STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH GREYHOUND KENNEL ASSOCIATION,

Petitioner,

vs. Case No. 18-0915RP

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

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was conducted in this case on February 19, 2019, in Tallahassee, Florida, before E. Gary Early, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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For Respondent: Jett Lee Baumann, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Department of Business and Professional Regulation, Division of Pari-mutuel Wagering ("Respondent" or "Division"), has demonstrated that its approval of certain provisions of proposed rule 61D-6.0052 that were found to be invalid exercises of delegated legislative authority was substantially justified, or whether special circumstances exist which would make an award of fees unjust, so as to constitute a defense against an award of reasonable attorney's fees and costs to Petitioner, Palm Beach Greyhound Kennel Association ("Petitioner" or "PBGKA") pursuant to section 120.595(2), Florida Statutes.

PRELIMINARY STATEMENT

A Final Order was entered in the underlying rule challenge case on October 1, 2018. Jurisdiction was retained for the purpose of determining reasonable attorney's fees and costs pursuant to section 120.595(2), and whether the Division's actions were substantially justified or special circumstances exist which would make the award unjust.

On October 15, 2018, Petitioner filed its Motion to Tax Attorneys' Fees and Costs. The case was set for hearing to convene on February 19, 2019.

On February 8, 2019, the parties filed their Joint Pre-hearing Stipulation. Among the stipulations was the following:

> Respondent and Petitioner have stipulated that, in the event that it is determined that Petitioner is entitled to fees and costs pursuant to section 120.595(2), Florida Statutes, Petitioner is entitled to total of $50,000 for all fees and costs associated with Case No. 18-0915RP through the date a Final Order is entered following the hearing that is currently set for February 19, 2019.

The hearing was convened as scheduled on February 19, 2019. At the commencement of the final hearing, Petitioner's Motion for Summary Final Order Awarding Attorneys' Fees and Costs, Respondent's Motion in Limine to Exclude the Testimony of Brad Beilly, and Petitioner's Motion in Limine to Preclude Respondent from Presenting Certain Evidence and Argument were taken up. Each was denied. However, Mr. Beilly's testimony was generally limited to his testimony as a fact witness.

The Division called Kate Marshman, its program administrator, to testify on its behalf. Respondent's Exhibits 1.a. through 1.p., 2, and 3 were received in evidence.

Petitioner called Bradford Beilly, Esquire, and Jennifer Rosenblum, Esquire, to testify on its behalf. Petitioner's Exhibits 1 through 4, 9, 10, and 13 were received in evidence.

In addition to the foregoing, the record of the underlying rule challenge was identified as part of the record, including Joint Exhibits 2 through 9, 11, 12, 14, 15, 20 through 23, 36, 37, 40 and 41; Petitioner's Exhibits 1, 10, 13, 16 through 19, 24 through 35, and 38; and Respondent's Exhibits 1 through 12.

The two-volume Transcript of the proceeding was filed on March 18 and 22, 2019. After a joint motion for extension of time was granted, the parties filed proposed final orders on April 8, 2019, which have been considered.

On April 11, 2019, Petitioner filed a Motion to Strike certain portions of the Division's Proposed Final Order, which it believed to be inflammatory. On April 15, 2019, the Division filed its response. Having considered both, the motion is denied.

All references to statutes are to the versions in effect on October 1, 2018, the date on which portions of proposed rule 61D-6.0052 were found to be invalid exercises of delegated legislative authority, and Petitioner became entitled to an award of fees, subject to the defenses set forth herein.

FINDINGS OF FACT

1. PBGKA prevailed in DOAH Case No. 18-0915RP on several provisions of proposed rule 61D-6.0052 ("Proposed Rule"), which governs the collection of urine samples from racing greyhounds for determining if the greyhounds have prohibited substances in their systems. As the prevailing party, PBGKA requests an award of reasonable attorney's fees pursuant to section 120.595(2).

2. The Division argues that its actions were "substantially justified" because there was a reasonable basis in law and fact at the time its actions were taken. The Proposed Rule was

approved by the Division director on January 26, 2018, which is the time when the Division's "actions were taken." The Division also argues that special circumstances exist that would make the award of fees unjust.

Stipulated Facts

3. The Division, on January 22, 2018, entered rule development and published a Notice of Rule Development in the Florida Administrative Register, Volume 44, Number 14.

4. On January 29, 2018, the Division published the full text of the Proposed Rule in the Florida Administrative Register. See 44 Fla. Admin. R. 19.

5. Petitioner requested a rule development workshop relative to the Proposed Rule on February 6, 2018, which Respondent deemed untimely.

6. On February 16, 2018, Petitioner filed its Petition for Administrative Determination of the Invalidity of Proposed Rule 61D-6.0052, F.A.C. ("Petition").

