STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs. Case No. 17-1533PL

ROBERT G. DAWSON,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge F. Scott Boyd at video teleconferencing sites in West Palm Beach and Tallahassee, Florida, on June 13, 2017.

APPEARANCES

For Petitioner: Charles LaRay Dewrell, Jr., Esquire
Joseph Yauger Whealdon, III, Esquire
Department of Business and
Professional Regulation
Division of Pari-mutuel Wagering
2601 Blair Stone Road
Tallahassee, Florida 32399

For Respondent: Robert Glenn Dawson, pro se
21 Horicon Court
Royal Palm Beach, Florida 33411

STATEMENT OF THE ISSUES

Whether Respondent raced an animal that was impermissibly medicated or determined to have a prohibited substance present,

in violation of section 550.2415(1)(a), Florida Statutes (2016),[1/] as alleged in the Administrative Complaint; and, if so, what sanction is appropriate.

PRELIMINARY STATEMENT

The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Petitioner or Division), served an Administrative Complaint on Robert Dawson (Respondent or Mr. Dawson) on or about October 14, 2016. The complaint alleged that Respondent was the trainer of record of racing greyhounds in six races at Florida racetracks on dates from September 3, 2016, through September 17, 2016, charging 18 counts of violations of statutes and rules governing pari-mutuel racing. Respondent disputed material facts alleged in the complaint and timely requested an administrative hearing. On November 17, 2016, the case was forwarded to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge.

The parties stipulated to certain facts, which were accepted at hearing and are included among those set forth below. Petitioner presented the testimony of Ms. Margaret Wilding, associate director of the University of Florida Racing Laboratory; Ms. Jessica Zimmerman, a chief veterinary assistant at the Division; and Respondent. Petitioner also offered Exhibits P-1 through P-24, which were admitted without

objection. At Petitioner's request, official recognition was given to section 550.2415 and Florida Administrative Code Rules 61D-6.002, 61D-6.007, and 61D-6.012.[2/]

Respondent testified and presented the testimony of Mr. Andre Tribble, a Division inspector; Mr. Henry Chin, a kennel owner and trainer; Mr. Anthony Calvo, a trainer for B&B Kennels; and Mr. Arthur Agganis, a kennel owner. Respondent offered no exhibits.

The one-volume Transcript of the hearing was filed at DOAH on July 6, 2017. Petitioner's Proposed Recommended Order was timely filed and was considered in the preparation of this Recommended Order.

FINDINGS OF FACT

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

2. Mr. Dawson is the holder of Pari-Mutuel Wagering Occupational License number 333293-1021, authorizing him to train greyhounds pursuant to section 550.105.

3. At all times relevant to the Administrative Complaint, Mr. Dawson was subject to chapter 550 and the implementing rules in Florida Administrative Code Chapter 61D-6.

4. Palm Beach Kennel Club is a facility operated by a permitholder authorized to conduct pari-mutuel wagering in this state under chapter 550.

5. Mr. Dawson trained and raced greyhounds at the Palm Beach Kennel Club facility from September 3 to 17, 2016, the time period relevant to the Administrative Complaint.

6. Mr. Dawson was the trainer of record for the racing greyhound "BOB'S SEAHAWK" on September 3, 2016.

7. Mr. Dawson was the trainer of record for the racing greyhound "PJ HO HEY" on September 4, 2016.

8. Mr. Dawson was the trainer of record for the racing greyhound "JIM'S GRAND SLAM" on September 5, 2016.

9. Mr. Dawson was the trainer of record for the racing greyhound "BS ANGEL" on September 7, 2016.

10. Mr. Dawson was the trainer of record for the racing greyhound "PJ SMOKE EM OUT" on September 9, 2016.

11. Mr. Dawson was the trainer of record for the racing greyhound "CENTEX WIZARD" on September 17, 2016.

12. Under rule 61D-6.002(1), "[t]he trainer of record shall be responsible for and be the absolute insurer of the condition of the . . . racing greyhounds he/she enters to race."

