STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA QUARTER HORSE RACING ASSOCIATION, INC.,

Petitioner,

vs. Case No. 16-4128RU

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

Respondent.
_____/

FINAL ORDER

Pursuant to notice, Lawrence P. Stevenson, Administrative Law Judge of the Division of Administrative Hearings, conducted a formal hearing in the above-styled case on October 25 and 26, 2016, in Tallahassee, Florida.

APPEARANCES

For Petitioner: J. Stephen Menton, Esquire
Tana D. Storey, Esquire
Gabriel F.V. Warren, Esquire
Rutledge Ecenia, P.A.
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301

For Respondent: William D. Hall, Esquire
Caitlin R. Mawn, Esquire
Department of Business and Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399-2202

STATEMENT OF THE ISSUE

Whether Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Division"), relied on an unadopted rule when it issued a 2016-2017 annual operating license and cardroom license to the South Florida Racing Association, LLC, d/b/a Hialeah Park ("Hialeah"), and continued to authorize slot machine operations at Hialeah beyond June 30, 2016.

PRELIMINARY STATEMENT

On July 22, 2016, Petitioner, Florida Quarter Horse Racing Association, Inc. ("FQHRA"), filed at the Division of Administrative Hearings a "Petition Challenging Agency Statement Defined as an Unadopted Rule" (the "Petition") alleging that the Division's acceptance of an agreement between Hialeah and the South Florida Quarter Horse Association, Inc. ("SFQHA"), as a basis for issuing Hialeah's annual operating license approving a total of 36 performances for the 2016-2017 racing season, issuing Hialeah's cardroom operating license for the 2016-2017 racing season, and continuing to authorize Hialeah's slot machine operations, constituted an unadopted rule in violation of section 120.54(1)(a), Florida Statutes.

The case was scheduled for hearing on August 22, 2016, in Tallahassee. One continuance was granted on Petitioner's

unopposed motion and the case was rescheduled for October 25 and 26, 2016, on which dates it was convened and completed.

At the hearing, Petitioner offered the testimony of Dr. Steven Fisch, a veterinarian and former president of the FQHRA, as a fact witness and expert on quarter horse racing; William White, president of the Florida Horsemen's Benevolent and Protective Association, Inc.; and F.E. "Butch" Wise, a member of the executive committee of the American Quarter Horse Association and a member of the board of directors of the FQHRA. The Department presented no witnesses.

Joint Exhibits 1 through 28 were admitted into evidence, including the depositions of Division employees Jonathan Zachem and Jamie Pouncey, and of SFQHA board member Samual Ard and former SFQHA board member Wesley Cox. Petitioner's Exhibits 1 through 5 and 7 were admitted into evidence, over Respondent's relevance objections. Respondent's Exhibits 1 through 4 were admitted into evidence, over Petitioner's relevance objections.

A two-volume Transcript of the hearing was filed at the Division of Administrative Hearings on November 14, 2016. Both parties timely filed their Proposed Final Orders. Both parties' proposals have been given careful consideration in the preparation of this Final Order.

Unless otherwise indicated, all statutory references in this Final Order are to the 2016 version of the Florida Statutes

and all references to rules are to the current version of the Florida Administrative Code.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, including the parties' Joint Prehearing Stipulation, the following Findings of Fact are made:

1. The FQHRA is a Florida not-for-profit corporation located in Tallahassee. It comprises members in good standing of its parent organization, the American Quarter Horse Association. The FQHRA describes its mission as promoting the owning, breeding, and racing of Florida-bred quarter horses. The FQHRA represents 602 breeders, owners, and trainers of quarter horses, many of whom have participated in the annual quarter horse meet at Hialeah Park. During the 2015-2016 racing season, 535 members of the FQHRA participated at Hialeah Park in a full schedule of live racing.

2. The FQHRA is named specifically in statutes related to quarter horse racing in Florida. It is the statutory "default" horsemen's association for purposes of setting the schedule of racing at quarter horse racetracks and representing quarter horse owners in negotiating purse agreements with quarter horse permitholders pursuant to sections 550.002(11), 551.104(10)(a)2. and 849.086(13)(d), Florida Statutes.

3. Hialeah is the holder of a horse racing permit that authorizes it to conduct quarter horse racing at its facility, Hialeah Park, in Miami-Dade County, Florida.

4. The Division is the state agency responsible for implementing and enforcing Florida's pari-mutuel laws, including the licensing and regulation of all pari-mutuel activities conducted in the state. The Division's regulatory duties include the adoption of "reasonable rules for the control, supervision, and direction of all applicants, permittees, and licensees and for the holding, conducting, and operating of all racetracks, race meets, and races held in this state." § 550.0251(3), Fla. Stat.

5. Gambling is generally prohibited under Florida law. See chapter 849, Florida Statutes, establishing criminal penalties for many forms of gambling.[1/] However, certain types of pari-mutuel activities, including wagering on horse racing, have been authorized.

6. In recent years, the Legislature has expanded the gambling activities that may occur at the facilities of licensed pari-mutuel permitholders by authorizing the operation of slot machines and cardrooms at pari-mutuel facilities. These operations are conditioned upon licensing requirements that include having a "binding written agreement" with the FQHRA or "the association representing a majority of the horse owners and

trainers at the applicant's eligible facility" as to the payment of purses on live quarter horse racing conducted at the facility. §§ 551.104(10)(a)2. and 849.086(13)(d)3., Fla. Stat.

7. These conditions are commonly referenced as "coupling" the expanded gambling operations with the promotion of horse racing in the state. The Legislature has enacted specific conditions to be met by applicants for slot machine and cardroom licenses to ensure that coupling occurs. Section 551.104, the slot machine licensing statute, sets forth conditions specific to thoroughbred racing and similar conditions specific to quarter horse racing. For purposes of this proceeding, the quarter horse provision at subsection (10)(a)2. is relevant:

> No slot machine license or renewal thereof shall be issued to an applicant holding a permit under chapter 550 to conduct pari-mutuel wagering meets of quarter horse racing unless the applicant has on file with the division a binding written agreement between the applicant and the Florida Quarter Horse Racing Association or the association representing a majority of the horse owners and trainers at the applicant's eligible facility, governing the payment of purses on live quarter horse races conducted at the licensee's pari-mutuel facility. The agreement governing purses may direct the payment of such purses from revenues generated by any wagering or gaming the applicant is authorized to conduct under Florida law. All purses shall be subject to the terms of chapter 550.

