STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs. Case Nos. 17-4870PL
17-4871PL
ARECI ROBLEDO, 17-4872PL
17-4873PL

Respondent.
_____/

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2017), before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on October 23, 2017, by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

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

For Respondent: Areci Robledo, pro se
1470 Haverhill Road South
West Palm Beach, Florida 33415

STATEMENT OF THE ISSUES

Whether Respondent raced animals that were impermissibly medicated or determined to have prohibited substances present, resulting in a positive test for such medications or substances in violation of section 550.2415(1)(a), Florida Statutes (2016),[1/] as alleged in the administrative complaints; and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

Petitioner, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Petitioner"), served four administrative complaints on Respondent, Areci Robledo ("Respondent"), charging her with a total of seven counts of violating statutes and rules governing pari-mutuel racing by impermissibly medicating or administering prohibited substances to racing greyhounds for which she was the trainer of record for races held at the Palm Beach Kennel Club ("PBKC") on specific dates between September 27, 2016, and January 28, 2017. Respondent disputed the material facts alleged in the administrative complaints and timely requested an administrative hearing. On August 28, 2017, the case was forwarded to DOAH for assignment of an ALJ to conduct a hearing pursuant to sections 120.569 and 120.57(1). The administrative complaints were consolidated for purposes of conducting the final hearing and

issuing the recommended order. The final hearing was held on October 23 and 24, 2017.

Petitioner presented the testimony of Ms. Jessica Zimmerman, a chief veterinary assistant employed by Petitioner; Ms. Margaret Wilding, associate director of the University of Florida Racing Laboratory; and Respondent. Petitioner offered Exhibits P-1 through P-24, which were admitted into evidence without objection. Official recognition was taken of section 550.2415 and Florida Administrative Code Rules 61D-6.002, 61D-6.007, and 61D-6.012.

Respondent testified[2/] on her own behalf and presented the testimony of Ms. Jamie Testa, an employee of another kennel that races greyhounds at PBKC; and Mr. Arthur Agganis, the owner of another kennel that races greyhounds at PBKC. Respondent offered a late-filed composite exhibit consisting of several photographs for admission into evidence; this exhibit was marked as Respondent's Exhibit 1 and admitted into evidence over objection.[3/]

Volume I of the final hearing Transcript was filed at DOAH on November 28, 2017, and Volume II was filed on December 8, 2017.[4/] By the Notice of Filing Transcript issued on November 28, 2017, the parties were given until December 8, 2017, to file their proposed recommended orders. On October 30, 2017, Respondent filed, along with her late-filed exhibit, a

letter stating her position on the charges against her; this letter was treated as her proposed recommended order. Petitioner's Proposed Recommended Order was timely filed on December 8, 2017. Both proposed recommended orders were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

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

2. Respondent is the holder of Pari-Mutuel Wagering Individual Occupational License No. 1572955-1021, which authorizes her to train greyhounds in Florida pursuant to section 550.105. Respondent has been licensed by Petitioner since 2009.

3. At all times relevant to the charges at issue in these proceedings, Respondent was subject to chapter 550 and the implementing rules codified in Florida Administrative Code Chapter 61D-6.

II. The Administrative Complaints

4. As noted above, Petitioner served Respondent with four administrative complaints charging her with a total of seven counts of violating statutes and rules governing pari-mutuel racing by impermissibly medicating or administering prohibited

substances to racing greyhounds for which she was the trainer of record for races held at the PBKC on specific dates between September 27, 2016, and January 28, 2017.

A. DOAH Case No. 17-4870

5. On November 28, 2016, Petitioner filed with its clerk's office an administrative complaint consisting of two enforcement cases, DBPR Case Nos. 2016-049902 and 2016-051419. This administrative complaint was assigned DOAH Case No. 17-4870.

6. Count I of this administrative complaint, DBPR Case No. 2016-049902, charges Respondent with having violated section 550.2415(1)(a) by racing greyhound ATASCOCITA ACURA, which was impermissibly medicated or determined to have a prohibited substance present resulting in a positive test for dimethyl sulfoxide.

7. Count II of this administrative complaint, DBPR Case No. 2016-051419, charges Respondent with having violated section 550.2415(1)(a) by racing greyhound ATASCOCITA DALT, which was impermissibly medicated or determined to have a prohibited substance present resulting in a positive test for caffeine.

B. DOAH Case No. 17-4871

8. On November 30, 2016, Petitioner filed with its clerk's office an administrative complaint consisting of two enforcement

cases, DBPR Case Nos. 2016-053062 and 2016-053069. This administrative complaint was assigned DOAH Case No. 17-4871.

9. Count I of this administrative complaint, DBPR Case No. 2016-053062, charges Respondent with having violated section 550.2415(1)(a) by racing greyhound ATASCOCITA EDGE, which was impermissibly medicated or determined to have a prohibited substance present resulting in a positive test for theobromine.

10. Count II of this administrative complaint, also part of DBPR Case No. 2016-053062, charges Respondent with having violated section 550.2415(1)(a) by racing greyhound ATASCOCITA EDGE, which was impermissibly medicated or determined to have a prohibited substance present resulting in a positive test for theophylline.

11. Count III of this administrative complaint, DBPR Case No. 2016-053069, charged Respondent with having violated section 550.2415(1)(a) by racing greyhound ATASCOCITA DALT, which was impermissibly medicated or determined to have a prohibited substance present resulting in a positive test for theobromine.

C. DOAH Case No. 17-4872

12. On December 28, 2016, Petitioner filed with its clerk's office an administrative complaint consisting of one enforcement case, DBPR Case No. 2016-056707. This administrative complaint was assigned DOAH Case No. 17-4872.

13. In this administrative complaint, Petitioner has charged Respondent with having violated section 550.2415(1)(a) by racing greyhound RCK MOHICAN, which was impermissibly medicated or determined to a prohibited substance present resulting in a positive test for caffeine.

