STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATI

SUMMER JAI-ALAI PARTNERSHIP,

Petitioner,

v.

DOAH Case No. 17-3727
DBPR Case No: 2017-026749

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

Respondent.
_____/

FINAL ORDER

Pursuant to Section 120.57(1)(k), Florida Statutes, and Rule 28-106.103, 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 Robert E. Meale ("ALJ Meale"), on December 12, 2017, in Division of Administrative Hearings ("DOAH"), case number 17-3727, a copy of which is attached as Exhibit "A." Both Summer Jai-Alai Partnership ("Petitioner"), and the Division ("Respondent"),[1] filed exceptions to the Recommended Order and Petitioner also filed a response to Respondent's exceptions. Both sets of exceptions and Petitioner's response are attached as composite Exhibit "B."

[1] In their proposed recommended orders, both parties identified Summer Jai-Alai Partnership as being the Petitioner and the Department of Business & Professional Regulation, Division of Pari-Mutuel Wagering as being the Respondent. In the caption for the Recommended Order and throughout the Recommended Order itself, Summer Jai-Alai Partnership was instead referred to as the Respondent and the Department of Business & Professional Regulation, Division of Pari-Mutuel Wagering was referred to as the Petitioner. For the sake of clarity and consistency, this final order will refer to the parties as they classified themselves, with the names of the parties edited to match this in the quotations from the Recommended Order.

Background

On December 26, 2016, Petitioner applied for a pari-mutuel operating license for pari-mutuel permit 280 for fiscal year 2017-18. Permit 280 authorizes Petitioner to conduct summer jai-alai performances in Dade County. The 2017-18 application sought a license to conduct performances via a lease agreement in Broward County. The Division granted this application on March 10, 2017, then issued a Notice of Intent to Withdraw License letter on June 1, 2017. Petitioner petitioned for a formal administrative hearing on June 22, 2017.

ALJ Meale convened a formal administrative hearing on October 17, 2017, for the Notice of Intent to Withdraw License.

ALJ Meale issued a Recommended Order on December 12, 2017, recommending the Division enter a final order dismissing the Notice of Intent to Withdraw License.

Petitioner and Respondent filed exceptions to the 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. Reg., 983 So. 2d 45, 46 (Fla. 1st DCA 2008) (quoting De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

Pursuant to Section 120.57(1)(e)4., 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 or does not comply with essential requirements of law.

RULINGS ON PETITIONER'S EXCEPTION TO THE FINDINGS OF FACT

Exception #1

1. Petitioner takes exception to the findings of fact set forth in the portion of Paragraph #6 on pages 5 and 6 of the Recommended Order which stated:

> However, these two facts do not preclude a mistake of law, as [Respondent] contends, so that the NOI is not necessarily a statement that represents a change in longstanding policy. The NOI states that the operating license is based on a mistake of law, but [Respondent's] proposed recommended order states that the operating license is a mistake of law—the same conclusion that the Administrative Law Judge reaches in the Conclusions of Law.

2. In taking exception, Petitioner argues that the above language is immaterial to the reasoning in the Recommended Order, improperly redesignates the role of the parties as "Petitioner" and "Respondent," and is possibly inconsistent with the later conclusion of law.

3. Upon review of the record, the Division grants Petitioner's Exception to Paragraph #6 because the finding in Paragraph #6 of the Recommended Order is not based on competent substantial evidence.

RULINGS ON RESPONDENT'S EXCEPTIONS TO THE FINDINGS OF FACT

Exception #1

4. Respondent takes exception to the findings of fact set forth in the portion of Paragraph #4 on page 4 of the Recommended Order which stated:

> In reliance on the 2017-18 operating license, [Petitioner] has terminated its lease for the Dade County facility and entered into a lease for the Dania facility.

5. In taking exception, Respondent noted that Petitioner made plans to terminate its lease prior to the issuance of the 2017-18 operating license. In support of this, Respondent relied on testimony from Petitioner's Chief Operating Officer, who stated during a deposition that Petitioner first began planning to terminate the lease in December 2016, prior to the issuance of Petitioner's 2017-18 operating license. Respondent cited the fact that Petitioner intentionally declined to file anything with the State of Florida which would preclude its operation in Broward County, the location of the Dania facility. Respondent also relied on correspondence written during the 2017-18 operating license application period from Petitioner to its lessor in Miami-Dade County stating that Petitioner intended to terminate its lease in Miami-Dade County and requesting that its lessor not file any applications on its behalf. Additionally, Respondent cited electronic correspondence between Petitioner's employees prior to the issuance of Petitioner's 2017-18 operating license indicating that Petitioner planned to terminate its lease in Miami-Dade County.

