STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs. Case No. 16-6423PL

TERESA M. POMPAY,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge F. Scott Boyd through video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida, on January 4, 2017.

APPEARANCES

For Petitioner: William D. Hall, Esquire
Thomas J. Izzo, Esquire
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399-2202

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

STATEMENT OF THE ISSUE

Whether Respondent raced a horse that was impermissibly medicated in violation of section 550.2415(1)(a), Florida Statutes (2015), and implementing administrative rules[1/] as

alleged in the Amended Administrative Complaint; and, if so, what sanction is appropriate.

PRELIMINARY STATEMENT

Petitioner, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Petitioner or Division), served an Amended Administrative Complaint on Teresa M. Pompay (Respondent or Ms. Pompay) on October 13, 2016. The complaint alleged that Respondent was the trainer of record of thoroughbred horses raced at Florida racetracks with restricted drugs on February 20, 2016, and May 13, 2016, and charged two counts of violation of statutes and rules governing pari-mutuel racing. Respondent disputed material facts alleged in the complaint and timely requested an administrative hearing on October 17, 2016. The case was forwarded to the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge on November 2, 2016.

The final hearing was conducted on January 4, 2017, based upon extensive stipulations of fact, which have been accepted and are included among the facts set forth below. At hearing, two Joint Exhibits, J-1 and J-2, were also admitted. Official recognition was given to Florida Administrative Code Rule 61D-6.005, both as it existed prior to June 15, 2015, and as it existed after that date at the times of the alleged violations. Official recognition was also given to the final orders in

Zaidie v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, Case No. 15-5037 (Fla. DOAH Nov. 25, 2015; Fla. DBPR Jan. 11, 2016), and Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. Ziadie, Case Nos. 14-4716PL and 15-2326PL (Fla. DOAH Dec. 15, 2015; Fla. DBPR Jan. 11, 2016) (Zaidie cases). The parties also stipulated at hearing that but for the affirmative defenses raised by Respondent and addressed here, the Division has proved the charges against Ms. Pompay.

A court reporter participated in the hearing, but neither party ordered a transcript. On January 17, 2017, both parties timely filed proposed recommended orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

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

2. At all times material, Ms. Pompay held a pari-mutuel wagering professional individual occupational license, number 1001817-1021, issued by the Division.

3. At all times material, Ms. Pompay was subject to chapter 550 and the implementing rules in Florida Administrative Code Chapter 61D.

4. Under section 550.2415(1)(a), an animal that has been impermissibly medicated or determined to have a prohibited substance present may not be raced. It is a violation of the statute for a person to impermissibly medicate a horse which results in a positive test for such medications based on samples taken immediately after the race.

5. Rule 61D-6.002(1) provides: "[t]he trainer of record shall be responsible for and be the absolute insurer of the condition of the horses . . . he/she enters to race."

6. Ms. Pompay was the trainer of record for the horse named R Bling Shines who raced at Gulfstream Park on February 20, 2016.

7. R Bling Shines won her race and was then sent to the Division-operated equine detention barn for the taking of urine, blood or other such samples pursuant to rule 61D-6.005. The equine detention barn is the site at each licensed racetrack in Florida where employees of the Division obtain urine and blood samples from racehorses.

8. Ms. Pompay was the trainer of record for the horse named Run Saichi who raced at Gulfstream Park on May 13, 2016.

9. Run Saichi finished second in his race and was then sent to the Division-operated equine detention barn for the taking of urine, blood or other such samples pursuant to rule 61D-6.005.

10. Rule 61D-6.005, entitled "Procedures for Collecting Samples from Racing Animals" was in effect when R Bling Shines and Run Saichi were sent to the equine detention barn for the collection of "urine, blood or other such samples" as authorized by the rule. The term "other such samples," as used in the rule, means hair and saliva. The rule does not refer to the "processing" of whole blood samples into blood serum.

11. The University of Florida Laboratory determined that the post-race blood sample taken from R Bling Shines tested positive for a blood serum overage of the permitted medication "betamethasone."

