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

A final hearing was conducted in this case on August 8, 2018, by video-teleconference at sites in Tallahassee and West Palm Beach, Florida, before E. Gary Early, an administrative law judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jeremy E. Slusher, Esquire
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For Respondent: Louis Trombetta, Esquire
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Department of Business and Professional Regulation
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STATEMENT OF THE ISSUE

The issue for disposition in this case is whether proposed Florida Administrative Code Rule 61D-6.0052 (Proposed Rule) is an invalid exercise of delegated legislative authority as defined in section 120.52(8), Florida Statutes.

PRELIMINARY STATEMENT

On February 16, 2018, Petitioner, Palm Beach Greyhound Kennel Association (Petitioner or PBGKA), filed a Petition for Administrative Determination of Invalidity of Proposed Rule 61D-6.0052, F.A.C.

The case was scheduled to be heard on March 23, 2018. On March 1, 2018, the case was continued and rescheduled to May 11, 2018. On April 17, 2018, the parties jointly requested an additional continuance to allow for additional discovery. On April 18, 2018, the motion was granted, the May 11, 2018 hearing was cancelled, and the parties were advised to provide a status report by May 25, 2018. On May 24, 2018, the parties requested that the case be scheduled for final hearing, with August 7, 2018, being their first available date. On May 25, 2018, the final hearing was scheduled for August 7, 2018, and subsequently rescheduled for August 8, 2018.

The parties filed their Joint Pre-hearing Stipulation on August 7, 2018, in which the parties identified, among other

things, a list of stipulated facts. Those facts have been incorporated herein.

The final hearing was held on August 8, 2018. Joint Exhibits 2 through 9, 11, 12, 14, 15, 20 through 23, 36, 37, 40, and 41 were received in evidence.

Petitioner called as its witnesses: Henry Chin, a kennel owner and director of the PBGKA; A.J. Grant, a kennel owner; and Dr. Thomas Tobin, who met the standards in section 90.702, Florida Statutes, to testify as an expert. Petitioner's Exhibits 1, 10, 13, 16 through 19, 24 through 35, and 38 were received in evidence.

The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Respondent or Division), called as its witnesses: Robert Ehrhardt, director of the Division; and Arthur Agganis, a kennel owner and president of PBGKA. Respondent's Exhibits 1 through 12 were received in evidence. Respondent's Exhibit 7 is the deposition transcript of Dr. Tobin, Petitioner's expert witness; and Respondent's Exhibits 8 through 10 are the deposition transcripts and errata sheet of Mr. Agganis, Petitioner's party representative.

The one-volume Transcript of the final hearing was filed on August 28, 2018. On September 7, 2018, the parties jointly moved for an extension of time to file proposed final orders. The motion was granted, and the parties thereafter filed their

Proposed Final Orders on September 11, 2018, which have been considered in the preparation of this Final Order.

References to statutes are to Florida Statutes (2018), unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is a Florida for-profit corporation operating at the Palm Beach Kennel Club (PBKC) in West Palm Beach, Florida. Petitioner's members are owners of greyhounds that are raced at the PBKC. Of the 12 greyhound kennels that operate at PBKC, nine are current members of Petitioner.

2. Petitioner's members each hold licenses issued by the Division pursuant to chapter 550, Florida Statutes. Some of the PBKC kennel owners are themselves licensed greyhound trainers, and some employ licensed trainers.

3. Petitioner's Articles of Incorporation establish its purposes as including the promotion of "the welfare and care of greyhounds, . . . including, but not limited to, . . . promoting fair regulatory treatment of the greyhound industry."

4. The Division is the state agency charged with regulating pari-mutuel wagering activities in Florida pursuant to chapter 550.

The Proposed Rule

5. The full text of the Proposed Rule is as follows:

61D-6.0052 Procedures for Collecting Samples from Racing Greyhounds

(1) Designating Greyhounds for Sampling:

(a) Any greyhound the judges, division, track veterinarian, or authorized division representatives designate, shall be sent immediately prior to the race to the detention enclosure for examination by an authorized representative of the division for the taking of urine and/or other such samples as shall be directed for the monitoring and detection of both permissible and impermissible substances.

(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.

(2) Collection of Samples:

(a) Urine and/or other samples shall be collected by an authorized representative of the division in an unused sample container supplied by the division, or its agent. Authorized representatives of the division shall wear unused gloves supplied by the division, or its agent, during sample collection until the sample container is sealed with its lid.