7. On October 1, 2018, the Administrative Law Judge in the above-captioned case issued a Final Order declaring: (i) subsection (1)(b) of the Proposed Rule was an invalid exercise of delegated legislative authority because it failed to establish adequate standards for the Division's decisions and vested unbridled discretion in the Division; (ii) subsection 4(a) of the Proposed Rule was an invalid exercise of delegated

legislative authority because it was not supported by logic or the necessary facts, and was irrational, arbitrary and capricious; and (iii) subsections (5)(a) and (5)(b) of the Proposed Rule was an invalid exercise of delegated legislative authority because it failed to establish adequate standards for agency decisions and vested unbridled discretion in the Division.

Other Facts

8. The Division proceeded with rulemaking on a relatively expedited basis due to the invalidation of its reliance on the Greyhound Veterinary Assistant Procedures Manual ("Manual") on the basis that it was an unadopted rule, as determined in the Final Order in DOAH Case No. 14-5276RU, entered on January 29, 2015, and the determination that "on the job training" being conducted using the protocols and procedures outlined in the Manual also involved an unpromulated rule, as established in the Partial Summary Final Order in DOAH Case No. 17-5238RU, entered on December 22, 2017.

9. Although the rulemaking was expedited, there was no suggestion that the Division violated any statutory notice period or deadline.

10. Petitioner believed that a more cooperative period of engagement and negotiations between the two parties may have allowed the Division to resolve the issues found to be invalid in the underlying Final Order. Again, Petitioner could not

establish any specific rulemaking procedure that was violated by the Division.

11. Proposed rule 61D-6.0052(1)(b) provided that:

> (1) Designating Greyhounds for Sampling:
>
> * * *
>
> (b) When possible, a sample should be collected from two (2) greyhounds per race. When possible, greyhounds from more than one participating kennel should be sampled per performance. Additional greyhounds may also be sampled if designated by the judges, division, track veterinarian, or authorized division representatives.

12. That subsection of the Proposed Rule was invalidated because, although it was the Division's intent that the selection be random, and that greyhounds from different kennels be selected, the rule, as written, did not require either. Thus, it was concluded that the rule failed to establish a definitive standard for the Division's decisions, or vested unbridled discretion in the Division.

13. Ms. Marshman described the difficulty in making a completely blind draw of dogs to test. Unlike blood sampling, as performed with racing horses, urine is not as reliably produced by the racing animal. Sometimes, a dog just will not pee or, if it does, will not produce enough to test. She indicated that the Division included the "[w]hen possible, greyhounds from more than one participating kennel should be sampled per performance"

language to account for the unpredictability of which greyhounds choose to urinate. It was designed to create a functional sample collection procedure amidst "the Division's inability to control circumstances."

14. Mr. Beilly testified that:

> [O]bviously since they don't know who's going to win, and they don't know who's going to pee, then they select whatever dogs they do. But the—the rule as a whole, and I'm talking about 1A and 1B was designed for a specific purpose, and it looks like it's an anti-targeting rule, and what you did is you didn't get it.

15. Mr. Beilly's testimony supports a finding that the Division was attempting to implement an "anti-targeting" rule. The fact that it fell short of effectively accomplishing its intent does not mean that the Division had no reasonable basis in law and fact for its action at the time the Proposed Rule was approved.

16. Proposed rule 61D-6.0052(4)(a) provided that:

> (4) Storing and Shipping of Samples:
>
> (a) The samples shall be stored in a lockable freezer or container in a restricted area accessible by only authorized representatives of the division until the time of shipment.

17. That subsection of the Proposed Rule was invalidated because the proposed rule did not require that the "the freezer or container" actually be locked at all times so as to maintain

the chain of custody, or that the samples actually be maintained in a frozen state, which was determined to be arbitrary and capricious.

18. The Final Order noted that, although it was the Division's intent that the freezer or container should be locked at all times except when samples are being placed in it, and that samples be kept in a frozen state, the language of the rule was not sufficient to make that an enforceable requirement.

19. Subsection (4)(a) of the Proposed Rule was intended to be consistent with the Division's contract with the University of Florida racing laboratory for testing urine samples. The contract required samples to be stored and shipped in a frozen state in a container supplied by the laboratory.

20. Ms. Marshman testified that it was the Division's intent to implement to contract terms, and "[t]hat's why we put the language 'freezer' in there . . . the intent with the word 'freezer' is there that they are not refrigerated. They are in fact, frozen."

21. Ms. Marshman testified that the lockable language was intended to account for times when the storage container is opened and closed for placing samples. Because a "locked" freezer cannot be accessed, the term "lockable" was intended to account for the "opening and closing the freezer all day long."

22. Ms. Marshman admitted that, in retrospect, the language was "not the best choice." However, even though the "freezer" provision was found to be arbitrary and capricious, that was largely a function of imprecision, rather than a conscious decision to adopt a rule that did not require samples to be kept frozen in a secure container. Nonetheless, imprecision in the terms does not equal a lack of substantial justification for the rule.

