 26, 2015, the Department issued a License Denial Letter, denying Kirk Ziadie’s (“Mr. Ziadie”) application for a pari-mutuel individual occupational license in accordance with the provisions of Chapter 550, Fla. Stat., based upon Mr. Ziadie’s violations of

Section 550.2415(1)(a), Fla. Stat. (relating to the racing of animals with restricted drugs) and Rule 61D-6.002(1) (holding the trainer of record as an “absolute insurer” as the condition of his horses) on February 6, 2015, April 24, 2015, and May 9, 2015. Mr. Ziadie petitioned the Respondent for a formal hearing regarding the August 26, 2015 letter of license denial. ALJ Boyd convened a formal administrative hearing on September 30 and October 1, 2015, and issued a Recommended Order on November 25, 2015, recommending the Division enter a final order granting Mr. Ziadie’s application for renewal of his pari-mutuel professional occupational license because the test results that were the basis for Mr. Ziadie’s violations of Section 550.2415(1)(a), Fla. Stat, were based upon an unadopted rule set forth in subsection 4.6 of the 2010 Equine Detention Barn Procedure Manual (“the Manual”), and the Division’s purported failure to follow sample collection procedures set forth in Rule 61D-6.005(3), Fla. Admin. Code.

The Respondent and Petitioner filed exceptions to ALJ Boyd’s Recommended Order. After a complete review of the record in this matter, the Division rules as follows:

AGENCY STANDARD FOR REVIEW

Pursuant to Section 120.57(1)(l), Fla. Stat., a 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 Section 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 conclusion of law or interpretation of administrative rules and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

Pursuant to Section 120.57(1)(e)3., Fla. Stat., an ALJ's determination regarding an unadopted rule shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity that such determination is clearly erroneous and does not comply with essential requirements of law.

RULINGS ON RESPONDENT'S EXCEPTIONS

Exception #1

1. Respondent takes exception to the finding of fact set forth in the portion of Paragraph #35 on page 10 of the Recommended Order in which ALJ Boyd found, "after the blood samples were taken by the veterinarian, they were not "sealed" in collection the tubes. The fact that the collections 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 the specific purpose of the rule."

2. Paragraph #35 was supported by competent substantial evidence.

3. The Division denies Respondent's Exception #1.

Exception #2

4. Respondent takes exception to the findings of fact set forth in the portion of Paragraph #47 on Page 14 of the Recommended Order in which ALJ Boyd found, "[t]he 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), ...which required the owner's representative to sign as a witness to both the taking and the sealing of the specimen."

5. Paragraph #47 was supported by competent substantial evidence.

6. The Division denies Respondent's Exception #2.

Exception #3

7. Respondent takes exception to the findings of fact set forth in the portion of Paragraph #47 on Page 14 of the Recommended Order in which ALJ Boyd found, "[t]he 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)."

8. Paragraph #47 was supported by competent substantial evidence.

9. The Division denies Respondent's Exception #3.

Exception #4

10. Respondent takes exception to the findings of fact set forth in the portion of Paragraph #47 on Page 14 of the Recommended Order in which ALJ Boyd found, "[t]he requirement that the authorized representative must witness not only the taking, but also the sealing of the specimens, is a provision directly related to maintaining the integrity of the sample collection process."

11. While Paragraph #47 was based upon competent substantial evidence, the Division notes that the former requirement of Rule 6.005 that the authorized representative must witness not only the taking, but also the sealing of the specimens is related to maintaining the integrity of the sample collection process in that it placed the requirement upon the owner or authorized representative to observe the process so that the owner or qualified representative

could not make a complaint about chain of custody procedures regarding the sample collection process.

12. The Division denies Respondent's Exception #4.

Exception #5

13. Respondent takes exception to the findings of fact set forth in Paragraph #47 on Pages 14-15 of the Recommended Order in which ALJ Boyd found, "[s]uch deliberate disregard of the plain language of the rule directly affects the fairness of the entire sampling procedure."

14. While Paragraph #47 was supported by competent substantial evidence, the Division notes that in allowing the owner's witness to sign at the point of witnessing the taking of the urine and serum and sealing of the urine specimen, while allowing the owner's witness to return to the detention barn to witness and sign for the sealing of the serum specimen, it did not deliberately disregard then Rule 6.005, rather, its interpretation of the rule was contrary to that of ALJ Boyd. Additionally, the Department allowed the owner's witness to sign the card at the sealing of the urine and return later to sign the for the sealing of the serum.

15. The Division denies Respondent's Exception #5

Exception #6

16. Respondent takes exception to the Paragraph # 53 on Page 17 of the Recommended Order in which ALJ Boyd concluded, "[s]ubsection 4.6 of the Manual is an unadopted rule."

17. The Division denies Respondent's Exception #6.

Exception #7

18. Respondent takes exception to the findings of fact set forth in Paragraph #55 on Page 17 of the Recommended Order in which ALJ Boyd found, “the serum specimens were not collected pursuant to the requirements of chapter 61D-6.”

19. Paragraph #55 was supported by competent substantial evidence.

20. The Division denies Respondent’s Exception #7.

Exception #8

21. Respondent takes exception to the conclusion of law set forth in Paragraph #83 on Page 31 of the Recommended Order in which ALJ Boyd stated, “[p]etitioner clearly showed that the sampling procedures followed here, as set forth in the Manual, has the witness sign the card before the sealing of the serum specimen”

22. The Division denies Respondent’s Exception #8. The Undersigned concludes that the legal reasoning adopted by the ALJ is more persuasive than the legal reasoning offered by Respondent.

