STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE FLORIDA HORSEMEN'S
BENEVOLENT AND PROTECTIVE
ASSOCIATION, INC.,

Petitioner,

vs. Case No. 17-5882RX

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

Respondent.
_____/

FINAL ORDER

On January 29, 2018, Administrative Law Judge Lisa Shearer Nelson held the first portion of a rule challenge pursuant to section 120.56, Florida Statutes (2017), for the purpose of issuing a partial final order in this proceeding, which was issued March 13, 2018, and affirmed by the First District Court of Appeal on March 7, 2019. By Order dated May 25, 2018, the hearing scheduled to hear evidence related to the issues remaining in the proceeding was canceled and outstanding issues have been determined based upon deposition testimony and other exhibits filed by the parties.

APPEARANCES

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For Respondent: Louis Trombetta, Esquire
Department of Business and
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STATEMENT OF THE ISSUE

The issue for determination in this proceeding is whether Florida Administrative Code Rule 61D-6.011 is an invalid exercise of delegated legislative authority, in violation of section 120.52(8).

PRELIMINARY STATEMENT

On October 26, 2017, Petitioner, The Florida Horsemen's Benevolent and Protective Association, Inc. (FHBPA or Petitioner), filed a Petition to Challenge Rule 61D-6.011, F.A.C. (2016) (Petition). On October 31, 2017, Chief Judge Robert S. Cohen issued an Order of Assignment, assigning the matter to the undersigned. On November 7, 2017, a Notice of Hearing was issued, scheduling the hearing for November 28, 2017.

On November 13, 2017, Respondent filed a Stipulated Motion for Continuance, based upon pre-planned travel plans by Respondent's counsel. After a scheduling conference with the parties on November 14, 2017, the continuance was granted and the

case was rescheduled for December 18, 2017. On December 8, 2017, Respondent again requested a continuance, based upon attorney resource issues. Although Petitioner originally objected to the continuance, it withdrew its objection and the case was rescheduled for January 29, 2018.

On January 12, 2018, Respondent moved for a stay of the proceedings, citing its intention to amend the rule and the conduct of rule development workshops. Petitioner opposed the motion, noting that workshops had taken place over a year's time with no Notice of Proposed Rulemaking. A telephonic hearing was conducted, after which an Order was entered bifurcating the proceeding in order to consider the issue of whether Respondent was required to adopt the recommended penalties of the Association of Racing Commissioners International, Inc. (ARCI), (ARCI Recommended Penalties) provided in the ARCI Uniform Classification Guidelines for Foreign Substances and Recommended Penalties and Model Rule, version 8 (ARCI Document) in its rule. It was agreed at that time that, depending on the ruling made in the Partial Final Order, a separate hearing would be conducted to address the remaining issues raised in the Petition.

On January 25, 2018, the parties filed a Joint Pre-hearing Stipulation that contained a limited number of facts for which no evidence at hearing would be required, and those stipulated facts have been incorporated into the findings of fact below. The

hearing for the first issue was conducted as scheduled on January 19, 2018, at which time Petitioner presented the testimony of Edward Martin by telephone. Joint Exhibits 1 through 6, Petitioner's Exhibit 7, and Respondent's Exhibit 8 were admitted into evidence.

On February 1, 2018, Respondent filed a copy of the Notice of Proposed Rule, which includes language to amend rule 61D-6.011, which was published in the Florida Administrative Register, Volume 44, Number 22, on February 1, 2018.

The Transcript of the proceeding was filed February 9, 2018. Both parties timely filed their proposed partial final orders on February 19, 2018.

On March 13, 2018, a Partial Final Order was issued which found that the rule constituted an invalid exercise of legislatively delegated authority, in that it contravenes section 550.2415(7)(c), Florida Statutes, by failing to incorporate by reference the ARCI Recommended Penalties. The Partial Final Order directed the parties to file a status report no later than March 22, 2018, advising whether a hearing was still required to address the remaining issues alleged in the Petition to Challenge Rule 61D-6.011, F.A.C.; and, if so, provide mutually agreeable dates for holding that hearing. Jurisdiction was retained for the purpose of determining whether attorney's fees and costs are warranted, and, if so, the amount.