D. DOAH Case No. 17-4873

14. On February 16, 2017, Petitioner filed with its clerk's office an administrative complaint consisting of one enforcement case, DBPR Case No. 2017-006845. This administrative complaint was assigned DOAH Case No. 17-4873.

15. In this administrative complaint, Petitioner has charged Respondent with having violated section 550.2415(1)(a) by racing greyhound ATASCOCITA HAPPY, which was impermissibly medicated or determined to have a prohibited substance present resulting in a positive test for caffeine.

III. The Alleged Violations and Respondent's Defenses

A. Racing Greyhound Urine Sample Collection and Testing

16. PBKC is a facility operated by a permit holder authorized to conduct pari-mutuel wagering in Florida under chapter 550.

17. Respondent trained and raced greyhounds at PBKC between September 27, 2016, and January 28, 2017, the time period relevant to these consolidated proceedings. All

violations charged in the administrative complaints are alleged to have occurred at PBKC.

18. To enforce the statutes and rules prohibiting the impermissible medication or administration of prohibited substances to racing greyhounds, Petitioner collects urine samples from racing greyhounds immediately before races in which they are participating. At the PBKC, urine samples from racing greyhounds are collected in a restricted area called the "ginny pit."

19. Jessica Zimmerman, chief veterinary assistant for Petitioner, described Petitioner's urine sampling process. The samples are collected by veterinary assistants using clean cups that are unsealed immediately before being used to collect the samples. When each urine sample is collected, the veterinary assistant checks the identification number tattooed on the greyhound's ear and completes a PMW 503 form.[5/]

20. Here, the evidence establishes that the urine samples collected that have given rise to this proceeding were collected pursuant to this process.[6/]

21. The PMW 503 form shows the pari-mutuel wagering facility for which it was prepared——in these consolidated cases, for the PBKC——and lists the date, race, and post number of the greyhound; the greyhound's name and tattoo number; the time the

sample was collected; the trainer's name; the collector's initials; and a unique sample number.

22. Here, the completed PMW 503 forms and other evidence established that Respondent was the trainer of record for the following greyhounds that participated in specified races held on specific dates and from which urine samples were taken:

* ATASCOCITA ACURA, tattoo no. 6328024A, urine specimen no. 105889, twelfth race on September 27, 2016;
* ATASCOCITA DALT, tattoo no. 6407364C, urine specimen no. 108583, second race on October 15, 2016;
* ATASCOCITA EDGE, tattoo no. 65280114G, urine specimen no. 108633, ninth race on October 19, 2016;
* ATASCOCITA DALT, tattoo no. 6407364C, urine specimen no. 108304, tenth race on October 19, 2016;
* RCK MOHICAN, tattoo no. 65640124A, urine specimen no. 113568, eighth race on November 26, 2016;
* ATASCOCITA HAPPY, tattoo no. 65573124J, urine specimen no. 125184, ninth race on January 28, 2017.

23. Once a urine sample has been collected, the container is sealed with tape to maintain the integrity of the sample, and a tag on which the sample number is written is attached to the container holding the collected urine sample.[7/]

24. The urine samples are placed in a freezer at a restricted area at Petitioner's office and held there until they

are shipped to the University of Florida Racing Laboratory ("UF Lab")[8/] for testing for the presence of impermissible medications or prohibited substances. Petitioner is in constant possession of the samples until they are shipped to the UF Lab. The containers in which the samples are shipped are securely locked.

25. Here, the evidence established that urine specimen nos. 105889, 108583, 108633, 108304, 113568, and 125184 were collected, sealed, stored, and shipped to the UF Lab pursuant to the above-described protocol.

26. Once the samples are received at the UF Lab, laboratory staff inspect the samples to ensure that the evidence tape has adhered to the sample cup, cross-check the sample numbers with those on the accompanying PMW 503 form, identify any discrepancies with respect to date and sample number and record them on a discrepancy form,[9/] and log the samples into the Laboratory Information Management System. Thereafter, the samples are assigned an internal alphanumeric number and moved into a limited-access area, where they are stored while laboratory staff perform testing. The samples are stored in this area until they either are confirmed as positive for an impermissible medication or a prohibited substance——in which case they are moved to a specific freezer for storage——or confirmed as negative for a medication or prohibited substance and thereafter discarded.

27. As part of the sample testing process, an aliquot is taken and tested for an impermissible medication or a prohibited substance. If the test initially indicates a positive result for an impermissible medication or a prohibited substance, a confirmatory test is performed to determine the quantity of the medication or substance in the sample. The confirmatory testing process entails running calibrated samples, positive controls to ensure that the extraction process was accurate, and negative controls to ensure that there is no carryover of the medication or substance through the confirmatory testing process. If the confirmatory testing process yields a positive result for an impermissible medication or prohibited substance, the documentation is subjected to a two-step supervisory review, followed by generation of a Report of Positive Result, which is transmitted to Petitioner.

28. Here, the evidence establishes that urine specimen nos. 105889, 108583, 108633, 108304, 113568, and 125184 were logged, stored, and tested at the UF Lab pursuant to this protocol.

29. The Association of Racing Commissioners International has adopted the Uniform Classification Guidelines for Foreign Substances ("ARCI Guidelines"). 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.

30. Caffeine is a central nervous system stimulant and class II drug. Under rule 61D-6.007(3)(a), levels of caffeine at a urinary concentration less than or equal to 200 nanograms per milliliter are not reported to Petitioner as an impermissible medication or prohibited substance. Conversely, levels of caffeine at a urinary concentration greater than 200 nanograms per milliliter are reported to Petitioner as an impermissible medication or prohibited substance.

31. Theobromine is a diuretic, smooth muscle relaxant, and class IV drug. Under rule 61D-6.007(3)(b), levels of theobromine at urinary concentrations less than or equal to 400 nanograms per milliliter are not reported to Petitioner as an impermissible medication or prohibited substance. Conversely, levels of theobromine at urinary concentrations greater than 400 nanograms per milliliter are reported to Petitioner as an impermissible medication or prohibited substance.