Exception #9

23. Respondent takes exception to the conclusion of law set forth in Paragraph #88 on Page 33 of the Recommended Order in which ALJ Boyd stated, “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 authorize 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.”

24. The Division denies Respondent's Exception #9; however, it is noted the Division does not have the statutory authority to require an authorized representative to witness the sealing of the specimen.

Exception # 10

25. Respondent takes exception to the conclusion of law set forth in Paragraph #89 on Page 33 of the Recommended Order in which ALJ Boyd stated, "[u]nder 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 effected the fairness of the proceeding."

26. The Division denies Respondent's Exception #10. The Undersigned concludes that the legal reasoning adopted by the ALJ is more persuasive than the legal reasoning offered by the Respondent.

Exception #11

27. Respondent takes exception to the conclusion of law set forth in Paragraph #90 on Page 34 of the Recommended Order in which ALJ Boyd stated, "[t]he evidence was clear that Respondent failed to identify restricted drugs in specimens collected in the manner required by its rules."

28. The Division denies Respondent's Exception #11. The Undersigned concludes that the legal reasoning adopted by the ALJ is more persuasive than the legal reasoning offered by the Respondent.

Exception #12

29. The Respondent takes exception to the conclusion of law set forth in Paragraph #95 on Page 35 of the Recommended Order in which ALJ Boyd stated, "...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."

30. The Division denies Respondent's Exception #12. The Undersigned concludes that the legal reasoning adopted by the ALJ is more persuasive than the legal reasoning offered by the Respondent.

Exception #13

31. The Respondent takes exception to the conclusion of law set forth in Paragraph #104 on Page 39 of the Recommended Order in which ALJ Boyd stated, "[d]enial 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."

32. The Division denies Respondent's Exception #13. The Undersigned concludes that the legal reasoning adopted by the ALJ is more persuasive than the legal reasoning offered by the Respondent.

Exception #14

33. The Respondent takes exception to the conclusion of law set forth in Paragraph #104 on Page 39 of the Recommended Order in which ALJ Boyd stated, "[f]ailing 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 61D6.002(1) on February 6, April 24, or May 9, 2015, as alleged in the letter of denial dated August 26, 2015.

34. The Division denies Respondent's Exception #14. The Undersigned concludes that the legal reasoning adopted by the ALJ is more persuasive than the legal reasoning offered by the Respondent.

RULINGS ON PETITIONER'S EXCEPTIONS

Exception #1

35. The Petitioner takes exception to the "division Director asserting that he has the power to overrule the administrative law judge's findings of fact and conclusions of law that the evidence upon which the division primarily relied upon to deny the Petitioner's license renewal application was obtained pursuant to an unadopted rule, i.e. the Equine Detention Barn Procedures Manual."

36. The Division is not required to rule on Petitioner's Exception #1, pursuant to Section 120.57(1)(k), Fla. Stat., because the Petitioner failed to set forth with specificity any page number or paragraph of the recommended order it is disputing.

37. However it is noted that, pursuant to Section 120.57(1)(e)3., Fla. Stat., an ALJ's determination regarding an unadopted rule may be rejected by the agency if the agency first determines from a review of the complete record, and states with particularity that such determination is clearly erroneous and does not comply with essential requirements of law.

Exception #2

38. Petitioner takes exception to the finding of fact in Paragraph 42 in which ALJ Boyd found that "no transfer of custody takes place until the specimen containers are shipped to the laboratory."

39. Paragraph 42 is supported by competent substantial evidence.

40. The Division denies Petitioner's Exception #2.

Exception #3

41. Petitioner takes exception to the conclusion of law in Paragraph 81 in which ALJ Boyd stated that "the Respondent has the choice of either seeking discipline or denying the renewal of a license for a medication positive in violation of section 550.2145."

42. The Division denies Petitioner's Exception #3. Section 550.3145 (3), Fla. Stat. clearly sets forth that the Division has the option to seek discipline against a license or deny a license for a prohibited drug positive.

FINDINGS OF FACT

43. Other than as explained and clarified in the rulings on Respondent's exceptions # 4 and 5, ALJ Boyd's Findings of Fact, as set forth in Exhibit A are approved adopted and incorporated herein by reference. Those findings are supported by competent and substantial evidence.

CONCLUSIONS OF LAW

44. ALJ Boyd's Conclusions of Law, as set forth in Exhibit A are approved, adopted, and incorporated herein by reference.

WHEREFORE, IT IS ORDERED AND ADJUDGED THAT:

1. The Petitioner, Kirk Ziadie's application for pari-mutuel wagering license (license #701515-1021) shall be approved.
2. This order shall become effective on the date of the filing with the Department's Agency Clerk.



Jonathan R. Zachem, Director
Division of Pari-Mutuel Wagering
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399

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.

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) Kirk Ziadie c/o Brad Beilly, Esquire; Beilly & Strohsahl, P.A.; 1144 S.E. Third Avenue, Ft. Lauderdale, Florida 33316, brad@beillylaw.com; and (2) Caitlin Mawn, Esquire; Department of Business and Professional Regulation; 1940 North Monroe Street, Suite 42; Tallahassee, Florida 32399-2202, caitlin.mawn@myfloridalicense.com on this the 11th day of January 2016.

AGENCY CLERK'S OFFICE


Ronda Bryan, Agency Clerk