(b) Authorized representatives of the division shall use a sample card with a unique identifier to record the date of sample collection and the identification tattoo, microchip or name of the greyhound sampled or attempted to be sampled.

(c) The owner, trainer of record, or other authorized person is permitted to witness when the sample is collected from their greyhound. Failure of an owner, trainer of record or other authorized person to witness and/or sign the sample card shall not preclude the division from proceeding with sample analysis.

(3) Sealing and Labeling of Samples:

(a) As soon as possible after a sample is collected, the sample container shall be sealed with its lid.

(b) The sample container shall be labeled with the sample card's unique identifier.

(c) Evidence tape shall be placed over both the sample container and lid on at least two sides.

(d) The authorized representative of the division that sealed the sample container shall initial the evidence tape on the sample container.

(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.

(b) Upon the completion of packing the samples for shipment, the shipping container shall be locked. All appropriate forms for shipment shall be completed and included with the shipment to ensure correct delivery and identification of the contents.

(c) The samples shall be shipped to the laboratory under contract with the division for testing of the samples via the laboratory's contracted common carrier.

(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.

(c) It is a violation of these rules for a licensee to threaten to interfere, actually interfere or prevent the taking of urine, blood, saliva or other samples authorized by Chapter 550, F.S. For such a violation, the division may impose any disciplinary penalties authorized by Chapter 550, F.S., or the rules promulgated thereunder.

Rulemaking Authority 120.80(4)(a), 550.0251(3), 550.2415(12), (13) FS. Law Implemented 120.80(4)(a), 550.0251, 550.1155, 550.2415 FS. History–New _____.

Issues for Disposition

6. Section 120.56(2)(a) provides that "the agency has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised."

7. The "objections raised" as identified in the Joint Pre-hearing Stipulation are those that remain for disposition in this proceeding, with issues not preserved having been waived. See Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc., 174 So. 3d 1037 (Fla. 4th DCA 2015).

8. As set forth in the recitation of "Petitioner's Position," the following issues are at issue:

> a. The proposed rule refers to urine and/or other samples in its text, yet only contains procedures for urine collection;
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> b. The proposed rule fails to adequately detail necessary chain of custody procedures for sampling racing greyhounds;
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> c. The proposed rule ignores basic scientific principles as to contamination;
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> d. The proposed rule ignores basic scientific principles as to the timing of sampling;
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> e. The proposed rule ignores basic scientific principles as to the temperature of a sample;
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> f. The proposed rule fails to provide trainers and owners of an opportunity to witness their greyhounds' sampling;

g. The proposed rule grants too much discretion to Respondent;

h. Respondent failed to follow the applicable rulemaking procedures set forth in chapter 120;

i. The proposed rule does not limit its application to urine;

Stipulated Facts

The following facts were stipulated by the parties:

9. It is possible that a racing greyhound could become exposed to environmental substances during the time between the trainer relinquishing it at the track and the sampling.

10. The reason that racing greyhounds are tattooed is for identification purposes.

11. It is important to prevent contamination of a racing greyhound's sample.

12. It is important to preserve the integrity of a racing greyhound's sample.

13. The Proposed Rule does not require racing greyhound samples to be stored frozen. However, subsection (4)(a) of the Proposed Rule requires that the samples are stored in a lockable freezer or container.

14. The Proposed Rule does not require that the racing greyhound samples be kept refrigerated. However, subsection (4)(a) of the Proposed Rule requires that samples be stored in a lockable freezer or container.

15. The Proposed Rule does not contain any provisions for the drawing of blood, "other specimens," or other fluids from the racing greyhound.

16. The Proposed Rule does not describe how all the individuals involved in the chain of custody of a racing greyhound sample record their involvement.

17. The Proposed Rule contains a section entitled "Sealing and Labeling of Samples."

18. The Proposed Rule does not describe the chain of custody for the taking of "other specimens" from the racing greyhound.

19. The Proposed Rule does not describe the chain of custody procedures associated with materials confiscated under paragraph five of the Proposed Rule.

20. Respondent published its Notice of Development of Rulemaking for Proposed Rule 61D-6.0052, F.A.C. (Notice of Development), on January 22, 2018.

