

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DANIA ENTERTAINMENT CENTER,  
LLC,

Petitioner,

vs.

Case No. 16-5682F

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

Respondent.

\_\_\_\_\_/

DAYTONA BEACH KENNEL CLUB,  
INC.,

Petitioner,

vs.

Case No. 16-5683F

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

Respondent.

\_\_\_\_\_/

JACKSONVILLE KENNEL CLUB, INC.,

Petitioner,

vs.

Case No. 16-5684F

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

Respondent.

\_\_\_\_\_/

MELBOURNE GREYHOUND PARK, LLC,

Petitioner,

vs.

Case No. 16-5685F

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

Respondent.

\_\_\_\_\_  
BONITA-FORT MYERS CORPORATION,

Petitioner,

vs.

Case No. 16-5686F

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

Respondent.

\_\_\_\_\_  
INVESTMENT CORPORATION OF PALM  
BEACH,

Petitioner,

vs.

Case No. 16-5687F

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

Respondent.

\_\_\_\_\_

WEST FLAGLER ASSOCIATES, LTD.,

Petitioner,

vs.

Case No. 16-5688F

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

Respondent.

\_\_\_\_\_/

TAMPA BAY DOWNS, INC.; AND TBDG  
ACQUISITION, LLC, d/b/a TGT  
POKER AND RACEBOOK,

Petitioners,

vs.

Case No. 16-5689F

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

Respondent.

\_\_\_\_\_/

FINAL ORDER AWARDING ATTORNEY'S FEES AND COSTS

This cause is before the undersigned upon the entry of two Orders by the First District Court of Appeal (First DCA) granting motions for attorney's fees and costs and remanding the matter to the Division of Administrative Hearings (DOAH) to assess the amount pursuant to section 120.595(2).

Preliminary Statement

On September 26, 2016, after entry of a Final Order determining several proposed rules of the Department of Business

and Professional Regulation, Division of Pari-mutuel Wagering (DBPR or Respondent), relating to "designated player" card games, Florida Administrative Code Rules 61D-11.001(17) and 61D-11.002(5), to have been invalid exercises of delegated legislative authority, The Lockwood Law Firm filed separate Motions for Attorney's Fees and Costs pursuant to section 120.595(2) with DOAH on behalf its clients in DOAH Case Nos. 15-7010RP (Petitioner Dania Entertainment Center, LLC); 15-7011RP (Petitioner Daytona Beach Kennel Club, Inc.); 15-7012RP (Petitioner Jacksonville Kennel Club, Inc.); 15-7013RP (Petitioner Melbourne Greyhound Park, LLC); 15-7014RP (Petitioner Bonita-Fort Myers Corporation); 15-7015RP (Petitioner Investment Corporation of Palm Beach); and 15-7016RP (Petitioner West Flagler Associates, Ltd.) (the "Lockwood Petitioners"). On the same day, the Foley & Lardner law firm filed a Motion for Attorney's Fees and Costs on behalf of its clients in DOAH Case No. 15-7022RP (Petitioners Tampa Bay Downs, Inc., and TBDG Acquisition, LLC, d/b/a TGT Poker and Racetrack) (the "Foley & Lardner Petitioners"). The Lockwood Petitioners and the Foley & Lardner Petitioners shall be collectively referred to as "Petitioners."

On October 7, 2016, the Motions for Attorney's Fees and Costs, by then reassigned as DOAH Case Nos. 16-5682F, 16-5683F, 16-5684F, 16-5685F, 16-5686F, 16-5687F, 16-5688F, and 16-5689F,

were consolidated and placed in abeyance pending the resolution of DBPR's appeal of the Final Order.

On November 8, 2017, the court entered its written opinion in Department of Business and Professional Regulation, Division of Pari-mutuel Wagering v. Dania Entertainment Center, LLC, et al., 229 So. 2d 1259 (Fla. 1st DCA 2017), affirming the Final Order. The court also entered two separate Orders granting the motions for attorney's fees and costs filed by the Lockwood Petitioners and the Foley & Lardner Petitioners, and remanded the matters to DOAH to assess the amount.

The final hearing was bifurcated into two phases, with the first phase being a hearing to determine how the \$50,000 cap on attorneys' fees established by section 120.595(2) would be applied in the consolidated multi-party litigation, and the second phase to determine the amount of reasonable costs and attorneys' fees to be awarded.

The bifurcated hearing on the effect of the \$50,000 cap was held on January 16, 2018, as scheduled. Facts were stipulated by the parties, and the hearing was limited to argument taken to supplement previously filed memoranda of law.

On January 26, 2018, a Partial Final Order (PFO) on Effect of Statutory Cap on Fees was entered. The PFO provided that, under the facts of this case, the \$50,000 cap on attorney's fees

established in section 120.595(2) establishes the maximum amount that may be awarded to Petitioners, collectively, in this proceeding.