23. Proposed rule 61D-6.0052(5)(a) and (5)(b) provided that:

> (5) Authority of the Division:
>
> (a) The division investigator or other authorized representative is authorized to confiscate any legend or proprietary drugs, medications, unlabeled medication, medication with altered labels, medicinal compounds (natural or synthetic) or other materials which are found on the grounds of greyhound race tracks and kennel compounds or in the possession of any person participating in or connected with greyhound racing, including veterinarians and trainers, and which are suspected of containing improper legend or proprietary drugs, medications, medicinal compounds (natural or synthetic) or other materials which are illegal or impermissible under these rules. Such legend or proprietary drugs, medications, unlabeled medication, medication with altered labels, medicinal compounds (natural or synthetic) or other materials shall be delivered to the laboratory under contract with the division for analysis.
>
> (b) The division is authorized to confiscate any evidence that an illegal or impermissible

> legend or proprietary drug, medication, or medicinal compound (natural or synthetic) may have been administered to a racing animal.

24. The proposed rule was invalidated because it did not establish a procedure for handling, storing, or shipping confiscated materials, and no chain of custody procedure other than delivery to the Division's contract laboratory. That lack of specificity was determined to constitute a failure to establish adequate standards for agency decisions, and vested unbridled discretion in the Division.

25. Despite the lack of precision, the Division was proceeding with the understanding that chapter 550, Florida Statutes, did not impose a specific duty to establish chain of custody procedures. Rather, the Division understood that in any proceeding involving confiscated materials, the Division would have the burden of proof, and would have to follow the procedures established in the Administrative Procedures Act, the Florida Evidence Code, and the applicable provisions of the Florida Rules of Civil Procedure. The Division, in part, relied on section 550.2415(3)(d), which establishes the Division's authority to prosecute cases in compliance with chapter 120.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. § 120.595(2), Fla. Stat.

27. Statutory provisions providing for the award of attorneys' fees, including those applicable in administrative proceedings, are in derogation of the common law rule that each party pays its own fees, and must be strictly construed. Johnson v. Dep't of Corr., 191 So. 3d 965, 968 (Fla. 1st DCA 2016); Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276, 278 (Fla. 2003); Ag. for Health Care Admin. v. HHCI Ltd. P'ship, 865 So. 2d 593 (Fla. 1st DCA 2004).

28. Section 120.595(2) provides, in pertinent part:

> If the appellate court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency.

29. The Division argues that it was "substantially justified" in promulgating the Proposed Rule, and that there are special circumstances that would make an award of fees unjust. The Division has the burden of showing that it was substantially justified in promulgating the Proposed Rule. Helmy v. Dep't of Bus. & Prof'l Reg., 707 So. 2d at 366, 368 (Fla. 1st DCA 1998).

30. In Helmy, which construed language in section 57.111, Florida Statutes, that is equivalent to the section 120.595(2)

standard, the court followed the test for "substantially justified" set forth in Pierce v. Underwood, 487 U.S. 552, 565 (1988), and construed "substantially justified" as:

> "[J]ustified in substance or in the main" -- that is, justified to a degree that could satisfy a reasonable person. That is no difference [sic] the "reasonable basis in both law and fact" formulation adopted by . . . the vast majority of other Courts of Appeals that have addressed this issue . . . . To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness; that is surely not the standard for Government litigation of which a reasonable person would approve.

Helmy v. Dep't of Bus. & Prof'l Reg., 707 So. 2d at 368 (quoting Pierce v. Underwood, 487 U.S. at 565); see also Dep't of Ins. v. Fla. Bankers Ass'n., 764 So. 2d 660 (Fla 1st DCA 2000).

31. Thus, "in terms of Florida law, the 'substantially justified' standard falls somewhere between the no justiciable issue standard of section 57.105, Florida Statutes (1991), and an automatic award of fees to a prevailing party." Helmy v. Dep't of Bus. & Prof'l Reg., 707 So. 2d at 368. In that regard, "[t]he closest approximation is that if a state agency can present an argument for its action 'that could satisfy a reasonable person[,]' then that action should be considered 'substantially justified.'" Ag. for Health Care Admin. v. MVP Health, Inc., 74 So. 3d 1141, 1144 (Fla. 1st DCA 2011)(quoting Helmy v. Dep't of Bus. & Prof'l Reg., 707 So. 2d at 368).

32. With regard to the invalidated provisions of the Proposed Rule, the appropriate and correct regulatory intent was present, but the language used to carry out that intent was not precise. However, imprecision does not equal a lack of substantial justification. The Division demonstrated that it had a reasonable basis in law and fact, and was substantially justified in proposing the adoption of proposed rule 61D-6.0052(1)(b), (4)(a), (5)(a), and (5)(b).

33. Given the foregoing, it is unnecessary to determine whether special circumstances exist which would make an award of fees unjust.

CONCLUSION

Based on the foregoing findings of fact and conclusions of law, Petitioner's Motion to Tax Attorneys' Fees and Costs is DENIED.

DONE AND ORDERED this 23rd day of April, 2019, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
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this 23rd day of April, 2019.

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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.