32. Theophylline is a bronchodilator, smooth muscle relaxant, and class III drug. Under rule 61D-6.007(3)(b), levels of theophylline at urinary concentrations less than or equal to 400 nanograms per milliliter are not reported to Petitioner as an impermissible medication or a prohibited

substance. Conversely, levels of theophylline at urinary concentrations greater than 400 nanograms per milliliter are reported to Petitioner as an impermissible medication or a prohibited substance.

33. Dimethyl sulfoxide is an anti-inflammatory agent and class IV drug. Dimethyl sulfoxide is a non-threshold drug, which means that it is not permitted to be in a racing greyhound's body at any concentration. Therefore, the detection of any concentration of dimethyl sulfoxide in a urine sample is reported to Petitioner as an impermissible medication or a prohibited substance.

34. Pursuant to section 550.2415(1)(c), the finding of a prohibited substance in a race-day specimen taken from a racing greyhound constitutes prima facie evidence that the substance was administered and was carried in the body of the animal while participating in the race.

B. Urine Specimen Test Results

Urine Specimen No. 105889 - ATASCOCITA ACURA

35. As noted above, urine specimen no. 105889 was collected by Petitioner's veterinary assistant from ATASCOCITA ACURA, tattoo no. 6328024A, before the twelfth race on September 27, 2016.

36. UF Lab gas chromatography-mass spectrometry testing of urine specimen no. 105889 showed a urine concentration of 210 micrograms per milliliter of dimethyl sulfoxide.

37. The UF Lab prepared and transmitted to Petitioner a Report of Positive Result dated October 27, 2016, reporting this test result for urine specimen no. 105889.

38. As discussed above, dimethyl sulfoxide is a non-threshold drug. Accordingly, the finding of 210 micrograms per milliliter of dimethyl sulfoxide in urine specimen no. 105889 establishes that ATASCOCITA ACURA carried an impermissible medication or a prohibited substance in its body during the twelfth race on September 27, 2016.

Urine Specimen No. 108583 – ATASCOCITA DALT

39. As noted above, urine specimen no. 108583 was collected by Petitioner's veterinary assistant from ATASCOCITA DALT, tattoo no. 6407364C, before the second race on October 15, 2016.

40. UF Lab liquid chromatography-mass spectrometry testing of urine specimen no. 108583 showed a urine concentration of 4.343 +/- 0.03 micrograms per milliliter of caffeine.

41. UF Lab liquid chromatography-mass spectrometry testing of urine specimen no. 108583 showed a urine concentration of 728 +/- 90 nanograms per milliliter of theobromine.

42. UF Lab liquid chromatography-mass spectrometry testing of urine specimen no. 108583 showed a urine concentration of 1.578 +/- 0.08 micrograms per milliliter of theophylline.

43. These concentrations exceed the non-reportable levels for each of these substances established in rule 61D-6.007(3).

44. The UF Lab prepared and transmitted to Petitioner a Report of Positive Result dated October 27, 2016, reporting these test results for urine specimen no. 108583.

45. The findings of urine concentrations of 4.343 +/- 0.03 micrograms per milliliter of caffeine, 728 +/- 90 nanograms per milliliter of theobromine, and 1.578 +/- 0.08 micrograms per milliliter of theophylline establish that ATASCOCITA DALT carried these impermissible medications or prohibited substances in its body during the second race on October 15, 2016.

46. Notwithstanding that the test results for urine specimen no. 108583 showed the presence of theobromine and theophylline in ATASCOCITA DALT during the second race on October 15, 2016, at concentrations above the non-reportable levels established in rule 61D-6.007(3), Petitioner has not charged Respondent with violations related to the presence of these substances, and has only charged Respondent with one violation for the presence of caffeine above the non-reportable level during the second race on October 15, 2016.

Urine Specimen No. 108633 – ATASCOCITA EDGE

47. As noted above, urine specimen no. 108633 was collected by Petitioner's veterinary assistant from ATASCOCITA EDGE, tattoo no. 65280114G, before the ninth race on October 19, 2016.

48. UF Lab liquid chromatography-mass spectrometry testing of urine specimen no. 108633 showed a urine concentration of 822 +/- 90 nanograms per milliliter of theobromine.

49. UF Lab liquid chromatography-mass spectrometry testing of urine specimen no. 108633 showed a urine concentration of 625 +/- 80 nanograms per milliliter of theophylline.

50. These concentrations exceed the non-reportable levels for each of these medications or substances established in rule 61D-6.007(3).

51. The UF Lab prepared and transmitted to Petitioner a Report of Positive Result dated November 17, 2016, reporting these test results for urine specimen no. 108633.

52. The findings of urine concentrations of 822 +/- 90 nanograms per milliliter of theobromine and 625 +/- 80 nanograms per milliliter of theophylline establish that ATASCOCITA EDGE carried these impermissible medications or prohibited substances in its body during the ninth race on October 19, 2016.

Urine Specimen No. 108304 – ATASCOCITA DALT

53. As noted above, urine specimen no. 108304 was collected by Petitioner's veterinary assistant from ATASCOCITA DALT, tattoo no. 6407364C, before the tenth race on October 19, 2016.

54. UF Lab liquid chromatography-mass spectrometry testing of urine specimen no. 108304 showed a urine concentration of 534 +/- 90 nanograms per milliliter of theobromine.

55. This concentration exceeds the non-reportable level for this substance established in rule 61D-6.007(3).

56. The UF Lab prepared and transmitted to Petitioner a Report of Positive Result dated November 17, 2016, reporting this test result for urine specimen no. 108304.

57. The finding of a urine concentration of 534 +/- 90 nanograms per milliliter of theobromine establishes that ATASCOCITA DALT carried this impermissible medication or prohibited substance in its body during the tenth race on October 19, 2016.