8. Section 849.086(13)(d)3. contains a virtually identical condition for a quarter horse racing permitholder seeking to operate a cardroom at its facility:

> No cardroom license or renewal thereof shall be issued to an applicant holding a permit under chapter 550 to conduct pari-mutuel wagering meets of quarter horse racing unless the applicant has on file with the division a binding written agreement between the applicant and the Florida Quarter Horse Racing Association or the association representing a majority of the horse owners and trainers at the applicant's eligible facility, governing the payment of purses on live quarter horse races conducted at the licensee's pari-mutuel facility. The agreement governing purses may direct the payment of such purses from revenues generated by any wagering or gaming the applicant is authorized to conduct under Florida law. All purses shall be subject to the terms of chapter 550.

9. Once a track obtains its initial permit from the Division to conduct a particular type of pari-mutuel wagering, it must thereafter apply annually to the Division and obtain a license to conduct pari-mutuel operations. The license authorizes the track to conduct pari-mutuel wagering performances under its permit on the specific dates identified on the license.

10. A permitholder must file its application between December 15 and January 4, for a license to conduct performances during the next state fiscal year, i.e., July 1 through June 30.

The permitholder is entitled to amend its application through February 28. § 550.01215(1), Fla. Stat.

11. The Division is also responsible for issuing licenses for cardroom gaming at a licensed pari-mutuel permitholder's facility. "A cardroom license may only be issued to a licensed pari-mutuel permitholder and an authorized cardroom may only be operated at the same facility at which the permitholder is authorized under its valid pari-mutuel wagering permit to conduct pari-mutuel wagering activities." § 849.086(5)(a), Fla. Stat. After initial issuance, a cardroom operator must apply annually for renewal of its cardroom license, which must be submitted in conjunction with the annual application for the pari-mutuel license. § 849.086(5)(b), Fla. Stat.

12. To maintain its eligibility to operate cardrooms, the licensee must:

> [h]ave requested, as part of its pari-mutuel annual license application, to conduct at least 90 percent of the total number of live performances conducted by such permitholder during either the state fiscal year in which its initial cardroom license was issued or the state fiscal year immediately prior thereto if the permitholder ran at least a full schedule of live racing or games in the prior year.

§ 849.086(5)(b), Fla. Stat.

13. The Division is also responsible for authorizing slot machine operations through the issuance of annual licenses

pursuant to sections 551.104 and 551.105. As with cardrooms, slot machines may only be operated at a permitholder's eligible facility identified in a valid pari-mutuel wagering permit. § 551.104(3), Fla. Stat. As a condition of licensure, the slot machine licensee must conduct "no fewer [sic] than a full schedule of live racing or games as defined in s. 550.002(11)." § 551.104(4)(c), Fla. Stat.

14. Section 550.002(11) sets forth the definition of "full schedule of live racing or games." As to quarter horse permitholders, the definition provides, in relevant part:

> "Full schedule of live racing or games" means . . . for a quarter horse permitholder at its facility unless an alternative schedule of at least 20 live regular wagering performances is agreed upon by the permitholder and either the Florida Quarter Horse Racing Association or the horsemen's association representing the majority of the quarter horse owners and trainers at the facility and filed with the division along with its annual date application . . . for every fiscal year after the 2012-2013 fiscal year, the conduct of at least 40 live regular wagering performances.

15. Hialeah began quarter horse racing in 2009, partnering with the FQHRA to obtain initial approval from the Division to operate slot machines at the Hialeah Park facility. The FQHRA provided the horses and trainers needed by Hialeah to conduct two quarter horse race meets, one at the end of 2009 and one at the beginning of 2010. These race meets were timed to meet the

definition of "eligible facility" set forth in section 551.102(4), which provides in relevant part that a licensed pari-mutuel facility may apply for a slot machine license "provided such facility has conducted live racing for 2 consecutive calendar years immediately preceding its application."

16. Hialeah and FQHRA entered into exclusive horsemen's agreements,[2/] hereinafter referred to collectively as the "FQHRA Agreement," to govern the payment of purses on live quarter horse races conducted at Hialeah's pari-mutuel facility for the 2009-2010 racing season through the 2015-2016 racing season. The FQHRA Agreement was valid through June 30, 2016. The last quarter horse race at Hialeah for the 2015-2016 season was February 29, 2016.

17. As noted above, section 550.01215(1) requires a pari-mutuel permitholder to file its license renewal application between December 15 and January 4 for the next state fiscal year, and permits the applicant to amend its application through February 28. Section 550.01215(2) requires the Division to issue the license no later than March 15.

18. Cardroom licenses must also be renewed annually, in conjunction with the applicant's annual application for its pari-mutuel license. § 849.086(5)(b), Fla. Stat.

19. Slot machine licenses are valid for one year and must be renewed annually. § 551.105(1), Fla. Stat. Hialeah's most recent slot machine license was issued on December 11, 2015.

20. In September 2015, it was apparent that Hialeah might be looking for options other than entering into a horsemen's agreement with the FQHRA for the 2016-2017 season. On or about September 15, 2015, Hialeah's legal counsel, Andrew Lavin, met with Jonathan Zachem, then the director of the Division, and Jason Maine, legal counsel for the Division, to discuss several issues, including the upcoming application process. In a follow-up letter to Mr. Maine and Mr. Zachem, Mr. Lavin wrote:

> During our meeting you confirmed that the Division has on file SFRA's purse agreement with the Florida Quarter Horse Racing Association, which expires on June 30, 2016 (the "SFRA/FQHRA Agreement"). You also confirmed that the SFRA/FQHRA Agreement serves as the requisite agreement for SFRA's applications for its upcoming slots license and cardroom license. SFRA shall file its application accordingly.
>
> You further explained that it is the Division's position that by the expiration date of the SFRA/FQHRA Agreement, SFRA is required to have a new agreement on file with the Division that is effective as of July 1, 2016, and that meets the requirements of § 551.104(10)(a)(2), Fla. Stat., and § 849.086(13)(d)(3), Fla. Stat.

21. Mr. Zachem confirmed that the meeting occurred and did not dispute the substance of Mr. Lavin's letter.

22. Representatives of the FQHRA met independently with the Division's leadership, including Jonathan Zachem and Jason Maine, in mid-September 2015, to discuss FQHRA's concerns with respect to Hialeah's license applications and the negotiations with Hialeah for a new horsemen's agreement for the 2016-2017 fiscal year. FQHRA came away from this meeting with the understanding that the Division would rely on the FQHRA Agreement to allow Hialeah to continue slot machine operations until the agreement expired on June 30, 2016, and that a new horsemen's agreement would have to be in place for Hialeah to renew its cardroom license.