On April 6, 2018, the Department appealed the Partial Final Order to the First District Court of Appeal, where it was docketed as Case No. 1D18-1434.

The remaining issues alleged in the Petition were scheduled for hearing to take place on May 23, 2018. However, because of a series of unprecedented storms occurring down the eastern seaboard of the United States, Petitioner's witnesses were unable to appear at the hearing because of canceled and/or delayed flights. A status conference was held on May 22, 2018, wherein the parties advised of the flight dilemma, and after discussion with the parties, it was agreed that Petitioner would submit the testimony of its witnesses by deposition, the hearing would be canceled, and the remaining issues in the case would be decided based upon the deposition testimony and other exhibits submitted.

The depositions of the witnesses were filed on June 20, 2018, and after an unopposed motion for extension of time, the parties' Proposed Partial Final Orders were filed on July 13, 2018. Because a portion of the case remained on appeal, thus preventing the issuance of a Final Order while the appeal remained pending, the case was placed in abeyance by Order dated August 16, 2018.

On March 7, 2019, the First District Court of Appeal issued an Opinion affirming the Partial Final Order, and after issuance of the Mandate on March 28, 2019, an Order to Show Cause was

issued directing the parties to show cause, given that the rule in question has since been amended, why the remaining issues are not moot. After review of both responses, a determination on the merits of Petitioner's claim is included in this Final Order. All references to the Florida Statutes are to the 2017 codification.

FINDINGS OF FACT

1. Petitioner, FHBPA, is a Florida not-for-profit corporation created to advance, foster, and promote the sport of thoroughbred horse racing in the State of Florida. FHBPA's membership includes over 200 Florida-licensed horse trainers and over 5,000 Florida-licensed horse owners, and has associational standing to file and prosecute actions on behalf of its members. Respondent has not challenged FHBPA's standing to bring this proceeding.

2. Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (PMW), is the state agency charged with the regulation of pari-mutuel wagering in the State of Florida, pursuant to section 20.165 and chapter 550, Florida Statutes.

3. The question to be decided in this proceeding is what the Legislature meant when it amended section 550.2415(7) in 2015, and whether rule 61D-6.011 carries out the legislative directive it contains.

4. Before the 2015 legislative session, section 550.2415 stated, in pertinent part:

> (3)(a) 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 $5,000; require the full or partial return or the purse, sweepstakes, and trophy of the race at issue; or impose against the violator any combination of such penalties. The finding of a violation of this section in no way prohibits a prosecution for criminal acts committed.
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> (7)(e) The division may, by rule, establish acceptable levels of permitted medications and shall select the appropriate biological specimens by which the administration of permitted medication is monitored.
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> (12) The division shall adopt rules to implement this section. The rules may include a classification system for prohibited substances and a corresponding penalty schedule for violations.
> (13) Except as specifically modified by statute or by rules of the division, the Uniform Classification Guidelines for Foreign Substances, revised February 14, 1995, as promulgated by the Association of Racing Commissioners International, Inc., is hereby adopted by reference as the uniform classification system for class IV and V medications. (Emphasis added).

5. During the 2015 legislative session, the Legislature substantially amended section 550.2415. Ch. 15-88, § 1, Laws of Fla. Not all of the changes made are germane to the challenge at

issue here, but the amendments to subsections (3) and (7) are critical:

> (3)(a) 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. The finding of a violation of this section does not prohibit a prosecution for criminal acts committed.
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> (7)(a) In order to protect the safety and welfare of racing animals and the integrity of the races in which the animals participate, the division shall adopt rules establishing the conditions of use and maximum concentrations of medications, drugs, and naturally occurring substances identified in the Controlled Therapeutic Medication Schedule, Version 2.1, revised April 17, 2014, adopted by the Association of Racing Commissioners International, Inc. Controlled therapeutic medications include only the specific medications and concentrations allowed in biological samples which have been approved by the Association of Racing Commissioners International, Inc., as controlled therapeutic medications.
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> (c) 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. The division shall adopt laboratory screening limits approved by the Association of Racing Commissioners International, Inc., for drugs and medications that are not included as controlled therapeutic medications, the presence of which in a sample may result in a violation of this section. (Emphasis added).