Urine Specimen No. 113568 – RCK MOHICAN

58. As noted above, urine specimen no. 113568 was collected by Petitioner's veterinary assistant from RCK MOHICAN, tattoo no. 65640124A, before the eighth race on November 26, 2016.

59. UF Lab liquid chromatography-mass spectrometry testing of urine specimen no. 113568 showed a urine concentration of 8.532 +/- 0.03 micrograms per milliliter of caffeine.

60. UF Lab liquid chromatography-mass spectrometry testing of urine specimen no. 113568 showed a urine concentration of 3.434 +/- 0.09 micrograms per milliliter of theobromine.

61. UF Lab liquid chromatography-mass spectrometry testing of urine specimen no. 113568 showed a urine concentration of 8.374 +/- 0.08 micrograms per milliliter of theophylline.

62. These concentrations exceed the non-reportable levels for each of these medications or substances established in rule 61D-6.007(3).

63. The UF Lab prepared and transmitted to Petitioner a Report of Positive Result dated December 13, 2016, reporting these test results for urine specimen no. 113568.

64. The findings of 8.532 +/- 0.03 micrograms per milliliter of caffeine, 3.434 +/- 0.09 micrograms per milliliter of theobromine, and 8.374 +/- 0.08 micrograms per milliliter of theophylline establish that RCK MOHICAN carried these impermissible medications or prohibited substances in its body during the eighth race on November 26, 2016.

65. Notwithstanding that the test results for urine specimen no. 113568 showed the presence of theobromine and theophylline in RCK MOHICAN during the eighth race on

November 26, 2016, at concentrations above the non-reportable levels established in rule 61D-6.007(3), Petitioner has not charged Respondent with violations related to the presence of these medications or substances, and has only charged Respondent with one violation for the presence of caffeine above the non-reportable level during the eighth race on November 26, 2016.

Urine Specimen No. 125184 – ATASCOCITA HAPPY

66. As noted above, urine specimen no. 125184 was collected by Petitioner's veterinary assistant from ATASCOCITA HAPPY, tattoo no. 655731245, before the ninth race on January 28, 2017.

67. UF Lab liquid chromatography-mass spectrometry testing of urine specimen no. 125184 showed a urine concentration greater than 1.25 micrograms per milliliter of caffeine.

68. UF Lab liquid chromatography-mass spectrometry testing of urine specimen no. 125184 showed a urine concentration of 988 +/- 90 nanograms per milliliter of theobromine.

69. UF Lab liquid chromatography-mass spectrometry testing of urine specimen no. 125184 showed a urine concentration of 2.129 +/- 0.08 micrograms per milliliter of theophylline.

70. These concentrations exceed the non-reportable levels for each of these substances established in rule 61D-6.007(3).

71. The UF Lab prepared and transmitted to Petitioner a Report of Positive Result dated February 10, 2017, reporting these test results for urine specimen no. 125184.

72. The findings of urine concentrations of greater than 1.25 micrograms per milliliter of caffeine, 988 +/- 90 nanograms per milliliter of theobromine, and 2.129 +/- 0.08 micrograms per milliliter of theophylline establish that ATASCOCITA HAPPY carried these impermissible medications or prohibited substances in its body during the ninth race on January 28, 2017.

73. Again, it is noted that notwithstanding that the test results for urine specimen no. 125184 showed the presence of theobromine and theophylline in ATASCOCITA HAPPY during the ninth race on January 28, 2017, at concentrations above the non-reportable levels established in rule 61D-6.007(3), Petitioner has not charged Respondent with violations related to the presence of these medications or substances, and has only charged Respondent with one violation for the presence of caffeine above the non-reportable level during the ninth race on January 28, 2017.

C. Respondent's Defenses

74. Respondent denied having administered any impermissible medications or prohibited substances to the racing greyhounds that are the subject of these proceedings.

75. Respondent also questioned, on three grounds, the accuracy of the test results showing the presence of impermissible medications or prohibited substances in the greyhounds that are the subject of these proceedings.

76. First, Respondent disputes whether the urine specimens that yielded the positive test results were taken from the greyhounds that are the subject of these proceedings. She noted that under Petitioner's previous practice, when a urine sample was taken from a dog, the trainer was able to be present to verify that the animal from which the sample was collected was trained by him or her. She testified that now, under Petitioner's current sampling practice, the trainer is not able to be present so cannot verify the identity of the animal from which the sample is taken.

77. This argument is not persuasive.[10/] As previously discussed, Zimmerman described the process by which urine samples are collected from racing greyhounds for prohibited substances testing. As part of the urine sampling protocol, the identity of the greyhound from which the sample is collected is determined pursuant to an identification number tattooed on the dog's ear and that identification number is recorded both on the PMW 503 form and on the urine sample card that is transmitted to the UF Lab for testing. As previously noted, the evidence shows that this protocol was followed in collecting urine samples from

the racing greyhounds that are the subject of these proceedings. Apart from mere conjecture,[11/] Respondent did not present any evidence to show that the urine specimens for which positive test results were obtained were not collected from the greyhounds specifically identified herein, on the dates and at the times pertinent to these proceedings.

78. Respondent presented evidence to show that conditions at the PBKC made it possible for racing greyhounds to ingest foods and beverages that could cause urine specimens from those animals to test positive for impermissible medications or prohibited substances.

79. Specifically, Respondent testified that foods, such as chocolate, and beverages, such as coffee, sodas, and Red Bull, are available to purchase at the PBKC; that PBKC personnel consume these foods and beverages at many locations within the facility; that these foods and beverages are often left unattended in areas where they are accessible to the racing greyhounds; and that the greyhounds sometimes consume these foods and beverages.

80. Jamie Testa corroborated Respondent's testimony. She echoed that PBKC personnel consume food and beverages in the PBKC facility and leave unfinished food and beverages in various locations, including in the weigh-in area, that are accessible to the greyhounds. She recounted one occasion on which she

observed a veterinarian at the PBKC spill coffee and not clean up the spill, leaving it accessible for consumption by greyhounds. She described these conditions at PBKC as pervasive and continuing. In her words, "it's not just from one day. It's every day."