23. Hialeah received a renewal of its slot machine license on December 11, 2015. In issuing this license, the Division relied on the FQHRA Agreement that would expire on June 30, 2016.

24. Hialeah electronically submitted its application for its 2016-2017 racing license and cardroom gaming license on December 23, 2015. On February 26, 2016, Hialeah electronically submitted an amended application for its annual racing license. At the time of Hialeah's applications for its 2016-2017 racing and cardroom licenses, the FQHRA Agreement was the only purse agreement in the Division's files for Hialeah.

25. In its December 2015 filings, Hialeah requested a full schedule of live racing and renewal of its cardroom gaming

license for the 2016-2017 race year. A "full schedule of live racing" for the 2016-2017 quarter horse meet at Hialeah Park would be 40 live regular wagering performances, absent an alternative schedule agreed to by Hialeah and either the FQHRA or the horsemen's association representing the majority of the owners and trainers at Hialeah.

26. Jamie Pouncey is the Division employee responsible for reviewing license applications for completeness. Ms. Pouncey has no authority to approve or reject license applications. Only the Division director has approval authority.

27. Ms. Pouncey testified that having a valid horsemen's agreement on file is a requirement for purposes of processing the cardroom application and for issuing the operating license.

28. In reviewing Hialeah's racing license application, Ms. Pouncey utilized a Division checklist that enumerated the necessary forms and other requirements. One of the items on that checklist stated: "a copy of the binding written agreements between the facility and respective associations (horsemen's agreement) as required by section 849.086(13)(d)(3), Florida Statutes (Quarter Horse Only)." Ms. Pouncey marked the checklist to indicate that Hialeah met this requirement. In so doing, Ms. Pouncey relied on the FQHRA Agreement, which remained valid until June 30, 2016.

29. On February 25, 2016, Dr. Steven Fisch, a former president and current board member of the FQHRA, sent an email to Ms. Pouncey inquiring whether Hialeah had applied for its 2016-2017 quarter horse racing license and whether it had submitted a horsemen's agreement. Ms. Pouncey responded that "there is one on file valid through 06/30/2016," and later confirmed to Dr. Fisch that the FQHRA Agreement was the only one on file for Hialeah at that time.

30. On February 26, 2016, Hialeah electronically transmitted its amended racing license application to the Division. The amended application requested to run a reduced schedule of 36 performances instead of the full schedule of 40 requested in the December 2015 filing. At the time the amended application was filed, the only horsemen’s agreement on file at the Division for Hialeah remained the FQHRA Agreement, which included no deviation from the 40-performance schedule.

31. On March 8, 2016, Ms. Pouncey indicated on the Division's checklist that Hialeah's amended application for a racing license and its application for a cardroom gaming license were complete, with all the necessary documentation in place. She forwarded Hialeah's renewal applications to Mr. Zachem, along with draft licenses for his signature.

32. Ms. Pouncey testified that in her application review, she does not look at the issue of whether the applicant is

requesting less than a full schedule of live racing dates. She had no specific recollection of whether Hialeah requested less than a full schedule. She made no assessment of whether 36 dates constitutes less than a full schedule. Ms. Pouncey testified that she would "consult management" if the issue arose during her application review, but stated that she did not do so regarding Hialeah's application.

33. On March 15, 2016, Hialeah electronically submitted to the Division a horsemen's agreement between Hialeah and the SFQHA (the "SFQHA Agreement"). It represented that the SFQHA would be the horsemen's association representing the majority of the horsemen at Hialeah Park effective July 1, 2016. Also on March 15, 2016, the SFQHA's articles of incorporation were filed with the Secretary of State.

34. Regarding who would represent the majority of the horsemen at Hialeah, the preamble of the SFQHA Agreement states:

> WHEREAS, because only horses owned by members of SFQHA will be eligible to participate in races during the race meet, the SFQHA is the horsemen's association that represents all of the horse owners and trainers at SFRA's facility who will participate in the live quarter horse events that will be conducted by Hialeah at Hialeah Park during the race meet to which this Agreement is applicable.

35. The substance of the SFQHA Agreement elaborates as follows:

> 13. For and in consideration of the purse payments that Hialeah has agreed to make as provided in paragraph 4 above, Hialeah agrees that it will accept entries during the Race Meet only from owners and/or trainers: (a) that appear on the membership roll of the SFQHA as a member in good standing; and (b) that have on file with Hialeah a photocopy of an executed original "Pledge Card" in the form attached as Exhibit A whereby said owner and/or trainer has appointed the SFQHA to represent said owner and/or trainer for the purposes stated in § 550.002(11); § 551.104(10); § 849.086(13); and the IHA [Interstate Horseracing Act of 1978]. The SFQHA shall maintain up to date membership information that it will provide to Hialeah in order for Hialeah to comply with the requirements of this paragraph. Furthermore, Hialeah and the SFQHA agree that all entries shall be horses from qualifying breeds that have either been bred in the State of Florida or have been permanently based in the State of Florida during the calendar year preceding the day on which the horse is entered to race at Hialeah Park. No exceptions will be granted to the requirements of this paragraph.

36. Regarding whether Hialeah would be required to run a full schedule of 40 performances during the racing season, the SFQHA Agreement states:

> 3. The parties agree that Hialeah has the managerial prerogative to determine the dates and the number of operating performances for which Hialeah shall seek authorization when filing an application for an operating license.
>
> * * *
>
> 12. The SFQHA hereby authorizes Hialeah to file this Agreement with the Division

> evidencing compliance by Hialeah with the provisions of Chapters 550, 551 and 849 that require the filing of this Agreement with the Division of Pari-Mutuel Wagering as a condition precedent to annual operating, cardroom and/or slot machine licensure. Specifically with regard to the number of performances that Hialeah shall operate, the SFQHA hereby provides the consent required by § 550.002(11) to authorize Hialeah to operate 36 performances during the Race Meet. The authorizations, approvals and consents set forth in this Agreement shall remain in full force and effect through June 30, 2017.

37. On March 15, 2016, the Division issued to Hialeah a permit to conduct quarter horse racing at Hialeah Park for the fiscal year 2016-2017. The license, signed by Mr. Zachem as director of the Division, authorized 36 regular performances, as requested by Hialeah's amended application.