6. Upon review of the record, the Division grants Respondent's Exception to Paragraph #4 because the finding in Paragraph #4 of the Recommended Order is not based on competent substantial evidence.

Exception #2

7. Respondent takes exception to the findings of fact set forth in the portion of Paragraph #5 on pages 4 and 5 of the Recommended Order which stated:

> [T]he Division of Pari-Mutuel Wagering concluded that it had issued the operating license in error, determined that an operating license for a converted permit must be limited to the county named in the converted permit, and issued the NOI on June 1, 2017.

8. In taking exception, Respondent argues that this reference to a "converted permit" fails to recognize that permits are classified based on the type of activity they authorize rather

than their manner of creation. Respondent notes that a permit, once converted, operates under the same rules regarding relocation and operation (not leasing) as any other permit allowing for the same type of activity. Respondent argues that the reference to a "converted permit" fails to recognize the proper permit type identified in the NOI, and accordingly leads to a mischaracterization of the permit classification, conversion, and withdrawal process.

9. Upon review of the record, the Division grants Respondent's Exception to Paragraph #5 because the finding in Paragraph #5 of the Recommended Order is not based on competent substantial evidence.

Exception #3

10. Respondent takes exception to the findings of fact set forth in the portion of Paragraph #6 on pages 5 and 6 of the Recommended Order which stated:

> In the past, [Respondent] issued operating licenses to holders of converted or created permits that authorized performances at the licensed location or a facility leased pursuant to [S]ection 550.475. It is unclear when the Division changed its position.

11. In taking exception, Respondent argues that the issue of summer jai-alai leasing in another county was an issue of first impression, and that it lacked any policy towards "converted permits." In support of this, Respondent cited testimony by Director David Roberts, testimony by Division employee Jamie Pouncey, and the discovery responses of Petitioner. There is no evidence on the record supporting the finding of fact made in Paragraph #6 of the Recommended Order.

12. Upon review of the record, the Division grants Respondent's Exception to Paragraph #6 because the finding in Paragraph #6 of the Recommended Order is not based on competent substantial evidence.

Exception #4

13. Respondent takes exception to the findings of fact set forth in the portion of Paragraph #26 on page 17 of the Recommended Order which stated:

> The construction of [S]ections 550.0745(1) and (2), and 550.475 is not a new issue, nor is the need for authoritative determination of how to harmonize these [S]ections.

14. In taking exception, Respondent argues that the Division never had prior occasion to interpret Sections 550.0745(1) and (2) and 550.475, Florida Statutes, in conjunction, and that the Division did not have a previous policy regarding their interpretation. In support of this, Respondent cited testimony by Director David Roberts, testimony by Division employee Jamie Pouncey, and the discovery responses of Petitioner. There is no evidence on the record supporting the finding of fact made in Paragraph #26 of the Recommended Order.

15. Upon review of the record, the Division grants Respondent's Exception to Paragraph #26 because the finding in Paragraph #26 of the Recommended Order is not based on competent substantial evidence.

RULING ON PETITIONER'S EXCEPTION TO THE CONCLUSIONS OF LAW

Exception #1

16. Petitioner takes exception to the conclusion of law set forth in Paragraph #16 on pages 11 and 12 of the Recommended Order which stated:

> A reasonable construction of [S]ection 550.0745 and 550.475 would trim each statute, rather than fully preserve [S]ection 550.0745 and carve a large exception out of [S]ection 550.475. Without regard to county lines, a lessor could enter into a qualifying lease of a facility with the holder of a converted or created permit, as long as the leased facility were not more than 35 miles from the original licensed facility (or current licensed facility within the original county, if the permittee has already used [S]ection 440.475 for an intra-county relocation), but, to give effect to the county-specific provisions of 550.0745, the lessee

> could not effect a second relocation under [S]ection 550.475 to another lease, out-of-county facility that this more than 35 miles from the original licensed facility (or the most recently licensed facility within the original county, if the permittee had already used [S]ection 550.475 for an intra-county relocation.)

17. In taking exception, Petitioner argues that this language appears to state that a permittee may not lease at more than one location, even if it is within a 35 mile radius. Petitioner argues that this could be interpreted as implying that once a permittee has leased a facility outside of its original county, it cannot later lease a facility within its original county.

18. As detailed below, the Division grants Respondent's Exception to Paragraph #16, which includes language germane to this exception. This provides additional clarity which prevents any confusion regarding future implications or interpretations of Paragraph #16- the key concern underlying this exception. As this concern is addressed below, the Division rejects Petitioner's Exception to Paragraph #16.