12. The University of Florida Laboratory determined that the post-race blood sample taken from Run Saichi tested positive for a blood serum overage of the permitted medication "mepivicaine."

13. On February 20, 2016, the Equine Detention Barn Procedures Manual (2010 Manual) was in effect for all equine detention barn facilities. The 2010 Manual was in effect between June 2010 and April 7, 2016. At the time the 2010 Manual became effective, rule 61D-6.005 (2001) was in effect.

14. On November 25, 2015, the Recommended Order issued in Case No. 15-5037 concluded that subsection 4.6 of the 2010 Manual was an unadopted rule of the Division and that pursuant to section 120.57(1)(e)1., Florida Statutes, the Division could

not base agency action on blood serum samples obtained pursuant to it. On January 11, 2016, the director of the Division issued a Final Order finding that subsection 4.6 of the 2010 Manual was an unadopted rule of the Division.

15. On December 15, 2015, the Recommended Order issued in consolidated Case Nos. 14-4716 and 15-2326 concluded that subsection 4.6 of the 2010 Manual was an unadopted rule of the Division and that pursuant to section 120.57(1)(e)1. the Division could not base agency action on blood serum samples obtained pursuant to the unadopted rule. On January 11, 2016, the director of the Division issued a Final Order finding that subsection 4.6 of the 2010 Manual was an unadopted rule of the Division.

16. On April 7, 2016, the 2016 Guidelines were distributed to all equine detention barn facilities to become effective as of that date. The 2016 Guidelines superseded and replaced the 2010 Manual. At the time the 2016 Guidelines became effective, rule 61D-6.005 (2015) was in effect. The 2016 Guidelines were in effect on May 13, 2016, when Run Saichi raced at Gulfstream Park.

17. The 2010 Manual prescribed detailed procedures for collecting blood samples from race horses, spinning the blood in the centrifuge to extract the serum, pouring of the serum into the evergreen tube, sealing of the evergreen tube with evidence

tape, and mailing of the specimen to the laboratory for testing. The 2010 Manual was applicable to every horse racing facility within the State of Florida. It had been in effect in its then-current form between 2010 and April 2016 and, by its own terms, was mandatory. It provided that veterinary assistants, chief veterinary assistants, detention barn security guards, and detention barn supervisors "study, become completely familiar with, and put into practice" the procedures outlined in the 2010 Manual. It described seven steps in chain-of-custody procedures, three of which are "collecting the specimen, sealing the specimen, and completing the required forms," and described detailed procedures in this "strict sequence of events that must be followed."

18. The 2016 Guidelines do not prescribe the detailed procedures for collecting blood samples from racehorses, spinning the blood in the centrifuge to extract the serum, pouring of the serum into the evergreen tube, sealing of the evergreen tube with evidence tape, freezing the sample and mailing of the specimen to the laboratory for testing. However, since the date the 2016 Guidelines were put into effect, the procedures followed by Division employees in the testing barn for the processing of the whole blood into blood serum, the pouring of the serum into the evergreen tube, the sealing of the tube with evidence tape, the freezing of the sample and the

mailing of the specimen to the laboratory have been the same as those prescribed by the 2010 Manual.

19. At the time of the implementation of the 2016 Guidelines, there were no "established procedures pursuant to applicable law and administrative rule" to process whole blood into blood serum other than the procedures set forth in subsection 4.6 of the 2010 Manual. In addition, at the time of the implementation of the 2016 Guidelines, there were no "testing laboratory SOPs" or "protocols" in place for detention barn personnel to follow. According to the laboratory director, the laboratory's SOPs and protocols do not begin to operate until the moment the samples arrive at the laboratory in Gainesville.

20. The Division published the 2010 Manual under the direction of its deputy director and distributed it to every employee who worked at a detention barn, including the state veterinarian, the chief veterinary assistant, other veterinary assistants, detention barn security guards, and detention barn supervisors. The 2010 Manual was not made available to the general public unless a copy was requested as a public record. The 2010 Manual was an official publication of the Division used at all horse racing facilities in the State of Florida and was last updated on June 25, 2010. During the approximate six-year period that the 2010 Manual was in effect, not one owner's

witness went to the detention barn at the end of the racing day to observe the pouring of blood serum from the blood tubes into the evergreen tube.