38. The FQHRA contends that the Division's issuance of licenses to Hialeah is based on a new, unpromulgated policy that allows pari-mutuel permitholders to unilaterally control racing dates and purse decisions without the involvement of an independent horsemen's association. The FQHRA also alleges that the Division is operating pursuant to a new, unpromulgated policy of allowing amendments to license applications after February 28 of a given year. The FQHRA urges the conclusion that the Division's issuance of licenses to Hialeah represents a new policy and/or interpretation of the statutory requirements that have not been promulgated as required by chapter 120,

Florida Statutes. The FQHRA alleges that the Division's actions and new interpretations effectively authorize "decoupling" by allowing pari-mutuel permitholders to unilaterally control racing dates and purse agreements.

39. The FHQRA presented extensive testimony regarding the Legislature's intent when it established the requirement of a horsemen's agreement between a permitholder and a horsemen's association as a condition of licensure to operate slot machines or cardrooms, and the need for arm's length negotiations in establishing those agreements. Dr. Fisch was involved in the effort in the late 1990s and early 2000s to found the FQHRA and re-establish quarter horse racing in Florida. He testified that an independent horsemen's association, genuinely representing the interests of the horsemen in negotiations with the permitholder, is necessary to promote the stability of the industry. The purse payments from the track must be sufficient to entice the horsemen, who incur substantial expenses, to provide horses for the races. A single race meet can result in the horsemen collectively investing millions of dollars.

40. Dr. Fisch stated that fewer horsemen will race and enter into the horse racing industry if horsemen are excluded from purse negotiations and the number of races is arbitrarily reduced. Racing and its purse payments drive the horse breeding industry, which is important to the economy of the state.

Dr. Fisch testified that if the horsemen's association is not independent from the track, then the track can dictate the purse payments and racing dates without input from the horsemen, a situation contrary to the intent and purpose of coupling expanded gaming opportunities with the continued healthy operation of horse racing.

41. Dr. Fisch testified that the FQHRA offers membership to any owner or trainer racing at Hialeah Park. The FQHRA issues membership cards stating that the member has chosen FQHRA to represent him in track negotiations and legislative endeavors. Membership can be obtained online, and is renewed automatically every year. Dr. Fisch stated that people may opt out of membership in the FQHRA and still race at the facility.

42. The FQHRA contends that the SFQHA is a sham organization established and controlled by Hialeah as a means to effectively skirt the coupling requirement of the relevant statutes. At the hearing, it was established that the SFQHA had no members as of March 14, 2016, the date on which the SFQHA Agreement was submitted to the Division, or as of March 15, 2016, the date the racing and cardroom licenses were issued. In deposition testimony, Wesley Cox, a founding board member of the SFQHA (since resigned), testified that the SFQHA had no signed pledge cards from members as of September 20, 2016.

43. The FQHRA asserts that, as of the dates of the SFQHA Agreement and Hialeah's license issuance, it was the only horsemen's association representing a majority of the owners and trainers at Hialeah, by virtue of the ongoing FQHRA Agreement. Therefore, the FQHRA was the only entity authorized to enter a valid horsemen's agreement with Hialeah.

44. The FQHRA points out that the Division was presented with plentiful reasons to inquire whether the SFQHA was a "captive" association created by Hialeah. Even though both Hialeah and the FQHRA had made several inquiries to the Division regarding the license renewal requirements and the recognized horsemen's association for Hialeah, the Division made no effort to establish whether the SFQHA actually represented a majority of the owners and trainers at Hialeah at the time the SFQHA Agreement was submitted on March 15, 2016.

45. The Division's position is that the date of Hialeah's license issuance was the correct time to ascertain which horsemen's association represented a majority of the owners and trainers at Hialeah Park, because no racing was occurring at that time. There were no owners or trainers at Hialeah Park as of March 15, 2016. When asked whether the Division checked for SFQHA membership cards upon receiving the SFQHA Agreement, Mr. Zachem stated that "it wouldn't have been possible yet"

because Hialeah had not "had performances since [the filing of the SFQHA Agreement] for us to be able to."

46. The Division reads the language of sections 551.104(10)(a)2 and 849.086(13)(d)3. in literal terms: a "binding written agreement between the applicant and the [FQHRA] or the association representing a majority of the horse owners and trainers at the applicant's eligible facility" must be "on file with the division" at the time the license is issued. At all times pertinent to this proceeding, there was a binding written agreement on file with the Division: the FQHRA Agreement that expired on June 30, 2016, and the SFQHA Agreement that commenced on July 1, 2016. The Division's position is that the agreement in effect at the time the license is issued need not be the same agreement that will be in effect at the time the race meet is underway.

47. Nothing in the statutes gainsays the Division's position. The Division has not here acted according to an unadopted rule but pursuant to the language found on the face of the statute. No new policy has been announced, no interpretation was necessary. The only novel aspect of this licensing determination is that Hialeah has changed horsemen's associations, an event clearly contemplated by sections 551.104(10)(a)2. and 849.086(13)(d)3.

48. The FQHRA's position is that Hialeah should be required to run its 2016-2017 race meet using the horsemen's association with which it had an agreement on file with the Division at the time of the application. In other words, Hialeah has no alternative but to enter a new horsemen's agreement with the FQHRA, using the slot machine statute's arbitration process if necessary. See § 551.104(10)(c), Fla. Stat. Acceptance of the FQHRA's position would make it difficult, if not impossible, for a quarter horse permitholder to ever dislodge an incumbent horsemen's association. The statutes' provision of alternatives--"the Florida Quarter Horse Racing Association or the association representing a majority of the horse owners and trainers at the applicant's eligible facility"--militates against the FQHRA's position.[3/]

49. The Division concedes that FQHRA's points regarding legislative intent and the need for an independent horsemen's association may be valid as matters of policy. However, the Division argues that the statutes give it no authority to determine which is a "legitimate" and which is a "sham" or "puppet" horsemen's association. The term "horsemen's association" is undefined in statute. The Division's position is that if it has on file a facially valid and binding horsemen's agreement, the Division lacks any statutory ground not to issue the license.