13. Mr. Dawson is substantially affected by the Division's intended action.

14. As Ms. Jessica Zimmerman testified, the ginny pit is the area at the Palm Beach Kennel Club where employees of the Division collect urine samples from racing greyhounds prior to the races. At the time each urine sample is collected, the veterinary assistant checks the number tattooed on the ear of the dog and completes a PMW 503 Form. The PMW 503 Form shows that it was prepared for the Palm Beach Kennel Club and contains the date, the race and post number of the dog, the dog's name, the tattoo number, the time the sample was collected, the trainer's name, the collector's initials, and a unique sample number. The top portion of a sample tag containing the sample number is attached to the container holding the collected urine sample, and the container is sealed with evidence tape to maintain the integrity of the sample. The bottom part of the sample tag is retained by the Division. Ms. Zimmerman signed each PMW 503 Form, indicating the dogs named in the Administrative Complaint, identifying Mr. Dawson as the trainer, and assigning a unique sample number to the urine sample collected from each dog. At hearing, Ms. Zimmerman identified the PMW 503 Form that was completed for each of the six races in the Administrative Complaint.

15. The sealed urine samples are kept in a freezer in a restricted area at the track until they are picked up for

shipping to the University of Florida racing laboratory. The PMW 503 Form indicates the time and date samples were picked up.

16. As Ms. Margaret Wilding testified, the laboratory receives only the information on the urine label with samples and does not know the identity of the dog or trainer. The samples are checked to ensure the seal is intact and are then assigned a number internal to the lab for processing, associated with the sample number.

17. The Association of Racing Commissioners International creates Uniform Classification Guidelines for Foreign Substances. Classes range from class I drugs, which are stimulants without therapeutic value and are most likely to affect the outcome of a race, to class V drugs, which have the most therapeutic value and the least potential to affect the outcome of a race.

18. Caffeine is a central nervous system stimulant and class II drug; theobromine is a diuretic, smooth muscle relaxant, and class IV drug; and theophylline is a bronchodilator, smooth muscle relaxant, and class III drug.

19. As Ms. Wilding testified, the urine samples received at the laboratory were analyzed by liquid chromatography-mass spectrometry and sample 097442 was found to contain a concentration of caffeine of 1.946 +/- 0.03 mcg/mL, a concentration of theobromine of 859 +/- 90 ng/mL, and a

concentration of theophylline of 2.462 +/- 0.08 mcg/mL. Sample 097466 was found to contain a concentration of caffeine of 4.555 +/- 0.03 mcg/mL, a concentration of theobromine of 1.23 +/- 0.09 mcg/mL, and a concentration of theophylline of 3.235 +/- 0.08 mcg/mL. Sample 104694 was found to contain a concentration of caffeine of 3.911 +/- 0.03 mcg/mL, a concentration of theobromine of 1.107 +/- 0.09 mcg/mL, and a concentration of theophylline of 2.881 +/- 0.08 mcg/mL. Sample 097486 was found to contain a concentration of caffeine of 4.551 +/- 0.03 mcg/mL, a concentration of theobromine of 3.056 +/- 0.09 mcg/mL, and a concentration of theophylline of 8.05 +/- 0.08 mcg/mL. Sample 104746 was found to contain a concentration of caffeine of 2.392 +/- 0.03 mcg/mL, a concentration of theobromine of 1.893 +/- 0.09 mcg/mL, and a concentration of theophylline of 4.169 +/- 0.08 mcg/mL. Sample 106083 was found to contain a concentration of caffeine of 2.457 +/- 0.03 mcg/mL, a concentration of theobromine of 664 +/- 0.09 ng/mL, and a concentration of theophylline of 1.69 +/- 0.08 mcg/mL.

20. Under rule 61D-6.007(3), levels of caffeine at a urinary concentration less than or equal to 200 nanograms per milliliter and levels of theophylline and theobromine at urinary concentrations less than or equal to 400 nanograms per milliliter are not reported to the Division. The levels found

by the laboratory tests and testified to by Ms. Wilding exceeded these amounts.

21. A Report of Positive Test Result was sent to the Division regarding each of the urine samples. After the Division received the laboratory report on each sample, the report was matched to the retained sample tag. It was determined that sample 097442 had been obtained from BOB'S SEAHAWK, sample 097466 from PJ HO HEY, sample 104694 from JIM'S GRAND SLAM, sample 097486 from BS ANGEL, sample 104746 from PJ SMOKE EM OUT, and sample 106083 from CENTEX WIZARD. Each of the samples with the sample numbers corresponding to the dogs listed in the Administrative Complaint, therefore, tested positive for levels of these three drugs in excess of permitted amounts. The trainer for each of these dogs was Mr. Dawson.