21. The Division published the 2016 Guidelines under the direction of its deputy director and distributed it to every employee that worked at a detention barn, including the state veterinarian, the chief veterinary assistant, other veterinary assistants, detention barn security guards, and detention barn supervisors. The 2016 Guidelines were not made available to the general public unless a copy was requested as a public record. Since the 2016 Guidelines took effect, not one owner's witness has gone to the detention barn at the end of the racing day to observe the pouring of blood serum from the blood tubes into the evergreen tube.

22. The Division uses various forms in connection with blood and urine sampling. The forms catalog the specimens and, if the procedures set forth in the 2010 Manual and the 2016 Guidelines are followed, demonstrate that the horse was in the testing barn at the time the blood and urine samples were taken.

23. The Division's Form RL 173-3 is a self-adhesive sequentially numbered bar-coded, three-part form (blood label, urine label and card) provided by the University of Florida Racing Laboratory used to catalog specimens by assigning them "Specimen Numbers." As specimens are collected, information

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

24. The sample tag thus consists of three portions: the numbered portion designated for the blood specimen (blood label), the numbered portion designated for the urine specimen (urine label), and the numbered portion containing information about the animal and trainer that was required to be signed by the witness (card) under rule 61D-6.005 (2001) and "may" be signed by the witness under rule 61D-6.005 (2015). In the sampling procedures followed in this case, the blood labels were not affixed to the collection tubes. The blood labels, from which the card portion was "detached," were affixed to the evergreen blood tubes. This was consistent with the governing rule, as well as the 2010 Manual. The evergreen tube is the specimen container for the serum.

25. The sampling procedures followed on February 20, 2016, were in compliance with the procedures set forth in the 2010

Manual. The sampling procedures followed on May 13, 2016, were the same as those followed on February 20, 2016.

26. As stated in subsection 4.4 of the 2010 Manual, "[s]ealing the sample ensures the specimen does not spill during shipment to the laboratory and assures all parties that the sample has not been tampered with" between the time the sample is sealed at the detention barn and the time the sample is received by the University of Florida Laboratory. The same purposes are served by sealing the serum specimen.

27. The procedures prescribed in the 2010 Manual for the collection of whole blood and the processing of the whole blood into serum were followed when the blood samples from the horses trained by Ms. Pompay were taken on February 20, 2016, and May 13, 2016. After the blood was centrifuged, and the serum was poured into the evergreen tube, the serum was sealed with evidence tape, as described in subsection 4.6 of the 2010 Manual, and the chief veterinary assistant put his initials over the seal. This constituted "sealing" of the specimen in its container. Subsection 4.6 of the 2010 Manual provided:

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

The opening of the blood tubes, the pouring of the serum from the blood tubes into the evergreen tube, and the sealing of the

evergreen tube was witnessed by two Division employees: a chief veterinary assistant or detention barn supervisor who pours the serum from the blood tubes to the evergreen tubes and another employee who observes the process.

28. In the proposed recommended orders referred to in paragraphs 14 and 15 above, a specific finding of fact was made that the 2001 version of rule 61D-6.005 did not make reference to spinning the blood in the centrifuge to extract serum, the pouring of serum into an evergreen tube, the sealing of the evergreen tube with evidence tape or the freezing of the specimen.

29. The state veterinarian who took the blood sample from R Bling Shines and Run Saichi signed PMW Form 504, a Daily Record of Sample Collection, indicating that this was done. After centrifuging the whole blood in the collection tubes, at the end of the day the state veterinarian usually leaves the collection tubes with the chief veterinary assistant, who pours the separated serum from each collection tube into the correspondingly numbered evergreen container and seals it (under the observation of another detention barn employee). Sometimes, the state veterinarian stays to observe the transfer of the serum to the evergreen specimen container.

30. There is no signature indicating the time the state veterinarian leaves the samples at the detention barn or the

time the chief veterinary assistant opens the collection tubes and transfers the serum.