6. The title page of the ARCI Document states, "Uniform Classification Guidelines for Foreign Substances and Recommended Penalties and Model Rule." Each of the remaining pages of the ARCI Document, including those pages that encompass the ARCI Recommended Penalties, identifies the ARCI Document as the "Uniform Classification Guidelines for Foreign Substances." The Notes Regarding Classification Guidelines, found at page ii, states that "Where the use of a drug is specifically permitted by a jurisdiction, then the jurisdiction's rule supersedes these penalty guidelines." (Emphasis added).

7. Rules 61D-6.011 and 61D-6.008 were amended in 2016, in response to the amendments to section 550.2415. Rule 61D-6.008 addresses permitted medications allowed for horses, and rule 61D-6.011 addresses the penalties to be imposed for drug violations. Relevant portions of rule 61D-6.011 provide:

> (1) The penalties in this rule shall be imposed when the stewards or the Division finds that the following substances have been identified by the state laboratory in a urine sample or blood sample collected from

a horse participating in a pari-mutuel event:
(a) Any medication listed in subsection 61D-6.008(2), F.A.C.

[1.-3. provide penalty ranges for first, second, and third offenses]

(2) The penalty for any medication or drug which is not described in subsection (1) above shall be based upon the classification of the medication or drug found in the Uniform Classification Guidelines for Foreign Substances, revised December 2014, as promulgated by the Association of Racing Commissioners International, Inc., which is hereby incorporated and adopted herein by reference, https://flrules.org/Gateway/reference.asp?No=Ref-06400, www.myfloridalicense.com/dbpr/pmw or by contacting the Department of Business and Professional Regulation, 2601 Blair Stone Road, Tallahassee, Florida 32399.
The penalty schedule shall be as follows:

(a) Class I substances:	
1. First violation of this chapter	$3,000 to $5,000 fine and suspension of license 90 days to one year, or revocation of license;
2. Second violation of this chapter	$4,000 to $5,000 fine and suspension of license of no less than one year, or revocation of license.
3. Third or subsequent violation of this chapter	$5,000 to $10,000 fine and revocation of license.
(b) Class II substances:	
1. First violation of this chapter	$250 to $1,000 fine and suspension of license zero to 180 days;

2. Second violation of this chapter	$500 to $1,000 fine and suspension of license of no less than 180 days, or revocation of license;
3. Third or subsequent violation of this chapter	$1,000 to $5,000 fine and suspension of license of no less than one year, or revocation of license
(c) Class III substances:	
1. First violation of this chapter	$300 to $500 fine;
2. Second violation of this chapter	$500 to $750 fine and suspension of license zero to 30 days, or revocation of license;
3. Third or subsequent violation of this chapter	$750 to $1,000 fine and suspension of license zero to 180 days, or revocation of license.
(d) Class IV or V substances:	
1. First violation of this chapter	$100 to $250 fine;
2. Second violation of this chapter	$250 to $500 fine and suspension of license zero to 10 days;
3. Third violation of this chapter	$500 to $1,000 fine and suspension of license zero to 60 days.

(3) The Division may consider mitigation or aggravation to deviate from these penalty guidelines.

* * *

(5) Absent mitigating circumstances, the stewards or the Division shall order the return of any purse, prize, or award from any pari-mutuel event for redistribution when a

> positive test for a drug or medication described in paragraphs (1)(a), (1)(b), (2)(a), or (2)(b) is reported by the state laboratory and confirmed through the hearing process.
> (6) The stewards or the Division may order the return of any purse, prize, or award for redistribution when the positive test of a drug or medication reported by the state laboratory is not described in paragraphs (1)(a), (1)(b), (2)(a), or (2)(b) of this rule. In the event the stewards or Division orders the return of the purse, prize, or award for redistribution as described in this subsection, the reason(s) for the redistribution shall be provided in writing. (Emphasis added).