81. On cross-examination, Testa acknowledged that greyhounds are muzzled during the weigh-in process, although she nonetheless asserted that this "doesn't mean that the dogs cannot pick up anything that's on the ground." However, she conceded that she did not witness the greyhounds that are the subject of these proceedings consuming food or beverages during the weigh-in or at any other times on the dates and at the times relevant to these proceedings.

82. Arthur Agganis also corroborated Respondent's testimony that PBKC personnel often consume food and beverages in close proximity to the racing greyhounds, and that food and coffee is sometimes spilled on the ground. Agganis testified that on one occasion he observed a greyhound eat food off of the ground.

83. On cross-examination, Agganis acknowledged that he did not witness any food or spilled coffee at the PBKC on the dates relevant to these proceedings.

84. Respondent also presented an exhibit consisting of eight photographs ostensibly taken inside the PBKC.[12/] The

photographs depict vending machines from which chocolate bars and other snacks and sodas can be purchased, employees eating food, and unattended soda containers and beverage cups placed on tables and on the floor.

85. On cross-examination, Respondent acknowledged that she took some, but not all, of the photographs, and some of the photographs were provided to her by other persons. She did not identify which photographs she took and which were provided to her by other persons. She also did not identify the specific locations within the PBKC facility in which the photographs ostensibly were taken; she did not identify the persons who took the photographs; and she did not present any testimony by these persons to establish that the photographs were, in fact, taken in the PBKC or that they accurately depict conditions within the PBKC. She also did not present any evidence establishing that the photographs were taken on the dates and at the times when the greyhounds that are the subject of these proceedings raced. In fact, she acknowledged that none of the photographs were taken on those dates, but instead were taken during a timeframe spanning from three months to one week before the final hearing.

86. Respondent's argument that the positive test results are due to the greyhounds that are the subject of these proceedings having ingested foods or beverages at the PBKC

rather than having been purposely administered those substances, is unpersuasive.

87. Respondent did not present any evidence to show that the conditions described in Testa's and Agganis' testimony or portrayed in the photographs accurately depicted the conditions present at the PBKC on the specific dates and at the specific times during which the greyhounds that are the subject of these proceedings raced.

88. Most important, even if the evidence showed that these conditions existed at the PBKC on the dates and at the times the greyhounds that are the subject of these proceedings raced, no evidence was presented showing that the greyhounds actually ingested anything at the PBKC that may have caused the positive test results. To the contrary, Respondent, Testa, and Agganis all acknowledged that they did not witness the greyhounds that are the subject of these proceedings ingest any foods or beverages at the PBKC on the dates and at the times pertinent to these proceedings.

89. Respondent also argues that the urine samples taken from the greyhounds that are the subject of these proceedings could have been collected in contaminated containers, resulting in false positive test results for impermissible medications or prohibited substances. Specifically, Respondent testified: "I

was able to see two people, like the females from the State, the ones who do——who collect the urine with their coffee cup."

90. Testa also testified that on occasion, she observed veterinary assistants collecting urine samples by placing a urine sample collection cup on the sand in the ginny pit, which could cause cross-contamination of the urine sample.

91. Respondent's testimony that she observed Petitioner's veterinary assistants collect urine samples from greyhounds using coffee cups is neither credible nor persuasive. In fact, Respondent herself testified that trainers do not have access to the ginny pit, so are unable to observe the urine collection process. These contradictions render Respondent's testimony incredible.

92. Further, there is no evidence showing that Petitioner's veterinary assistants placed the urine collection cups on the sand in the ginny pit when collecting urine samples from the greyhounds that are the subject of the proceedings on the pertinent dates and at the pertinent times.

93. Rather, the evidence establishes that Petitioner's veterinary assistants consistently follow an established protocol in collecting urine specimens for testing, which includes using clean, sealed cups that are unsealed immediately before the sample is collected, and then resealed with evidence tape and tagged with the sample number. The credible,

persuasive evidence shows that Petitioner's veterinary assistants followed this protocol in collecting the urine samples from the greyhounds that are the subject of this proceeding on the dates and at the times pertinent to these proceedings. There is no credible, persuasive evidence showing that this protocol was not followed by Petitioner's veterinary assistants in collecting the urine samples from the greyhounds that are the subject of this proceeding on the dates and at the times pertinent to this proceeding.

IV. Findings of Ultimate Fact Regarding Violations

94. Based on the foregoing, it is determined that Respondent violated section 550.2415(1)(a) by racing greyhound ATASCOCITA ACURA, which was impermissibly medicated or determined to have a prohibited substance present resulting a positive test for dimethyl sulfoxide.

95. Based on the foregoing, it is determined that Respondent violated section 550.2415(1)(a) by racing greyhound ATASCOCITA DALT, which was impermissibly medicated or determined to have a prohibited substance present resulting in a positive test for caffeine.

96. Based on the foregoing, it is determined that Respondent violated section 550.2415(1)(a) by racing greyhound ATASCOCITA EDGE, which was impermissibly medicated or determined

to have a prohibited substance present resulting in a positive test for theobromine.

97. Based on the foregoing, it is determined that Respondent violated section 550.2415(1)(a) by racing greyhound ATASCOCITA EDGE, which was impermissibly medicated or determined to have a prohibited substance present resulting in a positive test for theophylline.

98. Based on the foregoing, it is determined that Respondent violated section 550.2415(1)(a) by racing greyhound ATASCOCITA DALT, which was impermissibly medicated or determined to have a prohibited substance present resulting in a positive test for theobromine.

99. Based on the foregoing, it is determined that Respondent violated section 550.2415(1)(a) by racing greyhound RCK MOHICAN, which was impermissibly medicated or determined to have a prohibited substance present resulting in a positive test for caffeine.