RULING ON RESPONDENT'S EXCEPTIONS TO THE CONCLUSIONS OF LAW

Exception #1

19. Respondent takes exception to the conclusion of law set forth in Paragraph #11 on page 8 of the Recommended Order which stated:

> [Respondent] lacks statutory grounds for withdrawing or revoking the 2017-18 operating license.

20. In taking exception, Respondent argues that Sections 550.01215(2) and 550.0251(10), Florida Statutes, grant it express authority to revoke or withdraw pari-mutuel licenses for failure to meet or maintain required qualifications. Respondent also argues that its' ability to grant pari-mutuel licenses comes with implied authority to revoke or withdraw the same licenses. In support, Respondent distinguishes the case law which served as the basis of this conclusion of law.

21. The Division grants Respondent's Exception to Paragraph #11 because the conclusion of law set forth in the Recommended Order is clearly erroneous, while Respondent's proposed substituted conclusion of law is not.

22. The Division has express authority in Sections 550.01215(2) and 550.0251(10), Florida Statutes, and implied authority from its ability to issue licenses that allows it to revoke or withdraw pari-mutuel licenses for failure to meet or maintain required qualifications. Therefore, the conclusion of law that Respondent possesses statutory grounds for withdrawing or revoking the 2017-18 license is appropriate and not clearly erroneous.

Exception #2

23. Respondent takes exception to the conclusion of law set forth in Paragraph #14 on pages 9 and 10 of the Recommended Order which stated:

> However, applicable to almost all pari-mutuel permits, including jai-alai permits, [S]ection 550.475 authorizes a holder of any pari-mutuel permit to lease its facility to 'any other holder of the same class valid pari-mutuel permit ... when located within a 35 mile radius of each other... [a]s [Petitioner] contends, nothing in [S]ection 550.475 suggests that it is inapplicable to summer jai-alai permits converted or created under [S]ection 550.0745.

24. In taking exception, Respondent argues that Section 550.0745, Florida Statutes, is more specific than Section 550.475, Florida Statutes, as pertaining to summer jai-alai permits and that it therefore controls. Respondent argues that the doctrine of *in pari materia* was incorrectly applied instead of determining that a specific statute was controlling in this situation.

25. The Division grants Respondent's Exception to Paragraph #14 because the conclusion of law set forth in the Recommended Order is clearly erroneous, while Respondent's proposed substituted conclusion of law is not.

26. Section 550.0745, Florida Statutes, specifically governs the creation of summer jai-alai permits and is more specific to these permits than Section 550.475, Florida Statutes. Accordingly, Section 550.0745, Florida Statutes, is the controlling statute in determining if and where summer jai-alai permitholders can lease facilities. Therefore, the conclusion of law that Section 550.475, Florida Statutes, is not applicable to summer jai-alai permits that were converted or created under Section 550.0745, Florida Statutes, is appropriate and not clearly erroneous.

Exception #3

27. Respondent takes exception to the conclusion of law set forth in Paragraph #15 on pages 10 and 11 of the Recommended Order which stated:

> [Respondent's] determination relies on an unenacted exception to [S]ection 550.475: as applied to converted or created permits, [S]ection 550.475 authorizes relocation up to 35 miles, but not outside of the original county.

28. In taking exception, Respondent argues that it did not rely on a rejected exception. Instead, Respondent states that it relied on the fact that Section 550.0745, Florida Statutes, is more specific than Section 550.475, Florida Statutes, as pertaining to summer jai-alai permits and that it therefore controls. Respondent argues that the doctrine of *in pari materia* was incorrectly applied instead of determining that a specific statute was controlling in this situation.

29. The Division grants Respondent's Exception to Paragraph #15 because the conclusion of law set forth in the Recommended Order is clearly erroneous, while Respondent's proposed substituted conclusion of law is not.

30. The Division's determination in this case relied upon applying Section 550.0745, Florida Statutes, as the controlling provision, rather than Section 550.475, Florida Statutes. As detailed above, Section 550.0745, Florida Statutes, serves as the controlling provision because it

is more specific to summer jai-alai permits than Section 550.475, Florida Statutes. Therefore, the conclusion of law that Petitioner's determination relied on Section 550.0745, Florida Statutes, and that Section 550.475, Florida Statutes, does not authorize relocation of jai-alai permits that were converted or created under Section 550.0745, Florida Statutes, up to 35 miles, but not outside of the original county, is appropriate and not clearly erroneous.