8. Rule 61D-6.011 varies from the penalty provisions in the ARCI Recommended Penalties in several respects. First, in the drug classification tables in the ARCI Document, which the rule incorporates by reference, there are columns to identify the drug or substance; trade name, if any; drug class; and penalty class. Not all drugs in a drug class are in the same penalty class. For example, all class 1 drugs are in penalty class A, with the exception of cocaine, morphine, and strychnine, which are in penalty class B. The majority of class 2 drugs are also in penalty class A, with the exception of caffeine, carisoprodol, diazepam, hydroxyzine, ketamine, levamisole, lidocaine, mepivacaine, and romifidine, which are in penalty class B. Class 3 drugs are generally split between penalty classes A and B, and class 4 drugs include both penalty classes B and C. Similarly, class 5 drugs are split between penalty classes C

and D. It is clear from the text of the ARCI Document that the drug classifications and the penalty guidelines are intended to work together as a comprehensive approach to the impermissible drugging of racing horses.

9. In the Recommended Penalty and Model Rule portion of the ARCI Document, there are separate penalties recommended for licensed trainers and for owners. For trainers, class A penalties include a minimum fine of $10,000 or 10% of the total purse, whichever is greater, absent mitigating circumstances, to a maximum of $25,000 or 25% of the purse with aggravating factors for a first offense. For a second offense in any jurisdiction, the fine amount is $25,000 or 25% of the total purse, whichever is greater, absent mitigating circumstances, and may increase with aggravating circumstances to a maximum of $50,000 or 50% of the purse, whichever is greater. For a third offense in any jurisdiction, the minimum fine is $50,000 or 50% of the total purse, whichever is greater, absent mitigating circumstances, and may increase with aggravating circumstances to a maximum of $100,000 or 100% of the purse, whichever is greater.

10. For owners, the first and second offenses include disqualification and loss of purse. The penalty for a third offense includes disqualification, loss of purse, and a $50,000 fine.

11. For owners and trainers, the monetary penalties may exceed the maximum permitted under section 550.4215(3), which authorizes a fine not exceeding the purse or sweepstakes earned by the animal, or $10,000, whichever is greater.

12. The parties have submitted the House and Senate Bill analyses that address the amendment to section 550.2415 at issue here.[1/] The House of Representatives Final Bill Analysis for CS/HB 239 includes the following statements:

> The bill changes the maximum fine for violations from $5,000 to $10,000 or the amount of the purse, whichever is greater. The bill also reduces the time for the division to begin administrative prosecutions for violations from 2 years to 90 days.
>
> The bill requires the division to adopt the Association of Racing Commissioners International (ARCI) rules regarding the medications, drugs, and naturally occurring substances given to race animals, including a classification system for drugs that incorporates ARCI's Penalty Guidelines for drug violations, and updates current methodologies used in testing procedures. . . .
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> **Effect of Proposed Changes**
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> The bill requires that the penalty schedule for violations must incorporate the Uniform Classification Guidelines for Foreign Substances, Version 8.0, revised December 2014, by the ARCI. These guidelines are "intended to assist stewards, hearing offices and racing commissioners in

> evaluating the seriousness of alleged violations of medication and prohibited substance rules. . . ."

13. The bill analysis for CS/SB 226 contains similar provisions stating that the ARCI Penalty Guidelines must be incorporated into a rule adopted by Respondent.

14. The penalty guidelines included in rule 61D-6.011 do not incorporate the ARCI Recommended Penalties.

15. The PMW's website includes a listing of statutes and rules, with links to the rules. Included in that list is a statement that "The Association of Racing Commissioners International, Inc. 'Uniform Classification Guidelines for Foreign Substances and Recommended Penalties and Model Rule' is adopted and incorporated by rule."

16. Notwithstanding this statement, the ARCI Recommended Penalties are not incorporated into rule 61D-6.011 or any other rule identified in this proceeding.