100. Based on the foregoing, it is determined that Respondent violated section 550.2415(1)(a) by racing greyhound ATASCOCITA HAPPY, which was impermissibly medicated or determined to have a prohibited substance present resulting in a positive test for caffeine.

V. Aggravating or Mitigating Factors

101. Petitioner presented evidence proving that Respondent was disciplined in 2011 for two violations involving the administration of class III drugs to racing greyhounds. These violations are relevant to determining the applicable penalty ranges in rule 61D-6.012.

102. The violations charged in the administrative complaints filed on November 28 and 30, 2016, and December 28, 2016, occurred sufficiently close together in time such that Respondent was not informed of the violations in these complaints in time to enable her to take corrective measures. However, by the time the administrative complaint dated February 16, 2017, was filed, Respondent was on notice of the violations charged in the previously served administrative complaints, so she had sufficient time before the January 28, 2017, race to take appropriate corrective measures. This constitutes an aggravating factor in determining appropriate penalties.

103. The evidence establishes that the caffeine level in RCK MOHICAN on November 26, 2016, was approximately 42 times the permissible limit for that substance established in rule 61D-6.007(3)(a). As noted above, caffeine is a class II drug, which means that there is a high potential that its administration

would affect the greyhound's performance. This constitutes an aggravating factor in determining appropriate penalties.

CONCLUSIONS OF LAW

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

105. 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). Therefore, Petitioner must 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)).

106. The Supreme Court of Florida has described the clear and convincing standard of proof 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)).

107. Section 550.2415(1)(a) states, in pertinent 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.

108. Section 550.2415(1)(c) states: "[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."

109. Section 550.0251(3) requires 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.

110. The statute also provides that when a racing greyhound has been impermissibly medicated or drugged, action may be taken "against an occupational licensee responsible pursuant to rule." § 550.2415(2), Fla. Stat.

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

112. As discussed above, Petitioner has charged Respondent with seven counts of violating section 550.2415(1)(a) by racing greyhounds which were impermissibly medicated or were determined to have a prohibited substance present resulting in a positive test for specifically identified medications or substances.

113. As discussed above, the procedures established and consistently followed by Petitioner and the UF Lab in these proceedings ensure the integrity of the sample through collection, storage, and testing; accurately record the source of each sample; and reliably and accurately demonstrate the presence of impermissible medications or prohibited substances in the greyhounds that are the subject of these proceedings on the dates and at the times pertinent to these proceedings.

114. For the reasons discussed above, it is concluded that Petitioner has proven, by clear and convincing evidence, that Respondent violated section 550.2415(1)(a) by racing greyhounds which were impermissibly medicated or determined to have a prohibited substance present that resulted in a positive test for those medications or substances, as specifically alleged in the administrative complaints filed on November 28 and 30, 2016; December 28, 2016; and February 16, 2017.

Penalty

115. Section 550.2415(3)(a) provides, in pertinent 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.

116. Section 550.2415(7)(c) provides, in pertinent 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.

117. Florida Administrative Code Rule 61D-6.012(1) states that penalties "shall" be imposed when specified substances have been identified by the state laboratory in a urine sample collected from a greyhound participating in a pari-mutuel event. The use of the word "shall" in the rule indicates that the penalty schedule established in rule 61D-6.012 is mandatory.[13/] As discussed below, subsection (4) of rule 61D-6.012 sets forth circumstances which may be considered for purposes of mitigating or aggravating any penalty. Subsection (3) of the rule provides that the agency may consider mitigation or aggravation to

deviate from the penalty guidelines——that is, to impose a penalty that either is greater or less than the range of penalties established in the rule for a particular type of violation.

118. Rule 61D-6.012(2) states that the penalty for any medication or drug is based on the classification of that medication or drug by the ARCI Guidelines.

119. Rule 61D-6.012(2)(b) provides that for a class II medication or drug, the penalty schedule shall 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.

120. Rule 61D-6.012(2)(c) provides that for a class III medication or drug, the penalty schedule shall 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.

121. Rule 61D-6.012(2)(d) provides that for a class IV medication or drug, the penalty schedule shall 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.

122. Rule 61D-6.012(4), which establishes aggravating or mitigating factors for purposes of penalty determination, states:

> Circumstances which may be considered for the purposes of mitigation or aggravation of any penalty shall include, but are not limited to, the following:
>
> (a) The impact of the offense to the integrity of the pari-mutuel industry.
> (b) The danger to the public and/or racing animals.
>
> (c) The number of repetitions of offenses.
>
> (d) The time periods between offenses.
>
> (e) The number of complaints filed against the licensee or permitholder, which have resulted in prior discipline.
>
> (f) The length of time the licensee or permitholder has practiced.
>
> (g) The deterrent effect of the penalty imposed.
>
> (h) Any efforts at rehabilitation.

(i) Any other mitigating or aggravating circumstances.

Penalties for the Violations Charged in These Proceedings

123. As discussed above, Petitioner proved that Respondent previously was disciplined for having committed two violations of section 550.2415(1)(a) by having administered class III medications or drugs to racing greyhounds. Accordingly, every violation with which Respondent has been charged in these proceedings constitutes a "third" or "subsequent" violation of chapter 550.

124. Pursuant to the penalty guidelines in rule 61D-6.012, the maximum penalties that collectively could be imposed in these consolidated proceedings is a $7,000 fine, and a suspension of Respondent's license for 330 days, or revocation of her license.

125. However, Petitioner seeks to impose a lesser penalty in these proceedings. Specifically, Petitioner requests that a fine of $1,000 be levied for each class II drug violation, with an additional $200 "to be included for the positives involving the aggravating factors" discussed above; a fine of $750 to be levied for each class III drug violation; and a fine of $500 to be levied for each class IV drug violation. Thus, Petitioner seeks total fine of $5,650 in these proceedings.