Exception #4

31. Respondent takes exception to the conclusion of law set forth in Paragraph #16 on pages 11 and 12 of the Recommended Order which stated:

> A reasonable construction of [S]ections 550.0745 and 550.475 would trim each statute, rather than fully preserve [S]ection 550.0745 and carve a large exception out of [S]ection 550.475.

32. In taking exception, Respondent argues that allowing the more specific statutory provision to control is proper, rather than engaging in an attempt at harmonization. Respondent argues that the purported harmonization places priority on effecting Section 550.475, Florida Statutes, and, in doing so, weakens the effect of Section 550.0745, Florida Statutes. Respondent also argues that the construction in the Recommended Order would limit the impact of Section 550.0745, Florida Statutes, to instances of a second relocation. Additionally, Respondent argues that the construction in the Recommended Order fails to take into account the underlying purpose of Section 550.0745, Florida Statutes.

33. The Division grants Respondent's Exception to Paragraph #16 because the conclusion of law set forth in the Recommended Order is clearly erroneous, while Respondent's proposed substituted conclusion of law is not.

34. The ALJ's construction of the statutes fails to harmonize the statutes, as it places priority on effecting Section 550.475, Florida Statutes, and reduces the effect of Section

550.0745, Florida Statutes, which serves as the controlling provision in regard to summer jai-alai permits.

35. Additionally, the ALJ's construction fails to harmonize the statutes, as it relegates the applicability of Section 550.0745, Florida Statutes, to instances of a speculative, hypothetical second relocation by a summer jai-alai permittee. Therefore, the conclusion of law that a reasonable construction of Sections 550.0745 and 550.475, Florida Statutes, recognizes that Section 550.0745, Florida Statutes, serves as the controlling statute over Section 550.475, Florida Statutes, in regard to leasing of facilities by holders of summer jai-alai permits is appropriate and not clearly erroneous.

Exception #5

36. Respondent takes exception to the conclusion of law set forth in Paragraph #21 on page 14 of the Recommended Order which stated:

> Of course, [Respondent's] implying a broad exception in [S]ection 550.475 for created or converted permits is not readily apparent from a literal reading of this statute.

37. In taking exception, Respondent argues that it did not imply a broad exception in Section 550.475, Florida Statutes. Instead, Respondent states that it recognized that Section 550.0745, Florida Statutes, is more specific than Section 550.475, Florida Statutes, as pertaining to summer jai-alai permits and that it therefore controls. Respondent argues the doctrine of *in pari materia* was incorrectly applied instead of determining that a specific statute was controlling in this situation.

38. The Division grants Respondent's Exception to Paragraph #21 because the conclusion of law set forth in the Recommended Order is clearly erroneous, while Respondent's proposed substituted conclusion of law is not.

39. The ALJ's analysis assumed that the Division utilized a broad exception in Section 550.475, Florida Statutes. However, the Division instead recognized that Section 550.0745, Florida Statutes, was controlling in regard to summer jai-alai permits. The recognition that one statute is qualifying over another does not equate to an implication of a broad exception in a statute. Therefore, the conclusion of law that Respondent recognized that Section 550.0745, Florida Statutes, was controlling over Section 550.475, Florida Statutes, in situations involving summer jai-alai permits is appropriate and not clearly erroneous.

Exception #6

40. Respondent takes exception to the conclusion of law set forth in Paragraph #25 on pages 16 and 17 of the Recommended Order which stated:

> The NOI is a rule that deprives holders of converted and created permits of the benefit of [S]ection 550.475 - either entirely, as suggested by the omission of the statute from the statement, or partially in terms of any attempt to relocate performances to compliant locations that are outside of the original counties named in the permit.

41. In taking exception, Respondent argues that its interpretation of Section 550.0745, Florida Statutes, in the NOI is not an unpromulgated rule. Respondent argues that its interpretation reiterates the legislature's statutory mandate that summer jai-alai licenses may only be issued in the county in which the pre-conversion permit was located, does not interpret Section 550.0745, Florida Statutes, in a way that is not readily apparent from its literal reading, and that this interpretation reflects the Division's construction of Section 550.0745, Florida Statutes, without modifying or adding to a legal norm based on the Division's own authority.

42. The Division grants Respondent's Exception to Paragraph #25 because the conclusion of law set forth in the Recommended Order is clearly erroneous, while Respondent's proposed substituted conclusion of law is not.