17. The rule provides for consideration of a number of aggravating and mitigating circumstances, when warranted, that allow for deviation from the identified penalty guidelines.

18. As noted above, rule 61D-6.011(1) refers to the medications listed in rule 61D-6.008. Rule 61D-6.008 provides in pertinent part:

> Permitted medications for horses:
> (1) The prescription medications defined in this rule shall be permitted under the

> conditions set forth to conserve and protect the health of the horse which is entered to race. All such medications shall be procured and administered by a licensed veterinarian, except where a valid prescription or dispensing occurs in compliance with the requirements of Chapter 474, F.S.
> (2) The following permitted medications at concentrations less than or equal to the following schedule shall not be reported by the racing laboratory to the Division as a violation of Section 550.2415, F.S.
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> [list of medications and concentration levels for each one].

Thus, subsection (1) of rule 61D-6.011 addresses violations where too much of a permitted medication is found in a race day sample, whereas subsection (2) addresses violations based upon prohibited medications.

19. Petitioner presented the testimony of Scott Hay and Edward Martin in support of its contention that the penalty guidelines adopted by PMW are arbitrary and capricious. Dr. Scott Hay is a veterinarian who has worked with thoroughbred racehorses since 1988. He is a member of the American Association of Equine Practitioners, the American Veterinary Medical Association, and the Florida Veterinary Association. He serves as co-chair on the scientific advisory committee for the Racing Medication and Testing Consortium, which worked on the development of the ARCI Document. Dr. Hay was familiar with the ARCI Document and described the process used to determine threshold levels for

medications. He testified that the scientific advisory committee relied extensively on the expertise of some of its members to determine the appropriate levels of medications that would be appropriate under the drug classifications. On the other hand, while he is familiar with PMW's rules and was involved in the rulemaking workshops when the rules were first amended after the 2015 statutory change, he did not believe that he made any comments on these particular rules during that process. He did not provide any testimony that provided information on what methodology PMW used when formulating its penalty guidelines.

20. Mr. Martin works for the Association of Racing Commissioners International as its president and has done so since 2005. He testified that the Racing Medication and Testing Consortium is a consortium of racing industry organizations that advises ARCI and regulatory entities on medication and anti-doping policies. He described the process by which the scientific advisory committee meets and considers recommendations on changes to policies. According to Mr. Martin, the scientific advisory committee relies on the collective judgment of the pharmacologists, chemists, toxicologists, and veterinarians to provide advice and expertise about appropriate public policy. The controlled therapeutic medication schedule is an attempt to provide some consistency in the regulation of some commonly used medications that are considered appropriate for equine care. The

schedule recommends a threshold for testing, and only if that threshold is exceeded, is there a violation of the rules of racing.

21. Mr. Martin pointed to the reference in rule 61D-6.011 to rule 61D-6.008. He testified that what "struck him" about the Florida rules is that rule 61D-6.008 encompasses the controlled therapeutic list, but rule 61D-6.011(1) appears to provide the same penalty for any violation of a substance itemized in 61D-6.008. This treatment is not consistent with ARCI's penalty schedule, but Mr. Martin did not know whether Florida made a conscious decision to impose a different recommended penalty than what is contained in the ARCI Document, and did not know the intent of the drafters with respect to the rule.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.56, 120.569, and 120.57(1), Florida Statutes.

23. Petitioner has standing to participate in this case. Section 120.56 allows a person who is substantially affected by a rule or agency statement to initiate a challenge. To establish standing under the "substantially affected" test, generally a party must demonstrate that: 1) the rule will result in a real and immediate injury in fact, and 2) the alleged interest is

within the zone of interest to be protected or regulated. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358 (Fla. 1st DCA 2005); see also Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery, Inc., 808 So. 2d 243, 250 (Fla. 1st DCA 2002), superseded on other grounds, Dep't of Health v. Merritt, 919 So. 2d 561 (Fla. 1st DCA 2006).