31. In each instance of sampling in this case, the owner's witness signed the card portion of the sample tag (Form RL 172-03) after the taking of the urine and blood samples. In fact, since the change in rule 61D-6.005 in June 2015, no owner’s witness has refused to sign the sample tag.

32. In each instance of sampling in this case, the owner's witness signed the card portion of the sample tag (Form RL 172-03) after the sealing of the urine specimen in its container, but before the whole blood was processed into blood serum, the blood serum was poured into the serum container, and the serum container was sealed.

33. The pouring of the collection tubes into specimen containers takes place at the end of the racing day, after all of the horses have departed from the detention barn. It would be very inconvenient for an authorized witness to remain until the serum specimens were sealed.

34. The sampling procedures set forth in the 2010 Manual and the sampling procedures in use under the 2016 Guidelines are important to the Division, to the trainers, and to the public. These sampling procedures affect the substantive rights of the trainers as they are the "absolute insurer" of the horse’s condition when it races.

35. The centrifuging process, extraction of the serum, and sealing of the serum specimen as described in detail in subsection 4.6 of the 2010 Manual were never discussed at a rule-making hearing. These procedures are not part of rule 61D-6.005, adopted in 2001, nor are they part of rule 61D-6.005 as amended in 2015.

36. Until it was superseded by the 2016 Guidelines, the 2010 Manual applied to every state-licensed horse racing facility in the State of Florida. It was a policy attributable to the Division. Amendments to rule 61D-6.005, effective June 15, 2015, to eliminate all references to the sealing of the blood serum specimen, left the 2010 Manual provisions establishing policy on extracting and sealing the serum specimen without support in statute or adopted rule.

37. After the amendments to the rule, the provisions of the 2010 Manual requiring extraction and sealing of the serum specimen were generally applicable Division policy that created rights important to a trainer. These provisions constituted an unadopted rule.

38. The established procedures pursuant to applicable law and administrative rule referenced by the 2016 Guidelines, which Division employees are required to follow, are the procedures that were set forth in the 2010 Manual. These procedures for the processing of the whole blood into blood serum, the pouring

of the serum into the evergreen tube, the sealing of the tube with evidence tape, the freezing of the sample, and the mailing of the specimen to the laboratory survive as de facto policies of the Division notwithstanding the "repeal" of the 2010 Manual.

39. The de facto Division policy regarding extraction and sealing of serum specimens affect rights important to trainers and has the direct and consistent effect of law.

40. Division employees do not have the discretion not to follow the de facto Division policy regarding extraction and sealing of serum specimens.

41. The de facto Division policy regarding extraction and sealing of serum specimens constitutes an unadopted rule.

CONCLUSIONS OF LAW

42. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).

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

44. A proceeding to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Petitioner must therefore prove the charges against Respondent by clear and convincing evidence. Fox v. Dep't of

Health, 994 So. 2d 416, 418 (Fla. 1st DCA 2008)(citing Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996)).

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

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

46. Section 550.2415(1)(a) provided:

> The racing of an animal that has been impermissibly medicated or determined to have a prohibited substance present is prohibited. It is a violation of this section for a person to impermissibly medicate an animal or for an animal to have a prohibited substance present resulting in a positive test for such medications or substances based on samples taken from the animal before or immediately after the racing of that animal. Test results and the identities of the animals being tested and of their trainers and owners of record are confidential and exempt from s. 119.07(1) and from s. 24(a), Art. I of the State Constitution for 10 days after testing of all samples collected on a particular day has been completed and any positive test results derived from such samples have been

> reported to the director of the division or administrative action has been commenced.

47. When a race horse has been impermissibly medicated or drugged, action may be taken "against an occupational licensee responsible pursuant to rule of the division" for the horse's condition. § 550.2415(2), Fla. Stat.

48. Consistent with the above statutes, Petitioner adopted rule 61D-6.002, last amended effective January 10, 2016, the "absolute insurer rule," making trainers strictly responsible for violations.