50. Both Dr. Fisch and William White, the president of the Florida Horsemen's Benevolent and Protective Association, Inc. ("FHBPA")(a thoroughbred horsemen's association recognized in the slot machine statute, see § 551.104(10)(a), Fla. Stat.), repeatedly referred to the need for "legitimate" horsemen's associations in the pari-mutuel industry. Mr. White defined a "legitimate" horsemen's association as one that "can prove it's the majority." This statement led to the following colloquy with counsel for the Division, illustrating the difficulty of proving who is "legitimate":

> Q. Okay. What about a situation like Dr. Fisch described, where not every member has cards?
>
> A. If you get proved as the majority, you wouldn't have to have everyone have the card.
>
> Q. How is that?
>
> A. Well, if you have 1,000 members and you have 600 cards, you're the majority.
>
> Q. Okay. But how do I know -- if you only have 600 cards, how do I know you've got 1,000 members?
>
> A. Well, in our particular case, our membership is anyone who has an owners or trainers license.
>
> Q. Sure.
>
> A. So if I have cards that are more than half of that number, then I've proven to you that we're the majority.

Q. You understand we're not talking about your organization, though, right?

A. Yes.

Q. So talking about the quarter horse association, who, all members we've heard, do not have cards, how are we to know how many members they have?

A. Well, how much time did you put into it to find out the answer to that question?

Q. I think you misunderstand. You need to answer the question, not ask me questions.

A. I cannot answer it because I do not know your effort that you put into it.

Q. I'm asking how could we.

A. Get on the phone and write some letters. Send some investigators out there, do some work.

Q. To people who don't have cards?

A. To get a pulse on what's going on out there.

Q. Okay. And how would you suggest we get said pulse?

A. It's--I'll give you the answer you guys usually give me.

Q. Okay.

A. It's not my job to tell you what to do.

51. The FQHRA insists that the Division has a duty to investigate the organization and membership of a horsemen's association prior to issuing a license based on an agreement between the association and a permitholder, and that its failure

to do so in this instance constitutes a change in policy. This insistence is based on the FQHRA's reading of In re: Petition for Declaratory Statement of Florida Horsemen's Benevolent & Protective Association, Inc., Case No. DS 99-025 (Mar. 22, 2000), issued by the Division in response to a request by the FHBPA, which sought a declaratory statement on how the Division "determines how a horsemen's group, such as Petitioner, is 'the horsemen's group representing a majority of thoroughbred race horse owners and trainers in this state' within the meaning of Section 550.3551(6)(a), Florida Statutes."

52. The FQHRA asserts that the declaratory statement "declared that a new horsemen's association seeking to represent the majority of the horsemen at a facility to replace an existing representative group must demonstrate support through the presentation of membership cards evidencing that the new group actually represents the majority of the horsemen." However, it is clear from the language of the declaratory statement that the Division was not declaring a general intent or duty on its part to investigate a new horsemen's association prior to issuance of a license, or stating a specific requirement that membership cards be presented as proof. Rather, the Division was placing the onus on the permitholder to ensure that the horsemen's group represents a majority of licensees:

9. Recognizing that the state may impose penalties against the permitholder for violations of section 550.3551, Florida Statutes, the permitholder should make every reasonable means [sic] to verify that the horsemen's group represents the majority of licensees.[4/] It is a reasonable summation that to determine which (if more than one horsemen's group representing thoroughbred horserace owners and trainers exist) of the horsemen's groups represent the majority of the thoroughbred horserace owners and trainers, one must examine the membership roster of each association. Signed enrollment cards should substantiate membership rosters. The permitholder should also receive confirmation that the membership roster is comprised of licensed thoroughbred racehorse owners or trainers maintaining a "current" status in contrast to an "expired" status. The membership roster must then be compared to the total number of licensed thoroughbred racehorse owners and trainers in the state on that race day.

10. While section 550.2614(2), Florida Statutes, may have provided a mandatory verification process for the horsemen's association to certify that it represented a majority of the owners and trainers of thoroughbred horses in the state, the Court in Florida Horsemen Benevolent & Protective Association v. Rudder, 738 So. 2d 449 (Fla. 1st DCA 1999), ruled all of section 550.2614, Florida Statutes, unconstitutional.

11. Nevertheless, said ruling does not prohibit the permitholder from seeking verification, independently from the statute, from the horsemen's groups. Such verification may be accomplished by several means, one [of] which may include state verification of the number of current licensed thoroughbred racehorse owners and trainers, supplemented by an affidavit by

> the horsemen's association that it represents a majority of those licensees.[5/]
>
> 12. The Division believes that the methodology outlined above is consistent with the legislative intent that the permitholder seek approval of the majority represented for holding less than eight live races on any race day.

53. The Division's actions in the instant case were not inconsistent with the declaratory statement as to the nature of the horsemen's association. In the instant case, Hialeah submitted a horsemen's agreement that on its face appeared to be valid and binding. The Division accepted Hialeah's implicit representation that it had used all reasonable means to verify that the SFQHA represented (or would represent, at the time the new agreement took effect) a majority of the quarter horse owners and trainers at Hialeah Park. At the hearing, the Division stated that Hialeah's representations could not be verified until the race meet begins. If events prove that the SFQHA does not represent a majority of the owners and trainers at Hialeah Park, then Hialeah will be subject to the disciplinary measures set forth in sections 551.014(10)(b) and 849.086(14). In the declaratory statement and in the instant case, the Division was consistent in claiming no duty or authority to investigate or take action against the permitholder prior to issuance of a license.

54. The FQHRA also contends that the Division's allowance of amendments to Hialeah's application after February 28 constituted an unadopted rule. The Division counters that the filing of the SFQHA Agreement on March 14, 2016, was not an amendment of Hialeah's application. Consistent with its position that the statute requires only that an agreement must be on file with the Division at the time an application is filed, and with the fact that the application form completed by the permitholder makes no reference to a horsemen's agreement, the Division states that the agreement itself is not a part of the application. So far as this goes, the Division's view is consistent with the statutes, none of which impose any deadline on the filing of a new horsemen's agreement to take effect upon the expiration of the horsemen's agreement already on file with the Division.

55. However, the statutes in fact contemplate two agreements between the permitholder and a horsemen's association. First, there is the mandatory "binding written agreement" regarding distribution of purses, for which the statutes provide no filing deadline. Second, there is the permissive agreement between the permitholder and the horsemen's association regarding a reduction in the "full schedule of live racing" as defined by section 550.002(11). If the facility intends to run the full schedule of 40 racing performances,

there is no need to file this agreement.[6/] However, this second agreement does have a statutory deadline: it must be "filed with the division along with [the permitholder's] annual date application." This agreement is, in effect, part of the application if the permitholder is seeking approval of a reduced schedule for purposes of the cardroom and slot machine licensing requirements.