24. With respect to associational standing, the Supreme Court of Florida has stated that to meet the requirements of section 120.56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule. The subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members. NAACP, Inc. v. Fla. Bd. of Regents, 863 So. 2d 294, 298 (Fla. 2003); Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec., 412 So. 2d 351 (Fla. 1982). That standard has been met here, and the parties do not dispute Petitioner's standing to participate in this proceeding.

25. Petitioner is challenging an existing, as opposed to a proposed, rule. Section 120.56(3) requires Petitioner to prove by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised.

26. A preponderance of the evidence has been defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

27. Section 120.56(1)(a) provides that any person substantially affected by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority. Section 120.52(8) defines "invalid exercise of delegated legislative authority." It provides:

> (8) "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could

> be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

28. In its Petition, Petitioner identified three bases in section 120.52(8) for invalidating the rule: that PMW exceeded its grant of authority within the meaning of section 120.52(8)(b); that the rule modifies and contravenes the express directive of section 550.2415(7)(c), in violation of section 120.52(8)(c); and that the rule is arbitrary and capricious in violation of section 120.52(8)(e). As provided by the Order dated January 19, 2018, the Partial Final Order only addressed whether rule 61D-6.011 is an invalid exercise of delegated legislative authority in violation of section 120.52(8)(c).

Whether Section 550.2415(7)(c) is Ambiguous

29. In order to resolve whether rule 61D-6.011 modifies or contravenes the directive in section 550.2415(7)(c) in violation of section 120.52(8)(c), it must be determined whether the directive in section 550.2415(7)(c) is ambiguous. A statute is "ambiguous" when its language is subject to more than one reasonable interpretation and may permit more than one outcome. Nicarry v. Eslinger, 990 So. 2d 661, 664 (Fla. 5th DCA 2008). As stated by the Supreme Court of Florida:

> The polestar of a statutory construction analysis is legislative intent. See Borden v. East-European Ins. Co., 921 So. 2d 587, 595 (Fla. 2006). To discern legislative intent, this Court looks first to the plain and obvious meaning of the statute's text, which a court may discern from a dictionary. See Rollins v. Pizzarelli, 761 So. 2d 294, 297-98 (Fla. 2000). If that language is clear and unambiguous and conveys a clear and definite meaning, this Court will apply that unequivocal meaning and not resort to the rules of statutory interpretation and construction. See Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). If, however, an ambiguity exists, this Court should look to the rules of statutory construction to help interpret legislative intent, which may include the examination of a statute's legislative history and the purpose behind its enactment. See, e.g., Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc., 948 So. 2d 599, 606-07 (Fla. 2006).

W. Fla. Reg'l Med. Ctr., Inc. v. See, 79 So. 3d 1, 9 (Fla. 2012); see also Kasischke v. State, 991 So. 2d 803, 807 (Fla. 2008); Daniels v. Fla. Dep't of Health, 898 So. 2d 61, 64-65 (Fla.

2005); Dep't of Rev. v. Cent. Dade Malpractice Trust Fund, 673 So. 2d 899, 900 (Fla. 1st DCA 1996).

30. Respondent argues that the legislative intent can be discerned from the plain language of section 550.2415(7)(c), and focuses on the Legislature's use of the word "a" before the phrase "penalty schedule." PMW contends that because the word "a" connotes "not identified," "undetermined," or "unspecified," it could then adopt its own penalty schedule as opposed to the one in the ARCI Document.

31. It is noted that the word "a" is used before both the reference to the penalty schedule and the classification system for drugs, and yet Respondent clearly recognizes its responsibility to incorporate by reference into its rules the drug classifications in the ARCI document.

32. More importantly, Respondent's argument ignores the order of the terms used in section 550.2415. Subsection (7)(c) states that the "division rules must include a classification system for drugs . . . and a corresponding penalty schedule for violations which incorporates the Uniform Classification Guidelines for Foreign Substances." (Emphasis added). PMW's reading of this provision would have the phrase "which incorporates the Uniform Classification Guidelines for Foreign Substances" omit the reference to penalty guidelines in order to describe only the classification system. Such a strained reading

ignores the doctrine of the last antecedent, which provides, "relative and qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to, or including, others more remote." Kasischke v. State, 991 So. 2d 803, 811 (Fla. 2008) (quoting City of St. Petersburg v. Nasworthy, 751 So. 2d 772, 774 (Fla. 1st DCA 2000)); Jacques v. Dep't of Prof'l Reg., 15 So. 3d 793, 796 (Fla. 1st DCA 2009).