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

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

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

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

expression of policy by the agency. First, it must be a statement of the agency as an institution, not merely the position of a single employee. It must be properly attributable to the agency head or some duly-authorized delegate. Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81, 87 (Fla. 1st DCA 1997)(Benton, J., concurring and dissenting). Second, to be a statement attributable to the agency, it must go beyond the mere reiteration or restatement of policy already established by a properly adopted rule or by the implemented statute. St. Francis Hosp., Inc. v. Dep't of HRS, 553 So. 2d 1351 (Fla. 1st DCA 1989).

52. While rare, courts have recognized that de facto policy established by procedures may constitute an unadopted rule. See Dep't of Bus. & Prof'l Reg. v. Harden, 10 So. 3d 647, 649 (Fla. 1st DCA 2009)(committee procedure by which license applications were reviewed was unadopted rule); Dep't of Rev. v. Vanjaria Enters., Inc., 675 So. 2d 252, 254 (Fla. 5th DCA 1996) (assessment procedure to determine tax exemption contained in training manual was unadopted rule).

53. The requirement that a statement be generally applicable involves the field of operation of the statement. Dep't of Com. v. Matthews Corp., 358 So. 2d 256 (Fla. 1st DCA 1978)(wage rates applicable to public works contracts held not to be rules because they applied only to the construction of a

particular public building and did not establish wages elsewhere in the state into the future).

54. The concept of general applicability also involves the force and effect of the statement itself. An agency statement that requires compliance, creates or adversely affects rights, or otherwise has the direct and consistent effect of law is a rule. State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010).

55. An agency statement must also be consistently applicable. In Department of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997), the court found three of the challenged policies not to be generally applicable because an employee's supervisor was not required to apply them, and therefore they could not be considered to have the "consistent effect of law." See also Coventry First, LLC, v. Off. of Ins. Reg., 38 So. 3d 200, 205 (Fla. 1st DCA 2010)(examination manual provided to examiners of the Office of Insurance Regulation not generally applicable because examiners had discretion not to follow it).

R Bling Shines

56. Respondent contends that the results of the laboratory tests from the February 20, 2016, race may not be used as a basis for discipline of her license because they were obtained

pursuant to the 2010 Manual procedures, and the 2010 Manual is an unadopted rule.

57. Respondent first argues that administrative estoppel bars Petitioner from using the test results from the February race. Although the Division determined one year ago that the 2010 Manual constituted an unadopted rule, it is too simplistic to automatically conclude that the 2010 Manual remains an unadopted rule solely because of that earlier determination. The unadopted rule doctrine established by chapter 120 requires not only examination of the contents of unadopted agency policy, but consideration of that policy against the backdrop of relevant statutes and properly adopted rules. Petitioner is therefore correct that amendment of applicable rules is relevant, and the full context of the agency policy statement must be considered.

58. Beyond the estoppel issue, however, contrary to Petitioner's argument the specific rule amendments enacted by the Division here did not obviate the need to adopt the 2010 Manual into rule. That argument is predicated on the decisions in the Zaidie cases, where it was held that some portions of the 2010 Manual constituted unadopted rules, while other portions did not. Following rule amendments which eliminated all references to the sealing of serum samples or the requirement to witness that sealing, Petitioner contends that the corresponding

portions of the 2010 Manual became "simply technical implementation akin to subsections 4.4 and 4.5 of the Manual" and should be found not to be rules for that reason.

59. The obvious conflict between the 2010 Manual and the old rule was certainly a factor in determining that the 2010 Manual constituted an unadopted rule in the Zaidie cases, but conflict is not required. Chapter 120 requires simply that any agency policy meeting the definition of a rule not contained in an adopted rule be properly adopted. § 120.54(1)(a), Fla. Stat.