22. The urine test results proved that each of the six dogs listed in the Administrative Complaint carried the drugs caffeine, theobromine, and theophylline in their bodies on their respective race days. Ms. Wilding later testified that the three drugs are frequently found together, and that although theobromine and theophylline could be administered separately, in some concentrations they can be detected as metabolites of caffeine. She indicated that it was possible they were metabolites in this case.

23. Mr. Henry Chin and Mr. Anthony Calvo, experienced trainers, testified convincingly that it is impractical for a trainer to remain with one of his dogs undergoing urine sample collection to witness the procedure, because a trainer is responsible for many dogs and is unaware of the exact time that a sample will be collected. Even though trainers have a right to sign indicating that they witnessed the sample collection and sealing, both indicated they do not do so. Both indicated they preferred sample collection to be conducted after the races, as has been done at certain times in the past, rather than before the races.

24. Mr. Calvo also testified that he has often seen trash and spilled liquids, including coffee, in an area the leadouts take the dogs through prior to their urine collection.

25. Mr. Arthur Agganis, who has worked in the racing industry for 41 years, and has been Mr. Dawson's employer for the last 20 of those, agreed that trainers cannot realistically be with their dogs for testing prior to the races. He testified that he proposed to the Division that closed circuit cameras be installed in the ginny pit area to improve monitoring and that "we would pay for it,"[3/] but that the Division never agreed to do so.

26. It is noted that the violations occurred close together in time, and that it is clear that Mr. Dawson was not

informed of the violations in one race before the samples were taken in the next. This may be considered a mitigating factor because Mr. Dawson would not have had a reasonable opportunity to increase security, adjust medication levels, or alter routines in response to earlier violations.

27. Mr. Andre Tribble convincingly testified that he could not recall ever finding any caffeine in Mr. Dawson's kennel.

28. Mr. Dawson has been licensed by the Division for some 37 years, since 1980.

29. The Division presented no evidence that Mr. Dawson has had previous discipline against his license.

CONCLUSIONS OF LAW

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

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

32. 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)).

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

> 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)).

34. Section 550.2415(1)(a) provided in part:

> 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.

35. Section 550.2415(1)(c) provided, in part: "[t]he finding of a prohibited substance in a race-day specimen constitutes prima facie evidence that the substance was

administered and was carried in the body of the animal while participating in the race."

36. Section 550.0251(3) required Petitioner to 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.

37. The statute also provided that when a racing greyhound has been impermissibly medicated or drugged, action may be taken "against an occupational licensee responsible pursuant to rule of the division" for the dog's condition. § 550.2415(2), Fla. Stat.

38. Consistent with these statutes, Petitioner adopted rule 61D-6.002, the "absolute insurer rule," making trainers strictly responsible.

39. Petitioner charged Respondent with 18 counts of violation of section 550.2415(1)(a), one count for each of the three drugs found in the samples taken before each of the six races.

40. The procedures followed by the Division accurately recorded the source of each sample, ensured the integrity of the sample through storage and testing,[4/] and demonstrated the presence of restricted drugs in the dogs on race day.

41. Petitioner proved by clear and convincing evidence that Respondent violated section 550.2415(1)(a) on 18 occasions in six separate races from September 3 to 17, 2016, as alleged in the Administrative Complaint.

Penalty

42. Section 550.2415(3)(a) provided, in part:

> Upon the finding of a violation of this section, the division may revoke or suspend the license or permit of the violator or deny a license or permit to the violator; impose a fine against the violator in an amount not exceeding the purse or sweepstakes earned by the animal in the race at issue or $10,000, whichever is greater; require the full or partial return of the purse, sweepstakes, and trophy of the race at issue; or impose against the violator any combination of such penalties.

43. Section 550.2415(7)(c) provided, in part:

> The division rules must include a classification system for drugs and substances and a corresponding penalty schedule for violations which incorporates the Uniform Classification Guidelines for Foreign Substances, Version 8.0, revised December 2014, by the Association of Racing Commissioners International, Inc.

44. Florida Administrative Code Rule 61D-6.012(2)(b) provided that for a class II impermissible substance under the incorporated Uniform Classification Guidelines for Foreign Substances, the penalty schedule would be:

> First violation of this chapter--$100 to $1,000 fine and suspension of license zero to 30 days;

> Second violation of this chapter--$250 to $1,000 fine and suspension of license of no less than 30 days, or revocation of license;
>
> Third violation or any subsequent violation of this chapter--$500 to $1,000 fine and suspension of license of no less than 60 days, or revocation of license.