56. The Division neglected to account for this deadline in concluding that Hialeah did not amend its application after February 28. Hialeah's initial race dates and cardroom license application, filed December 23, 2015, requested a full schedule of 40 performances. Hialeah's amended application, dated February 26, 2016, requested 36 performances, fewer than the statutory "full schedule" of 40. As of the application amendment deadline of February 28, 2016, Hialeah had not filed an agreement with any horsemen's association for an "alternative schedule" reducing the statutory number of performances. Hialeah made such a filing only on March 15, 2016, when it submitted the SFQHA Agreement, which purported to "authorize Hialeah to operate 36 performances during the Race Meet" and generally consent to Hialeah's "managerial prerogative" in determining the number of racing dates. The Division's approval of Hialeah's reduced operating schedule could only have been premised upon the SFQHA Agreement, which was not filed "along

with . . . the annual date application," even though in this respect it was part of the application.

57. For purposes of the cardroom and slot machine license statutes, it is immaterial when the purse agreement has been filed so long as there is a valid agreement on file at the time the license is issued. Mr. Zachem accurately stated that the Division has no way of knowing whether the SFQHA is the majority horsemen's association at Hialeah Park until the 2016-2017 race meet commences. The Division accepted the SFQHA Agreement on the premise that the SFQHA would represent, at the time of the race meet, a majority of the quarter horse owners and trainers at Hialeah Park, and that Hialeah would be subject to discipline against its license should that not come to pass. As to the purse agreement, the Division's actions did not constitute an unadopted rule but a straightforward application of statutory language.

58. However, the timing of the filing of the alternative schedule agreement is decisive. The deadline for filing the racing dates application was February 28, 2016. As of that date, the Division did know which horsemen's association represented a majority of the owners and trainers at Hialeah Park because the 2015-2016 racing meet did not conclude until the following day, February 29, 2016. As of the filing deadline, the FQHRA was indisputably the majority horsemen's

association. As of the filing deadline, the SFQHA did not exist, even on paper. As of the filing deadline, no alternative schedule agreement had been filed with the Division.[7/]

59. Therefore, the Division's action in approving Hialeah's operating dates and cardroom licenses constituted either a waiver of the statutory deadline of February 28 for the filing of application amendments, or a waiver of the statutory requirement that a permitholder file an alternative schedule agreement in order to receive a license to run fewer than 40 live regular wagering performances. Such a waiver would perforce be generally applicable to any similarly situated applicant. The Division's action in this respect constitutes an unadopted rule.

CONCLUSIONS OF LAW

60. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.56(4), 120.569, and 120.57(1), Florida Statutes.

61. The Division is an "agency" within the meaning of section 120.52(1). The Division's statutory powers include rulemaking pursuant to sections 550.0251(3) and 550.3511(10).

62. Section 120.52(16) defines a "rule" as:

> [E]ach agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the

> procedure or practice requirements of any agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

63. An "unadopted rule" is defined as an agency statement that meets the definition of the term rule, but that has not been adopted pursuant to the requirements of section 120.54. § 120.52(20), Fla. Stat.

64. Section 120.54(1) provides:

> (1)(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

65. The "flush left" language of section 120.52(8), defining "invalid exercise of legislative authority," provides:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

66. Section 120.56(4) provides a remedy for persons who are substantially affected by an unadopted rule:

> (a) Any person substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state facts sufficient to show that the statement constitutes an unadopted rule.
>
> * * *
>
> (e) If an administrative law judge enters a final order that all or part of an unadopted rule violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the unadopted rule or any substantially similar statement as a basis for agency action.

67. The FQHRA has standing for purposes of challenging an unadopted rule pursuant to section 120.56(4), in that a substantial number of its members would be substantially affected by the Division's regulatory actions. NAACP, Inc. v. Fla. Bd. of Regents, 863 So. 2d 294 (Fla. 2003); Rozenzweig v. Dep't of Transp., 979 So. 2d 1050, 1053-54 (Fla. 1st DCA 2008). The FQHRA, which is named specifically in the statutes at issue in this proceeding, would itself be substantially affected by the Division's decisions regarding horsemen's agreements generally and the Division's specific decision to approve Hialeah's license under the conditions described in the above Findings of Fact.

68. An administrative agency is required to promulgate rules as to "those statements which are intended by their own effect to create rights or to require compliance, or otherwise to have the direct and consistent effect of law." Coventry First, LLC v. Off. of Ins. Reg., 38 So. 3d 200, 203 (Fla. 1st DCA 2010), quoting Ag. for Health Care Admin. v. Custom Mobility, 995 So. 2d 984, 986 (Fla. 1st DCA 2008).

69. An agency statement need not be reduced to writing in order to meet the definition of a rule, and an agency cannot avoid the rulemaking requirement by refraining from memorializing the agency statement in written terms. Dep't of High. Saf. & Motor Veh. v. Schluter 705 So. 2d 81, 84 (Fla. 1st DCA 1997).

70. The focus in determining whether an agency statement is a rule within the meaning of section 120.52(16) is on the effect of the statement rather than the agency's characterization of it. Dep't of Rev. v. Vanjaria Enter., Inc., 675 So. 2d 252, 255 (Fla. 5th DCA 1996); Balsam v. Dep't of HRS, 452 So. 2d 976, 977 (Fla. 1st DCA 1984); Amos v. Dep't of HRS, 444 So. 2d 43, 46-47 (Fla. 1st DCA 1983); State Dep't of Admin. v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977).

71. An agency's interpretation of a statute is a rule if it gives the statute a meaning not readily apparent from a literal reading, or if it purports to create rights, require

compliance, or otherwise has the direct and consistent effect of law. Beverly Enterprises-Florida, Inc. v. Dep't of HRS, 573 So. 2d 19, 22-23 (Fla. 1st DCA 1990), quoting St. Francis Hosp., Inc. v. Dep't of HRS, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989).

72. Florida administrative law does not allow an agency to establish new policy by stealth, through the issuance of licenses. A policy having the force and effect of law must be formally adopted through the rulemaking process. Fla. Quarter Horse Track Ass'n v. Dep't of Bus. & Prof'l Reg., 133 So. 3d 1118, 1119-20 (Fla 1st DCA 2014). However,

> an agency interpretation of a statute which simply reiterates the legislature's statutory mandate and does not place upon the statute an interpretation that is not readily apparent from its literal reading, nor in and of itself purport to create certain rights, or require compliance, or to otherwise have the direct and consistent effect of the law, is not an unpromulgated rule, and actions based upon such an interpretation are permissible without requiring an agency to go through rulemaking.

