

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

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

Petitioner,
v.
TERESA M. POMPAY,

Respondent.

DOAH Case No. 16-6423PL
DBPR Case No. 2016-013443
2016-027440

FINAL ORDER

Pursuant to section 120.57(1)(k), Florida Statutes (2016), and Rule 28-106.103 of the Florida Administrative Code, the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (“Division”) files the following Final Order. This cause came before the Division for the purpose of considering the Recommended Order issued by Administrative Law Judge F. Scott Boyd (“ALJ Boyd”) on February 7, 2017, in DOAH case number 16-6423, a copy of which is attached as Exhibit “A”. The Department of Business and Professional Regulation (“Petitioner”) filed exceptions to the Recommended Order, to which Teresa Pompay (“Respondent”) filed a response and those exceptions and response are attached as composite Exhibit “B”.

Background

On April 13, 2016, the Division filed a one-count Administrative Complaint alleging the Respondent violated section 550.2415, Florida Statutes, in DBPR case number 2016-013443. On June 15, 2016, the Division filed another one-count administrative complaint alleging violations of section 550.2415, Florida Statutes in DBPR case number 2016-027440.

Subsequently, on October 13, 2016, the Division filed a two-count amended administrative complaint alleging Respondent violated section 550.2415, Florida Statutes. The administrative complaints alleged that the Respondent was the trainer of record of thoroughbred horses that were determined to have been impermissibly medicated or to have a prohibited substance present resulting in a positive test for such medications or substances based on samples taken from those horses between February 20, 2016 and May 13, 2016. The Respondent petitioned for formal administrative hearings regarding the April 13, June 15 and October 13, 2016 administrative complaints.

ALJ Boyd convened a formal administrative hearing on January 4, 2017 for the amended administrative complaint.

ALJ Boyd issued a Recommended Order on February 7, 2017, recommending the Division enter a final order dismissing the amended administrative complaint against Respondent.

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

AGENCY STANDARD FOR REVIEW

Pursuant to Section 120.57(1)(l), Florida Statutes, the Division may not reject or modify findings of fact unless it first determines, from a review of the entire record, and states with particularity, that the findings of fact were not based on competent substantial evidence. Competent substantial evidence is such evidence that is 'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. Comprehensive Medical Access, Inc. v. Office of Ins. Regulation, 983 So. 2d 45, 46 (Fla. 1st DCA 2008)(quoting DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

Pursuant to Section 120.57(1)(l), Florida Statutes, when rejecting or modifying conclusions of law or interpretations of administrative rules, the Division must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rules and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

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

RULINGS ON PETITIONER'S EXCEPTIONS TO THE FINDINGS OF FACT

Exception #1

1. The Petitioner takes exception to the findings of fact set forth in the portion of paragraph #38 on pages 14 and 15 of the Recommended Order in which ALJ Boyd found:

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.

2. The Division rejects Petitioner's Exception #1.

Exception #2

3. The Petitioner takes exception to the findings of fact set forth in the portion of paragraph #40 on page 15 of the Recommended Order in which ALJ Boyd found:

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

4. The Division rejects Petitioner's Exception #2.

Exception #3

5. The Petitioner takes exception to the findings of fact set forth in the portion of paragraph #41 on page 15 of the Recommended Order in which ALJ Boyd found:

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

6. The Division rejects Petitioner's Exception #3.

RULING ON PETITIONER'S EXCEPTIONS TO THE CONCLUSIONS OF LAW

Exception #1

7. The Petitioner takes exception to the conclusion of law set forth in paragraph #67 on pages 24 and 25 of the Recommended Order in which ALJ Boyd found:

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, 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 bars to continue precisely as before.

8. The Division rejects Petitioner's Exception #1.

Exception #2

9. The Petitioner takes exception to the conclusion of law set forth in paragraph #68 on page 25 of the Recommended Order in which ALJ Boyd found:

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.

10. The Division rejects Petitioner's Exception #2.

Exception #3

11. The Petitioner takes exception to the conclusion of law set forth in paragraph #69 on page 26 of the Recommended Order in which ALJ Boyd found:

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--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.

12. The Division rejects Petitioner's Exception #3.

Exception #4

13. The Petitioner takes exception to the conclusion of law set forth in paragraph #70 on page 26 of the Recommended Order in which ALJ Boyd found:

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.

14. The Division rejects Petitioner's Exception #4.

FINDINGS OF FACT

15. ALJ Boyd's Findings of Fact, as set forth in Exhibit "A" are approved, adopted, and incorporated herein by reference. Those findings are supported by competent and substantial evidence.

CONCLUSIONS OF LAW

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

WHEREFORE, IT IS ORDERED AND ADJUDGED THAT:

1. The amended administrative complaint is hereby dismissed.
2. This order shall become effective on the date of the filing with the Department's Agency Clerk.

(SIGNATURE APPEARS ON FOLLOWING PAGE)

DONE and ORDERED this 24 day of March, 2017.



MATILDE MILLER, Interim Secretary
Department of Business and
Professional Regulation

Handwritten signature of Anthony J. Glover in black ink.

Anthony J. Glover, Director
Division of Pari-Mutuel Wagering
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. and Electronic Mail to: (1) Teresa M. Pompay c/o Brad Beilly, Esquire, Beilly & Strohsahl, P.A., 1144 S.E. Third Avenue, Ft. Lauderdale, Florida 33316, brad@beillylaw.com; (2) William D. Hall, Esquire, Chief Attorney, Department of Business and Professional Regulation, 2601 Blair Stone Road, Tallahassee, Florida 32399-2202; and (3) F. Scott Boyd, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399 on this 24th day of March, 2017.

Ronda L. Bryan, Agency Clerk

Handwritten signature of Brandon M. Nichols in black ink.

Brandon Nichols, Deputy Agency Clerk
Department of Business and Professional Regulation

NOTICE OF RIGHT TO APPEAL UNLESS WAIVED

Unless expressly waived, any party substantially affected by this Final Order may seek judicial review by filing an original Notice of Appeal with the Agency Clerk of the Department of Business and Professional Regulation at 2601 Blair Stone Road, Tallahassee, Florida 32399-2202 (agc.filing@myfloridalicense.com), and a copy of the notice, accompanied by the filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal within thirty (30) days of rendition of this order, in accordance with Rule 9.110, Fla. R. App. P., and section 120.68, Florida Statutes.