33. Such an interpretation not only strains the rules of grammar, but requires a rewording of section 550.2415, something that an administrative law judge is not empowered to do. It is not within the province of this administrative law judge to write the language related to penalty schedules out of the statute, or to reword the statute to suit Respondent's interpretation. A "statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts." Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC, 986 So. 2d 1260, 1265 (Fla. 2008).

34. Respondent also contends that because section 550.2415(7)(c) omits the words "and Recommended Penalties and Model Rules" in its description of the ARCI Document, this omission is an indication that PMW need not incorporate the penalty schedules. As noted by Petitioner, the shortened title of the ARCI Document used by the Legislature appears on every

page of the ARCI Document. The Legislature's use of the shortened name does not indicate an intention to only require incorporation of the drug classifications portion of the ARCI Document. If that had been the case, the Legislature would not have placed the reference to the penalty schedules immediately prior to the phrase, "which incorporates the Uniform Classification Guidelines for Foreign Substances."

35. It is found that the plain language of section 550.2415(7)(c) requires the incorporation of the entire ARCI Document, and not just the drug classifications.

Legislative Intent

36. Even if it was determined that the language of section 550.2415(7)(c) was ambiguous, which it is not, the staff analyses of both the House and the Senate reinforce the finding that the intent of both chambers was for the penalty schedules to be incorporated by reference into PMW's rules. The Final Bill Analysis specifically states that "the bill requires that the penalty schedule for violations must incorporate the Uniform Classification Guidelines for Foreign Substances, Version 8.0, revised December 2014, by the ARCI." While it is not necessary to resort to evidence of legislative intent to determine the meaning of section 550.2415(7)(c), the staff analyses submitted by the parties clearly supports the finding that the Legislature

intended that the entire ARCI Document must be incorporated by reference in Respondent's rules.

Conflict between Subsections (3) and (7)(c)

37. Respondent points out that some of the monetary penalties included in the ARCI Recommended Penalties may exceed the statutory limit for fines provided in section 550.2415(3). That section authorizes fines "in an amount not exceeding the purse or sweepstakes earned by the animal in the race at issue or $10,000, whichever is greater." The ARCI Recommended Penalties for class A penalties with respect to trainers provide for a maximum of $25,000 or 25% of purse for a first offense, to a maximum of $100,000 or 100% of purse for a third offense. No evidence was provided with respect to the monetary value of purses awarded in races in Florida.

38. Rules of statutory construction require that a statute should be interpreted to give effect to every clause in it and to accord meaning and harmony to all of its parts. Larimore v. State, 2 So. 3d 101, 106 (Fla. 2008). A statutory subsection cannot be read in isolation, but must be read within the context of the entire section in order to determine legislative intent for the provision. Id. at 114. If one portion of a statute appears clear, when read in isolation, but is inconsistent with other parts of the same statute, then the entire statute must be

examined in order to ascertain the overall legislative intent. ContractPoint Fla. Parks, 986 So. 2d at 1265-1266.

39. Assuming for the sake of discussion that there are purses that are less than $10,000, then there may be instances where imposing the penalty identified in the ARCI Recommended Penalties would exceed the authority granted in section 550.2415(3).

40. The undersigned is required to construe two apparently contradictory statements in harmony if there is any "fair, strict, or liberal construction" that can achieve a reasonable field of operation for both without destroying their evident intent and meaning. There must be a hopeless inconsistency between the two provisions before rules of construction are applied to defeat the plain language of one of them. Dep't of Educ. v. Educ. Charter Found. of Fla., Inc., 177 So. 3d 1036, 1039 (Fla. 1st DCA 2015); Knowles v. Beverly Enters.-Fla., Inc., 898 So. 2d 1, 9 (Fla. 2004).