State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2014), quoting St. Francis Hosp., Inc. v. Dep't of HRS, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989).

73. Sections 551.104(10)(a)2., and 849.086(13)(d)3. set forth a conditional precedent to the issuance of slot machine gaming and cardroom licenses to permitholders. Both statutes require a quarter horse permitholder that wishes to apply for a

slot machine or cardroom license to have "on file with the division a binding written agreement between the applicant and the [FQHRA] or the association representing a majority of the horse owners and trainers at the applicant's eligible facility, governing the payment of purses on live quarter horse races conducted at the licensee's pari-mutuel facility."

74. Section 551.104(10)(b) requires the Division to suspend a slot machine license if the horsemen's agreement is terminated or otherwise ceases to operate, or if the Division determines that the licensee is materially failing to comply with the terms of the horsemen's agreement. Section 849.086 does not contain similar language.

75. The FQHRA has alleged that the Division's issuance of licenses to Hialeah is based on unadopted rules in two respects. First, the Division's acceptance of the SFQHA as a horsemen's association will have the effect of ceding control to permitholders to control racing dates and purse decisions without negotiating with a truly independent horsemen's association. Ultimately, such unilateral control will accomplish a "decoupling" of slot machine and cardroom operations from the promotion of horse racing and breeding in the state of Florida, in contravention of the Legislature's intent when it expanded gambling operations in the state.

76. Second, the Division's grant of a license to Hialeah announced a new, unpromulgated policy of allowing amendments to license applications after February 28 or, alternatively, a new, unpromulgated policy of waiving the requirement that a permitholder file an alternative schedule agreement in order to receive a license to operate for fewer than 40 live regular wagering performances.

77. As to the FQHRA's first policy-oriented allegation, it is concluded that the Division has not acted pursuant to an unadopted rule. Sections 551.014(10)(a)2. and 849.086(13)(d)3. employ identical phrasing: the applicant must have "on file with the division a binding written agreement between the applicant and the [FQHRA] or the association representing a majority of the horse owners and trainers at the applicant's eligible facility, governing the payment of purses on live quarter horse races conducted at the licensee's pari-mutuel facility." The statutes do not define "association" or "horsemen's association" and contain no limiting language such as "independent horsemen's association."

78. The Division did not dispute the FQHRA's arguments regarding the policy ramifications of allowing the newly-formed and dubiously independent SFQHA to enter into a purse agreement with Hialeah. The Division did convincingly point out that the statutes give it no authority to "pre-qualify" a horsemen's

association for purposes of the purse agreements. The Division's literal reading of sections 551.014(10)(a)2. and 849.086(13)(d)3. is persuasive. The "sham" identity or "captive" nature of the horsemen's association is not a ground for denial of a license, provided the Division has on file a binding purse agreement as of the date the license is issued. The FQHRA Agreement satisfied the purse agreement requirement for purposes of sections 551.014(10)(a)2. and 849.086(13)(d)3. In this respect, the Division acted according to the plain language of the statutes and not pursuant to an unadopted rule.

79. As to the FQHRA's second, more technical allegation, it is concluded that the Division has acted pursuant to an unadopted rule. The fact that a binding written purse agreement was on file did not satisfy the definitional requirement of section 550.002(11) regarding an alternative schedule agreement. Hialeah's amended application, filed on February 26, 2016, requested a license for 36 live regular wagering performances. In order to receive a license for fewer than 40 live regular racing performances, Hialeah was required to file, "along with its annual date application," an agreement for an alternative schedule between Hialeah and "either the [FQHRA] or the horsemen's association representing the majority of the quarter horse owners and trainers at the facility."

80. As of the February 28 deadline for submitting amendments to Hialeah's racing dates application, the SFQHA did not exist. The only entity that conceivably could have entered into an alternative schedule agreement with Hialeah on February 28, 2016, was the FQHRA.

81. The Division's approval of Hialeah's reduced operating schedule was based either on the SFQHA Agreement, which was not filed until March 14, 2016, well after the statutory deadline for submitting amendments to a racing dates application, or on thin air. Therefore, the Division's action in approving Hialeah's operating dates and cardroom licenses constituted either a waiver of the statutory deadline of February 28 for the filing of application amendments, or a waiver of the statutory requirement that a permitholder file an alternative schedule agreement in order to receive a license to run fewer than 40 live regular wagering performances. There is no other way to rationalize the Division's action.[8/]

82. The Division's action in waiving clear statutory racing dates application requirements for Hialeah constitutes an "agency statement of general applicability that implements, interprets, or prescribes law or policy." Without question, a deviation from clear statutory language gives the statute a meaning not readily apparent from a literal reading. It is

certainly a statement purporting by its own effect to create rights.

83. It could be objected that, as a creature of statute itself, the Division obviously lacks the authority to waive the clear requirements of sections 550.102(11) and/or 550.01215(1). Such an objection would misconstrue the nature of this proceeding. In Florida Quarter Horse Racing Association v. Department of Business & Professional Regulation, DOAH Case No. 11-5796RU (Final Order May 6, 2013), aff'd 133 So. 2d 1118 (Fla. 1st DCA 2014), Administrative Law Judge John Van Laningham succinctly disposed of a similar objection as follows, in endnote 16:

> The Division argues that because (in the Division's view) it has no authority to promulgate a rule defining "horse race" and its variants, the Division is legally incapable of formulating an unadopted rule expressing such a definition, which makes the Division immune from liability under § 120.56(4). This contention is rejected. An agency's duty to adopt a particular statement is wholly independent of the agency's authority to make that statement a formal rule. Thus, if an agency produces a statement which is a rule by definition, then the agency must adopt that statement as a rule or risk the consequences of being found in violation of § 120.54(1)(a). If the agency lacks the authority to adopt such statement as a rule, then the statement is doubly unlawful, first as an unadopted rule and second as an invalid exercise of delegated legislative authority. In a § 120.56(4) proceeding, however, the central issue is whether the challenged statement is

> an unadopted rule; its substantive validity is irrelevant for the moment, a matter to be determined in a future rule challenge, after the agency has initiated or completed rulemaking. The Division's position, if accepted, would allow an agency, with impunity, to formulate and apply a statement of general applicability having the effect of law as to a subject for which the legislature has not delegated such authority to the agency; that would be a perversion of § 120.54(1)(a), not to mention the democratic process.