126. Petitioner also seeks to suspend Respondent's license. Specifically, Petitioner seeks to suspend Respondent's license for 60 days for each class II drug violation, with an "additional 12 days to be included for both positives involving the aggravating factors" enumerated above; 30 days for each class III drug violation; and 15 days for each class IV violation.[14/] Thus, Petitioner seeks to suspend Respondent's license for a total of 279 days.

127. Upon full consideration of the evidence, it is concluded that the imposition of a total fine of $5,650 and a suspension of Respondent's license for 279 days is supported by the evidence and justified under the circumstances.

128. Accordingly, the penalties recommended to be imposed under the administrative complaints in these proceedings are as follows:

A. DOAH Case No. 17-4870 - DBPR Case No. 2016-049902, count I consisting of one class IV drug violation: a fine of $500 and a license suspension of 15 days; DBPR Case No. 2016-051419, count II consisting of one class II drug violation: a fine of $1,000 and a license suspension of 60 days. The total penalty imposed for DOAH Case No. 17-4870 is a fine of $1,500 and a license suspension of 75 days.

B. DOAH Case No. 17-4871 – DBPR Case No. 2016-053062, count I consisting of one class IV drug violation: a fine of $500 and a license suspension of 15 days; DBPR Case No. 2016-053062, count II consisting of one class III drug violation: a fine of $750 and a license suspension of 30 days; DBPR Case No. 2016-053069, count III consisting of one class IV drug violation: a fine of $500 and a license suspension of 15 days. The total penalty imposed for DOAH Case No. 17-4871 is a fine of $1,750 and a license suspension of 60 days.

C. DOAH Case No. 17-4872 – DBPR Case No. 2016-056707, one count consisting of one class II drug violation: a fine of $1,200 ($1,000 fine plus an additional $200 for the aggravating factor regarding the amount of caffeine in the test result for ATASCOCITA HAPPY) and a license suspension of 72 days (60 days plus 12 days for the aggravating factor regarding the amount of caffeine in the test result for ATASCOCITA HAPPY). The total penalty for DOAH Case No. 17-4872 is a fine of $1,200 and a license suspension of 72 days.

D. DOAH Case No. 17-4873 – DBPR Case No. 2017-006845, one count consisting of one class II drug violation: a fine of $1,200 ($1,000 fine plus $200 for the aggravating factor of the failure to take corrective measures after receiving notice) and a license suspension of 72 days (60 days plus 12 days for the

aggravating factor of failing to take corrective measures after receiving notice). The total penalty for DOAH Case No. 17-4873 is a fine of $1,200 and a license suspension of 72 days.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, enter final orders in these proceedings as follows:

A. For DOAH Case No. 17-4870, finding that Respondent committed two violations of section 550.2451(1)(a) and imposing a penalty consisting of a $1,500 fine and suspending Respondent's license for 75 days;

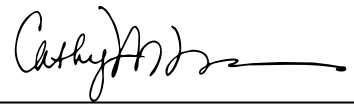
B. For DOAH Case No. 17-4871, finding that Respondent committed three violations of section 550.2415(1)(a) and imposing a penalty consisting of a $1,750 fine and suspending Respondent's license for 60 days;

C. For DOAH Case No. 17-4872, finding that Respondent committed one violation of section 550.2415(1)(a) and imposing a penalty consisting of a $1,200 fine and suspending Respondent's license for 72 days; and

D. For DOAH Case No. 17-4873, finding that Respondent committed one violation of section 550.2415 and imposing a

penalty consisting of a $1,200 fine and suspending Respondent's license for 72 days.

DONE AND ENTERED this 27th day of December, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of December, 2017.

ENDNOTES

[1/] The 2016 version of chapter 550 was in effect at the time of the alleged violations at issue in these consolidated cases.

[2/] Maribel Alonzo and Javier Aparisi-Winthuysen served as interpreters for the final hearing.

[3/] Respondent discussed the photographs in her testimony, but they were not available for viewing at the final hearing, and Respondent had not previously provided them to Petitioner. The undersigned considered Respondent's tender of the photographs as a late-filed exhibit and reserved ruling on their admission pending Petitioner's filing of a response in opposition. On November 6, 2017, Petitioner filed its Response in Opposition to Respondent's Motion to Admit Untimely Evidence. Petitioner's objection to admission of the photographs is overruled and the photographs are admitted into evidence. The legal basis for this ruling and the weight that has been assigned to these photographs is discussed in note 11, infra.

[4/] The final hearing was scheduled for two days, October 23 and 24, 2017. On October 23, Respondent presented the testimony of all but one of her witnesses, whose testimony she planned to present on October 24. However, this witness did not appear and his appearance was not secured by a subpoena. Therefore, the second volume of the Transcript did not contain any sworn testimony or address any other evidence, and consisted only of the ALJ's instructions regarding submitting proposed recommended orders.

[5/] Additionally, at the time the urine sample is collected in the ginny pit, each greyhound is wearing the blanket that identifies its post number in the race immediately following the sample collection. This also assists in identifying the greyhound whose urine is being sampled.

[6/] Pursuant to section 90.202(5), the undersigned takes official recognition of the Partial Summary Final Order entered on December 22, 2017, in Charles F. McClellan and Natasha Nemeth v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, DOAH Case No. 17-5238RU. In that case, the ALJ determined that agency action based on urine sampling procedures that were substantially similar, if not identical, to those set forth in Section 3 of the Greyhound Veterinary Assistant Procedures Manual issued on March 31, 2010 ("2010 Manual") was invalid because it was based on an agency statement that previously had been determined, in Dawson v. Department of Business and Professional Regulation, Case No. 14-5276RU (Fla. DOAH Jan. 29, 2015), aff'd per curiam, Department of Business and Professional Regulation v. Dawson, 187 So. 3d 1255 (Fla. 4th DCA 2016), to constitute an unadopted rule that violated section 120.54(1)(a). Key to the ALJ's determination in McClellan that urine sampling procedures used in that case constituted an unadopted rule was the agency's stipulation that: "[t]he Division and its representatives are still following the protocols and procedures outlined in Section 3 of the 2010 Manual as its protocol for sampling racing greyhounds' urine." By contrast, in the instant proceedings, the parties did not stipulate or otherwise assert that the sampling procedures used to collect and store the urine constitute an unadopted rule that violates section 120.54(1)(a), and the evidence presented in these proceedings was not sufficiently detailed to enable the undersigned to determine whether these procedures were, in fact, substantially similar or identical to those in Section 3 of the 2010 Manual. Accordingly, under the existing record in these proceedings, the undersigned is not able to make a finding that the urine sampling procedures used in these cases constitute an