45. Rule 61D-6.012(2)(c) provided that for a class III substance, the penalty schedule would be:

> First violation of this chapter -- $50 to $500 fine;
>
> Second violation of this chapter -- $150 to $750 fine and suspension of license zero to 30 days;
>
> Third violation or any subsequent violation of this chapter -- $250 to $1,000 fine and suspension of license zero to 60 days.

46. Rule 61D-6.012(2)(d) provided that for a Class IV substance, the penalty schedule would be:

> First violation of this chapter -- $50 to $250 fine;
>
> Second violation of this chapter -- $100 to $500 fine;
>
> Third or subsequent violation of this chapter -- $200 to $1,000 fine and suspension of license zero to 30 days.

47. Rule 61D-2.021, entitled Aggravating and Mitigating Circumstances, provided:

> Circumstances which may be considered for the purposes of mitigation or aggravation of any penalty shall include, but are not limited to, the following:

(1) The impact of the offense to the integrity of the pari-mutuel industry.

(2) The danger to the public and/or racing animals.

(3) The number of repetitions of offenses.

(4) The number of complaints filed against the licensee or permitholder, which have resulted in prior discipline.

(5) The length of time the licensee or permitholder has practiced.

(6) The deterrent effect of the penalty imposed.

(7) Any efforts at rehabilitation.

(8) Any other mitigating or aggravating circumstances.

48. The racing of an animal with a restricted drug negatively impacts the integrity of the pari-mutuel industry and is a danger to the racing greyhounds.

49. On the other hand, no evidence of prior discipline was introduced. Respondent has been licensed for a long time.

50. Although six separate races were involved, they were close together in time. Because Respondent was unaware of any positive test results before all of the races had been run, he had no opportunity to increase security, alter routines, or adjust medications.

51. Ms. Wilding testified that the theobromine and theophylline detected in each sample actually "can be

metabolites" of caffeine. In a criminal context, if in fact only caffeine were administered, one might argue that conviction on separate charges for three distinct acts was not even constitutionally permissible, because there would be only a single criminal episode or transaction. See, e.g., Lee v. State, 42 Fla. L. Weekly D1273 (Fla. 1st DCA June 1, 2017)(double jeopardy prohibits multiple convictions or punishments for a single criminal offense). While a license disciplinary proceeding almost never implicates the double jeopardy clause,[5/] the absence of clear evidence that two of the restricted drugs in each sample were not metabolites of the third should mitigate the penalty when the presence of each drug formed the basis of a separate count.

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: finding Robert G. Dawson guilty of 18 counts of violating section 550.2415(1)(a), Florida Statutes, and Florida Administrative Code Rule 61D-6.002(1); imposing an administrative fine of $3,000; and suspending his license for six months.

DONE AND ENTERED this 26th day of July, 2016, 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 26th day of July, 2017.

ENDNOTES

[1/] Except as otherwise indicated, statutory references in this Recommended Order are to the 2016 Florida Statutes, the text of which remained unchanged throughout the time the violations allegedly occurred.

[2/] Except as otherwise indicated, references to Florida Administrative Code rules are to those in effect at the time the alleged violations occurred, from September 3 through 17, 2016.

[3/] It was not exactly clear who constituted this "we," but presumably it was a group of kennel owners.

[4/] Although Respondent's Amended Answer and Affirmative Defenses to the Administrative Complaint initially suggested there was an insufficient link between Respondent and the samples, Respondent presented no evidence at hearing challenging the chain of custody or even suggesting that there was a probability of tampering so as to require Petitioner to prove that tampering did not occur. State v. Jones, 30 So. 3d 619, 622 (Fla. 2d DCA 2010)(burden shifts to the proponent of the evidence to submit evidence that tampering did not occur once movant demonstrates the probability of tampering). Affirmative defenses were not pursued at hearing and were abandoned.

[5/] See N. Hill Manor, Inc. v. Ag. for Health Care Admin., 881 So. 2d 1174, 1177 n.3 (Fla. 1st DCA 2004)(double jeopardy does not apply to limit sanctions in civil cases unless in an individual case the sanction is "so disproportionate to the government's damages that it serves the goal of punishment") (quoting State v. Knowles, 625 So. 2d 88, 91 (Fla. 5th DCA 1993)).

COPIES FURNISHED:

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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.