60. As stipulated, the sampling procedures set forth in the 2010 Manual are important to the Division, to the trainers, and to the public. These sampling procedures affect the substantive rights of trainers as they are made the "absolute insurer" of a horse's condition when it races. The sealing of a sample is a critical part of those procedures, ensuring that the sample is correctly correlated with the animal from which it came, while temporarily keeping the identity of the horse and trainer confidential. As the parties stipulated, sealing the sample also ensures the specimen does not spill during shipment to the laboratory and assures all parties that the sample is not tampered with between the time it is sealed and the time it is received at the laboratory. Elimination of all references in the rule to the sealing of the blood serum specimen leaves the critical sealing procedures mandated by the 2010 Manual without

support in statute or adopted rule. The 2010 Manual provisions governing sealing can hardly be considered as mere technical implementation that is implicit and incidental to an explicit policy of sealing blood serum specimens when no such policy is established either in statute or properly adopted rule. The surgical excision of provisions of the rule relating to the sealing of specimens thus only reinforced the 2010 Manual's status as unadopted policy. The 2010 Manual's provisions should have been incorporated by rule, or other provisions regarding these critical processes should have been adopted.

61. After the amendments to rule 61D-6.005, effective June 15, 2015, subsection 4.6 of the 2010 Manual, requiring that the serum in the evergreen tubes must be "immediately properly sealed with evidence tape," remained an agency statement of general applicability that described procedure requirements creating rights important to a trainer and constituted an unadopted rule on February 20, 2016.

62. Section 120.57(1)(e)1., Florida Statutes (2016), provides:

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

63. Discipline of Respondent's license may not be based upon test results of serum obtained from R Bling Shines on February 20, 2016, pursuant to the unadopted procedures of subsection 4.6 of the 2010 Manual. There is no other evidence of record that R Bling Shines was impermissibly medicated or had a prohibited substance present during the race on February 20, 2016. Petitioner failed to prove that Respondent violated section 550.2415(1)(a) as alleged in Count I of the Administrative Complaint.

Run Saichi

64. The race on May 13, 2016, taking place as it did after the 2016 Guidelines had "superseded and replaced" the 2010 Manual, involves different considerations.

65. Petitioner argues, as expressed both at hearing and in its proposed recommended order, that the 2010 Manual was replaced not only because it was an unadopted rule, but also because it failed to afford the Division flexibility. Petitioner contends that the new 2016 Guidelines will not lock the Division in to a particular method of processing, but will allow it to change its procedures going forward. But the probabilities of future change in circumstance or advances in science are reasons to amend rules; they are not reasons to eschew them. The Division is justified in "repealing" the 2010

Manual rather than adopting it only if the Division policy contained in the 2010 Manual in fact no longer exists.

66. Respondent maintains that the Division policy still survives, noting that since the 2016 Guidelines took effect, the procedures followed by Division employees have continued to be exactly those prescribed by the 2010 Manual. This carries some weight, but standing alone does not prove that a de facto Division policy on separating and sealing serum samples still exists. Had the barns continued these procedures without variation over an extended time period, this evidence would likely be alone sufficient to raise a reasonable inference that Division policy was still in place. However, given the short time since the 2010 Manual's replacement, it is at least possible that Division policy has truly been repealed and that it is only bureaucratic enertia that induces individual barns to continue to follow the old procedures.

67. Respondent additionally maintains that language in section V. of the 2016 Guidelines directs Division personnel to continue to follow the old procedures that were described in the 2010 Manual. The 2016 Guidelines provide, in part, that State of Florida regulatory personnel shall:

> Perform any necessary tasks associated with the collection, recordation, handling, processing, storing, and transporting of the collected and/or processed specimen samples in accordance with established procedures

> pursuant to applicable law and administrative rule to ensure the protection and preservation of the integrity of the specimen samples.

The processing and sealing of serum samples easily falls within this category of tasks. This text of the 2016 Guidelines,[2/] coupled with the parties' binding factual stipulation that, at the time of their implementation, "there were no 'established procedures pursuant to applicable law and administrative rule' to process whole blood into blood serum other than the procedures set forth in subsection 4.6 of the 2010 Manual" (emphasis added), compels the conclusion that the Division did intend all barns to continue precisely as before.[3/]

68. Further, section 550.0251(3) provides:

> The division shall adopt 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. Such rules must be uniform in their application and effect, and the duty of exercising this control and power is made mandatory upon the division.