41. Respondent points to the conflict between subsections (3) and (7)(c) as a basis for not incorporating the ARCI Recommended Penalties into its rule. This option, however, is unnecessary when a less intrusive compromise can be reached. Respondent can give credence to both provisions by specifying in its rule that, to the extent the recommended penalty identified in the ARCI Recommended Penalties exceeds the penalty allowed in

section 550.2415(3), then the limit provided in section 550.2415(3) would prevail. In any event, the perceived conflict does not divest Respondent of its responsibility pursuant to section 550.2415(7)(c) to incorporate the entire ARCI Document into its rules.

42. Rule 61D-6.011 is an invalid exercise of legislatively delegated authority as defined in section 120.52(8)(c), in that it contravenes section 550.2415(7)(c) by failing to incorporate by reference the ARCI Recommended Penalties. For the same reasons, the rule exceeds the PMW's grant of authority in violation of section 120.52(1)(b).[2/]

Arbitrary and Capricious

43. Section 120.52(8)(e) also declares that a rule is an invalid exercise of delegated legislative authority when it is arbitrary and capricious. The statute incorporates a long-standing definition of the term, stating that a rule is arbitrary if it "is not supported by logic or the necessary facts." A rule is capricious "if it is adopted without thought or reason or is irrational." See Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, 634 (Fla. 1st DCA 1992).

44. The Petition gives limited guidance in explaining why Petitioners contend the rule is arbitrary and capricious. It alleges at paragraph six that:

> 6. The "penalties set forth in the Division's Penalty Rule are contrary to, and in most instances more severe, than the penalties set forth in ARCI Version 8. Petitioner FSBPA's members are substantially affected by the Division's Penalty Rule. Petitioner's trainer members are substantially affected to the extent that the Division's Penalty Rule is not consistent with the Penalty Guidelines and requires harsher penalties than those set forth in the ARCI Penalty Guidelines. Petitioner's owner members are substantially affected by the Division's Penalty Rule to the extent that it requires purses earned by horses they own to be forfeited when the ARCI Penalty Guidelines would not require forfeiture of purses earned.
>
> * * *
>
> 10. Furthermore, the Division's adoption of the Division's Penalty Rule, as set forth in Rule 61D-6.011, was an "invalid exercise of delegated legislative authority" within the meaning of Fla. Stat. 120.52(8)(e) as the rule is arbitrary and capricious.

45. The fact that the penalties imposed by the rule are different than the penalties imposed under the ARCI Document does not make the rule arbitrary and capricious. Moreover, while the evidence presented provided insight into process for drafting the ARCI Document, it did not shed light on the process used for formulating rule 61D-6.011. While the rule is invalid because it violates section 120.52(8)(b) and (c), there is insufficient evidence to find that the rule is arbitrary and capricious.

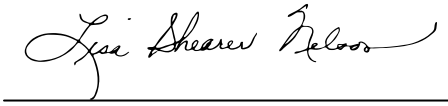
46. Petitioner has requested attorney's fees and costs pursuant to section 120.595(3), and the First District Court of

Appeal has ordered appellate attorney's fees. The issues related to fees will be considered in Case Numbers 18-2733F and 19-1661FC.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that rule 61D-6.011 is an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 12th day of April, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of April, 2019.

ENDNOTES

[1/] The House version of the bill, CS/HB 239, is the bill that became chapter 2015-88, Laws of Florida. The Senate version, CS/SB 226, contained the same requirement with respect to adoption of the ARCI classification guidelines and penalty schedule.

[2/] The alleged violation of section 120.52(1)(b) was not discussed in the Partial Final Order. However, as noted in Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise

Association, 794 So. 2d 696, 701 (Fla. 1st DCA 2001), subsections (b) and (c) are interrelated. Finding that both were violated in this instance adds nothing to the analysis already expressed in the Partial Final Order, but the finding is included in order to fully dispose of the issues raised in the Petition.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.