43. The restatement of the Division in the NOI is not an unpromulgated rule, as it simply reiterated the legislative mandate present in Section 550.0745, Florida Statutes, did not interpret the Section in a way that was not readily apparent from its literal meaning, and reflected the Division's construction of the Section while not modifying or adding to a legal norm based on the Division's own authority. Therefore, the conclusion of law that the NOI is not a rule and that it did not deprive holders of converted and created summer jai-alai permits of the benefit of Section 550.475, Florida Statutes, is appropriate and not clearly erroneous.

FINDINGS OF FACT

44. The Findings of Fact in Paragraphs #1-3 of the Recommended Order, as set forth in Exhibit "A", are approved, adopted, and incorporated herein by reference. Those findings are supported by competent substantial evidence.

45. The Finding of Fact in Paragraph #4 of the Recommended Order is rejected because, upon a review of the record, the finding that "in reliance on the 2017-18 operating license, Respondent has terminated its lease for the Dade County facility and entered into a lease for the Dania facility" is not based upon competent substantial evidence.

46. The Finding of Fact in Paragraph #5 of the Recommended Order is rejected because, upon a review of the record, the finding that "Division of Pari-Mutuel Wagering concluded that it had issued the operating license in error, determined that an operating license for a converted permit must be limited to the county named in the converted permit, and issued the NOI on June 1, 2017" is not based upon competent substantial evidence.

47. The Findings of Fact in Paragraph #6 of the Recommended Order are rejected because, upon a review of the record, the findings that "these two facts do not preclude a mistake of law, as Petitioner contends, so that the NOI is not necessarily a statement that represents a

change in longstanding policy. The NOI states that the operating license is based on a mistake of law, but Petitioner's proposed recommended order states that the operating license is a mistake of law—the same conclusion that the Administrative Law Judge reaches in the Conclusions of Law" and "[i]n the past, Petitioner issued operating licenses to holders of converted or created permits that authorized performances at the licensed location or a facility leased pursuant to section 550.475. It is unclear when the Division changed its position" are not based upon competent substantial evidence.

48. The Finding of Fact in Paragraph #26 of the Recommended Order is rejected because, upon a review of the record, the finding that "construction of [S]ections 550.0745(1) and (2), and 550.475 is not a new issue, nor is the need for authoritative determination of how to harmonize these" is not based upon competent substantial evidence.

CONCLUSIONS OF LAW

49. The Division has authority to issue a final order in this case pursuant to Sections 120.57(1)(l) and (m), Florida Statutes. Section 120.57(1)(m), Florida Statutes, states that:

> If a recommended order is submitted to an agency, the agency shall provide a copy of its final order and any exceptions to the division within 15 days after the order is filed with the agency clerk.

50. The Conclusions of Law in Paragraphs #12-13, 17-20, 22-24, and 26-27 of the Recommended Order (excepting any findings of fact present in Paragraph 26 that have already been rejected as detailed above), as set forth in Exhibit "A," are approved, adopted, and incorporated herein by reference.

51. Based on the record, the clearly erroneous Conclusions of Law in Paragraphs #11, 14-16, 21, and 25 of the Recommended Order are rejected and substituted with the conclusions of law set forth in the rulings on Respondent's Exceptions to the aforementioned Conclusions of

Law set forth herein. Those substituted conclusions of law are approved, adopted, and incorporated herein as referenced.

52. As recognized in Paragraph #9 of the Recommended Order, the Division had an obligation under Section 120.60(1), Florida Statutes, to either issue or deny Petitioner's license within 90 days of the application date. Since the Division did not deny Petitioner's license application by March 27, 2017, Petitioner's license application is considered approved.

WHEREFORE, IT IS ORDERED AND ADJUDGED THAT:

1. The Notice of Intent to Withdraw License is dismissed.

2. This order shall become effective on the date of the filing with the Department's Agency Clerk.

DONE and ORDERED this 20 day of March, 2018.

ROBERT EHRHARDT, DIRECTOR
Division of Pari-Mutuel Wagering
Department of Business and Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399-2202

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) Summer Jai-Alai Partnership c/o John M. Lockwood, Esq., Thomas J. Morton, Esq., and Devon Nunneley, Esq., the Lockwood Law Firm, 106 E. College Ave., Suite 810, Tallahassee, Florida 32301, * john@lockwoodlawfirm.com, * tj@lockwoodlawfirm.com, * devon@lockwoodlawfirm.com; (2) Louis Trombetta, Chief Attorney, Department of Business and Professional Regulation, 2601 Blair Stone Road, Tallahassee, Florida 32399-2202; and (3) Robert E. Meale, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399 on this 21st day of March, 2018.

* Emailed on March 20, 2018

Ronda L. Bryan, Agency Clerk

Brandon M. Nichols

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.