This statute does not allow the Division to delegate or relinquish control of critical race sampling protocols to the various testing barns, but instead expressly requires that it exercise this authority itself, and further requires that policies be uniform in application and effect.

69. In summary, any argument that the Division no longer has a policy requiring that serum be separated and sealed is rejected. It is simply not plausible that the Division intends, contrary to its statutory mandate, to allow each testing barn to do whatever it likes: separating the serum in some cases, but not others; sealing the serum specimen in some cases, but not others. It is concluded, to the contrary, that the Division retains its former policy, and has only "repealed" a written expression of it. Replacement of the 2010 Manual with the 2016 Guidelines was a formalistic charade masking the reality that there was no change in actual Division policy as to the sampling procedures to be followed by track personnel. This is not to say that the Division is necessarily required to have a policy that serum be separated and sealed to "assure all parties that the sample has not been tampered with"--a question not raised by this record[4/]--but rather to say that since it does have such a policy, it must be adopted by rule. Should the Division in fact decide to repudiate its established policy of separating and sealing serum specimens, it must clearly commit itself to that course. What it cannot do, under chapter 120, is continue to follow established Division policies at all of the racing tracks in Florida while denying trainers and the public the opportunity to be aware of, and the opportunity to participate in the development of, these important policies.

70. Discipline of Respondent's license may not be based upon test results of serum obtained pursuant to these unadopted policies. There is no other evidence of record that Run Saichi was impermissibly medicated or had a prohibited substance present during the race on May 13, 2016. Petitioner failed to prove that Respondent violated section 550.2415(1)(a) as alleged in Count II of the Amended Administrative Complaint.

RECOMMENDATION

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

That the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, enter a final order dismissing the Amended Administrative Complaint against Teresa M. Pompay.

DONE AND ENTERED this 7th day of February, 2017, in Tallahassee, Leon County, Florida.

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of February, 2017.

ENDNOTES

[1/] Except as otherwise indicated, statutory references in this Recommended Order are to the text of the 2015 Florida Statutes, which remained unchanged in 2016 and so was the same at the time of all alleged violations. References to Florida Administrative Code rules are to those in effect at the time the alleged violations occurred, on February 20, 2016, and May 13, 2016.

[2/] Respondent's distinct argument that the cited text of the 2016 Guidelines incorporates the 2010 Manual provisions themselves by reference is rejected. Even if it were assumed that the reference to the procedures rather than the legal authority could constitute an incorporational by reference, the phrase "established procedures" would certainly be general in nature rather than specific, and so would be an "ambulatory" reference under the American convention and Dexter presumption. See generally Boyd, "Looking Glass Law: Legislation by Reference in the States," 68 La. L. Rev. 1201, 1236-1245 (2008). The fact that the 2016 Guidelines superseded and replaced the 2010 Manual itself would thus mean that this "repeal" of the 2010 Manual would be given effect through the incorporation.

[3/] Any related argument that the 2016 Guidelines have no binding effect on Division employees is rejected. The title and introductory description of the 2016 Guidelines as containing only "guidelines, best practice tips, and recommendations" is given little weight, as these are clearly declarations by drafters attempting to avoid the conclusion that the document was another unadopted rule. That determination must depend on the effect of the document, not its characterization by the agency. While many provisions of the 2016 Guidelines are seemingly innocuous, the very nature and language of the specific provisions addressing the sample collection and preservation process compel the conclusion that they are mandatory for detention barn employees.

[4/] Cf. Lewis v. N.Y. State Racing & Wagering Bd., 189 A.D. 2d 621, 622, 592 N.Y.S. 2d 345 (App. Div. 1993)(lack of proof of "lidding and sealing" of urine cup failed to ensure the integrity and the identity of a urine sample); Wise v.

Commonwealth, Pa. State Horse Racing Com., 100 Pa. Commw. 205, 206, 514 A. 2d 308, 309 (1986)(gaps in proof of the chain of custody concerning blood and urine samples go to the weight of the testimony, not its admissibility).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.