84. The Division presented no case-in-chief and made no showing to overcome the presumption that rulemaking is feasible and practicable as to the unadopted rule waiving the clear requirements of sections 550.102(11) and/or 550.01215(1). § 120.56(4)(c), Fla. Stat. The FQHRA proved by a preponderance of the evidence that the Division failed to adopt, as a rule, its generally applicable policy of waiving the statutory February 28 deadline for submission of application amendments and/or its generally applicable policy of waiving the statutory requirement that an alternative schedule agreement be filed along with the quarter horse race dates application when the applicant seeks a license for fewer than 40 live regular wagering performances. In no other respect did the FQHRA prove that the Division’s issuance of licenses to Hialeah was based on an unadopted rule.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the policy of the Division pursuant to which an applicant for a license to conduct fewer than 40 live regular quarter horse racing wagering performances for the next state fiscal year may be granted such license, as well as subsidiary slot machine and cardroom licenses, despite its failure to submit a completed application within the statutory timeframe and/or despite its failure to submit an alternative schedule agreement with the Florida Quarter Horse Racing Association or the horsemen’s association representing the majority of the quarter horse owners and trainers at the facility, is an unadopted rule that violates section 120.54(1)(a), Florida Statutes.

Jurisdiction is retained to conduct further proceedings as necessary to award attorney's fees and costs pursuant to section 120.595(4). It is therefore further ORDERED that Petitioner shall have 30 days from the date of this Final Order within which to file a motion for attorney's fees and costs, to which motion (if filed) Petitioners shall attach appropriate affidavits (e.g., attesting to the reasonableness of the fees) and essential documentation in support of the claim, such as time sheets, bills, and receipts.

DONE AND ORDERED this 1st day of February, 2017, in Tallahassee, Leon County, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of February, 2017.

ENDNOTES

[1/] Paragraphs 6 through 17 of Florida Quarter Horse Racing Association v. Department of Business & Professional Regulation, DOAH Case No. 11-5796RU (Final Order May 6, 2013), aff'd 133 So. 2d 1118 (Fla. 1st DCA 2014), provide an excellent primer on Florida pari-mutuel wagering in general, and quarter horse racing in particular.

[2/] Horsemen's agreements are often referred to as "purse agreements," though they may cover topics beyond the distribution of purses. See Finding of Fact 55, infra, regarding the fact that there are two statutory requirements: one for a purse agreement between the permitholder and a horsemen's group in order to operate slot machines and cardrooms, and one for an agreement between the permitholder and the horsemen's group agreeing to reduced racing dates, if the permitholder intends to run less than a full schedule of live performances. The statutes do not necessarily require that these agreements be found in a single document, though such has been the practice up to now.

[3/] The undersigned's emphasis on the statutory option provided a quarter horse permitholder is partly rooted in the fact that the slot machine statute gives no such choice to a thoroughbred

permitholder, whose only option is to execute a binding written purse agreement with the Florida Horsemen's Benevolent and Protective Association, Inc. §§ 551.104(10)(a), Fla. Stat. The cardroom statute does not require a thoroughbred permitholder to file a purse agreement; rather, it requires a thoroughbred or harness racing permitholder to distribute half of its monthly cardroom proceeds to supplement purses and breeders' awards. § 849.086(13)(d)2., Fla. Stat.

[4/] The referenced statute, section 550.3551, sets forth the standards under which a licensed horse track, dog track, or jai alai fronton may transmit broadcasts of its races or games to locations outside of Florida. At the time of the declaratory statement, subsection (6)(a) required a thoroughbred permitholder to conduct at least eight live races on a race day, unless it had written approval from the Florida Thoroughbred Breeders' Association and the "horsemen's group representing the majority of thoroughbred racehorse owners and trainers in this state."

The FHBPA did not receive its statutory designation as the "default" horsemen's group until later in 2000. See § 27, ch. 2000-354, Laws of Florida, effective July 1, 2000. It should be noted that the current language of section 550.3551(6)(a) requires the written approval of the FHBPA "unless it is determined by the department that another entity represents a majority of the thoroughbred racehorse owners and trainers in the state." The quote indicates that the Legislature is well able, in plain language, to require the Division to determine the majority representation of a horsemen's association, and underscores the fact that it chose not to do so in the slot machine and cardroom statutes.

[5/] Regardless of legal requirements, this means of verification would be unavailable to Hialeah in the instant case as a practical matter. As noted in endnote 3 above, the declaratory statement was discussing an agreement between a facility and a statewide horsemen's group. The Division's occupational license filings would readily yield the number of owners and trainers in the entire state. The Division has no readily discoverable file of the number of current and licensed quarter horse owners and trainers at Hialeah Park.

[6/] The fact that the parties to the FQHRA Agreement and the SFQHA Agreement have in practice chosen to roll the two agreements into one "horsemen's agreement" has no bearing on the statutory scheme under discussion.

[7/] It could be argued that even if the SFQHA Agreement had been timely filed, it would not have satisfied the requirement of section 550.002(11), that the alternative schedule agreement include either the FQHRA or the horsemen's association representing the majority of the owners and trainers, because as of February 28, 2016, only the FQHRA satisfied either of those criteria.

[8/] There is, of course, an argument that the Division's action was simply a mistake. Ms. Pouncey was not trained to connect the requested reduction in racing dates with the alternative schedule agreement requirement, and neither Mr. Zachem nor any other Division employee caught the error before the license was issued. However, the fact that the sole Division employee charged with reviewing applications did not know the statutory requirements for a reduced racing dates license, coupled with the Division's institutional insistence that the licenses were issued in accordance with the law, support the conclusion that this was a policy decision rather than a single employee's mistake.

COPIES FURNISHED:

Jason L. Maine, General Counsel
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399-2202
(eServed)

J. Stephen Menton, Esquire
Tana D. Storey, Esquire
Gabriel F.V. Warren, Esquire
Rutledge Ecenia, P.A.
Suite 202
119 South Monroe Street
Tallahassee, Florida 32301
(eServed)

Caitlin R. Mawn, Esquire
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399-2202
(eServed)

William D. Hall, Esquire
Department of Business and
  Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399-2202
(eServed)

Jonathan Zachem, Director
Division of Pari-Mutuel Wagering
Department of Business and
  Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399-2202
(eServed)

Matilde Miller, Interim Secretary
Department of Business and
  Professional Regulation
Capital Commerce Center
2601 Blair Stone Road
Tallahassee, Florida 32399-2202
(eServed)

Ken Plante, Coordinator
Joint Administrative Procedures Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399-1400
(eServed)

Ernest Reddick, Chief
Alexandra Nan
Department of State
R. A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250
(eServed)

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.