unadopted rule on which Petitioner would not be entitled to rely as a basis for agency action. However, the undersigned is keenly aware that section 120.57(1)(e) prohibits both the ALJ and the agency from taking agency action based on an unadopted rule. Accordingly, if Petitioner believes that additional evidence needs to be presented in these proceedings to enable salient findings of fact to be made on this issue in these cases, it may, before entering the final orders, remand these proceedings to the undersigned with a request that the evidentiary hearing be re-opened to take additional evidence on this issue, that additional findings of fact on this issue be made, and that a recommended order after remand be entered.

[7/] Petitioner also keeps a log of the urine samples collected from the racing greyhounds. The veterinary assistants who collect the samples fill out tickets with the information consisting of the date on which the race was run; the urine specimen no.; the greyhound's name, color, sex, and age; the track number on which the race was run; the owner's name; the trainer's name; the name of the veterinary assistant who collected the urine sample; and the greyhound's tattoo no.

[8/] Petitioner has a contract with the UF Lab to perform laboratory testing on racing animal urine specimens for the presence of impermissible medications or prohibited substances in racing animals.

[9/] Discrepancy forms are completed by UF Lab staff and transmitted to the pari-mutuel wagering facility, which subsequently contacts the UF Lab with the correct information regarding specimen number or date.

[10/] In the letter that Respondent submitted with the late-filed exhibit consisting of eight photographs, which has been treated as her proposed recommended order, Respondent asserted additional arguments, not presented at the final hearing, to support her position that the urine samples that tested positive for prohibited substances were not taken from the greyhounds that are the subject of these proceedings. Specifically, she argues that the medications detected in the urine samples are performance-enhancing substances, but the results of consecutive races by the same greyhounds do not show enhanced performances. This argument is rejected. There was no evidence presented showing that administration of a performance-enhancing medication always results in enhancement of the racing greyhound's performance. Accordingly, it cannot be inferred from the evidence in the record that the greyhounds' failure to

exhibit enhanced performance in consecutive races proves that they were not administered performance-enhancing medications. Respondent also asserts that on October 15, 2016, on which a urine sample was collected from ATASCOCITA DALT, she did not work, because she does not work on Saturdays. This argument also fails. First, there no evidence presented at the hearing to support her assertion that she does not work on Saturdays, or, specifically, that she did not work on Saturday, October 15, 2016, when the urine sample was collected from ATASCOCITA DALT. Furthermore, Petitioner's Exhibit 4, the program for the second race on the afternoon of Saturday, October 15, 2016, shows ATASCOCITA DALT as running from the eighth post position. Respondent presented no evidence to show that this exhibit, which was authenticated by Zimmerman, as Petitioner's records custodian, contained incorrect information regarding ATASCOCITA DALT.

[11/] Testa and Agganis also expressed concern that because urine sample collection occurs in the ginny pit, which is not accessible to trainers, the trainers are not able to verify, through their own observations, that the urine sampling is conducted according to Petitioner's established protocol. However, neither Testa nor Agganis identified any specific instances in which the urine sampling at PBKC was not conducted according to protocol, and, most important, no evidence was presented showing that the urine specimens at issue in these specific proceedings were not collected according to that protocol.

[12/] Petitioner opposed the admission of these photographs on the ground that they were not provided by Respondent before the final hearing, so constitute unfair surprise to Petitioner; that they are not authenticated; and that they are not relevant to any material issue in these proceedings. As the Supreme Court of Florida recently observed in Florida Industrial Power Users Group v. Graham, 209 So. 3d 1142, 1146 (Fla. 2017), the Florida Evidence Code is not applicable to administrative proceedings, and administrative agencies therefore possess the discretion whether to require the parties to strictly adhere to the evidentiary rules established in chapter 90, Florida Statutes. Here, because Respondent appeared pro se and is not familiar with evidentiary principles regarding authentication; because the photographs, if authentic, are tangentially relevant to show general conditions present at the PBKC, albeit not necessarily on the dates on which the greyhounds that are the subject of these proceedings raced; and because Petitioner was able to conduct cross-examination at the final hearing regarding the

photographs, the undersigned determines that they should be, and therefore are, admitted into evidence. However, for the reasons discussed herein, they have been given minimal weight.

[13/] The penalty schedules for the types of violations establish a range of penalties that may be imposed per violation, so afford the agency discretion to impose a penalty that falls within that range. Importantly, the agency's exercise of discretion must be based on evidence in the record that supports the agency's exercise of its discretion. See Fla. Power and Light Co. v. Siting Bd., 693 So. 2d 1025, 1027-28 (Fla. 1st DCA 1997); E.M. Watkins & Co. v. Bd. of Regents, 414 So. 2d 583 (Fla. 1st DCA 1982).

[14/] Although in paragraph 66 of its Proposed Recommended Order, Petitioner requests that a suspension of "forty-five" days be imposed for the class III drug violation, the amount stated in the accompanying parenthetical is "(30)." Similarly, although Petitioner requests that a suspension of "thirty" days be imposed for each class IV drug violation, the amount stated in the accompanying parenthetical is "(15)." The undersigned has determined, based on the total length of suspension requested, that the amounts stated in the parentheticals represent the length of suspension requested for the class III and class IV violations.

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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.