After entry of the PFO, the parties agreed, subject to the right to appeal the issue of the statutory cap upon entry of the Final Order, that the capped amount of \$50,000 was adequately supported and should be awarded in compliance with the Order of the First DCA. The parties further agreed that Petitioners would file their accounting of costs, with Respondent reserving the right to contest whether such costs are properly taxable.

On March 30, 2018, Petitioners filed an Affidavit and Accounting of Taxable Costs, and an Affidavit of Joshua M. Hawkes Regarding Amount of Costs setting forth the costs asserted to have been incurred by Petitioners. Petitioners also filed a supporting Memorandum of Law. On April 9, 2018, Respondent countered with its Memorandum of Law Disputing the Taxability of Certain Portions of Petitioners' Claim for Attorney's Costs.

An Order Requiring Status Report was then entered inquiring as to whether the parties believed an evidentiary hearing to be necessary. On April 18, 2018, the parties filed a Joint Status Report in which they stipulated that: (1) the only remaining issue for disposition by the undersigned is the taxability of the costs associated with the Lower Cost Regulatory Alternative,

which disposition would be appropriately based on the pleadings filed; (2) all costs associated with the deposition of Mr. Chuck Taylor are not taxable; and (3) all remaining costs sought by Petitioners are taxable.

#### FINDINGS OF FACT

1. The Findings of Fact set forth in the Final Order entered in DOAH Case Nos. 15-7010 through 15-7016 and 15-7022 are hereby adopted in this Final Order.

2. The PFO is hereby adopted and incorporated in this Final Order as though set forth in full.

3. During the course of the rulemaking proceedings regarding "designated player" card games, Petitioners submitted a good-faith proposal for a lower cost regulatory alternative (LCRA) indicating that the proposed rules would have a significant monetary impact on Petitioners, which required Respondent to prepare a statement of estimated regulatory costs (SERC) pursuant to sections 120.54(3)(b) and 120.541, Florida Statutes.

4. Respondent did not prepare a SERC. That failure was determined to be a material failure to follow applicable rulemaking procedures and became a basis for the invalidation of the proposed rules.

CONCLUSIONS OF LAW

5. Section 120.595(2) provides:

(2) CHALLENGES TO PROPOSED AGENCY RULES PURSUANT TO SECTION 120.56(2).—If the appellate court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees . . . .

6. The Florida Supreme Court has established Statewide Uniform Guidelines for Taxation of Costs in Civil Actions ("the Guidelines"). App. II, Fla. R. Civ. P. Although not directly adopted in the Uniform Rules of Procedure that govern administrative proceedings, they are nonetheless instructive and persuasive in determining an award of costs under chapter 120.

7. The Guidelines place the burden of proof on the moving party to show that "all requested costs were reasonably necessary either to defend or prosecute the case at the time the action precipitating the cost was taken." Id.

8. The Guidelines further classify litigation costs as those "that should be taxed," those "that may be taxed," and "those that should not be taxed." Among the costs that should be taxed, and the category closest to providing support for the LCRA, are "[t]he costs of copies of documents filed (in lieu of 'actually cited') with the court, which are reasonably necessary to assist the court in reaching a conclusion."



9. The LCRA was prepared in an effort to compel Respondent to prepare a SERC during the rulemaking proceeding. It was not prepared in direct support of the challenge to the proposed rule that ultimately emerged from the rulemaking. A determination that such a cost was "reasonably necessary" to prosecute the rule challenge would be akin to concluding that the costs of drafting a contract are subject to an award in an action for its breach. The undersigned is not prepared to extend reasonable costs for a rule challenge proceeding to that degree.

See, e.g., Citizens Prop. Ins. Corp. v. River Oaks Condo. II Ass'n, 190 So. 3d 1110 (Fla. 2d DCA 2016).

10. Likewise, the authors of the LCRA did not testify at the final hearing, though they did testify at the rulemaking hearing. Their expenditure of time in the development of the LCRA was done for the direct purpose of influencing the direction of the rulemaking, not for reasons directly related to the rule challenge, and their costs are not taxable. See, e.g., McCoy v. City of Alachua, 991 So. 2d 983 (Fla. 1st DCA 2008).

11. For the reasons set forth herein, it is concluded that the costs associated with the LCRA are not taxable pursuant to section 120.595(2).

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, and on the stipulations of the parties as set forth in the April 18, 2018, Joint Status Report, the undersigned awards the following to Petitioners, to be paid by Respondent:

- a. \$50,000.00 in attorney's fees;
- b. \$2,588.30 in costs associated with the depositions of Jonathan Zachem, Steven Kogan, Joe Dillmore, Lisa Helms, Deborah Giardina, and Jamie Shelton, as set forth in the Affidavit and Accounting of Taxable Costs; and
- c. \$1,576.87 in costs as set forth in the Affidavit of Joshua M. Hawkes Regarding Amount of Costs.

DONE AND ORDERED this 20th day of April, 2018, in Tallahassee, Leon County, Florida.



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E. GARY EARLY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of April, 2018.

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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 one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.