21. Respondent published its Notice of Proposed Rule 61D-6.0052, F.A.C. (Notice of Proposed Rule), on January 29, 2018.

22. Respondent's Notice of Proposed Rule 61D-6.0052, F.A.C., indicated it was approved by the agency head, Jonathan Zachem, on January 26, 2018, a mere [four] days after publication of Respondent's Notice of Development of Rulemaking for Proposed Rule 61D-6.0052, F.A.C.

23. On February 6, 2018, a rule development workshop was requested for Proposed Rule 61D-6.0052, F.A.C.

24. Respondent did not hold a rule development workshop for Proposed Rule 61D-6.0052, F.A.C.

25. Respondent did not provide an explanation in writing as to why a workshop was unnecessary for Proposed Rule 61D-6.0052, F.A.C., other than Bryan A. Barber's letter of February 13, 2018.

Facts Adduced at Hearing

26. The purpose and effect of the Notice of Development was "to further clarify and describe the procedures performed by the Division in collecting samples from greyhounds and to create a rule specific to the greyhound sample collection.

27. The Notice of Proposed Rule did not contain a statement of estimated regulatory costs imposed on small businesses.

28. On February 6, 2018, Petitioner, through its representative, sent a letter to the Division requesting a rule development workshop. On February 13, 2018, the Division noted that the "rule development phase" ended with the publication of the Notice of Proposed Rule, and the request for a workshop was, therefore, untimely.

29. There is no evidence that anyone provided the Division with information regarding a statement of estimated regulatory costs, or provided the Division with a proposal for a lower cost

regulatory alternative. No one requested that a public hearing be held on the Proposed Rule.

30. Racing greyhounds are delivered to the track by their owners or trainers prior to the commencement of their race card. Greyhounds racing during the matinee card are delivered at one time, and greyhounds racing during the evening card are delivered at a later time.

31. The greyhounds are all weighed in about 60 to 90 minutes prior to the first race, regardless of the race in which a particular greyhound is scheduled to appear. After weigh-in, the greyhounds are handed over to the "lead-outs," who are track employees, and taken to the ginny pit. Each greyhound is then placed in a numbered cage designating its race and position, and held there until its race is scheduled to commence. From the time an animal is given over to the lead-outs until its race is over, they are out of the control and sight of the owners and trainers. For greyhounds racing in the last race of a card, that period can be well in excess of four hours.

32. Prior to each race, the race judge, Division, track veterinarian, or "authorized division representative" designates the greyhounds to be tested for that race. The process was not described, other than as described in the rule that "[w]hen 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." Mr. Ehrhardt testified that "ideally it's blind and that you just pick one at random," and that dogs from separate kennels be selected "to ensure that no one is singled out." However, the Proposed Rule contains no criteria for the selection of an animal other than its being in the race. Even a requirement that the selection be random, and a mandatory selection of different kennels be made "when possible," is sufficient to preclude an unfettered exercise of discretion in the selection of the greyhound. As it is, the selection of both dogs and kennels is completely within the discretion of the Division.

33. Upon selection, the greyhounds are led to an open area to relieve themselves. At the Orange Park Kennel Club, the area is a restricted access grass and sand area surrounded by a chain link fence. There was no evidence as to other tracks, but there is little to suggest that the areas at other tracks are dissimilar.

34. The process of collecting the sample involves watching the dog for a sign that it is ready to urinate, and then holding a plastic cup at the end of a stick, an "armed doohickey" as described by Mr. Ehrhardt, under the dog until it produces a sample. The sampler wears fresh gloves and uses an unused cup. When the sample is collected, the sampler places the lid on the

container, labels the container, and places evidence tape "over both the sample container and lid on at least two sides."

35. After the sample cup is capped, labeled, and sealed, it is placed in a "lockable freezer or container in a restricted area." Mr. Ehrhardt indicated that it was the Division's intent that the freezer or container should be locked at all times that it is not being accessed to place samples in it, and that it should not be left unlocked. However, the plain language of the rule suggests otherwise. The lockable container is to be in a restricted area, but is only required to be locked "[u]pon completion of the packing of the samples for shipment."

36. Dr. Tobin testified that samples must be kept frozen or, at a minimum, refrigerated. Mr. Ehrhardt testified that once a sample is collected, it goes "straight to the freezer," suggesting that freezing is the preferred method of storage. Failure to do so can result in degradation of the sample, bacterial growth, and, in certain cases, breakdown of substances into metabolites that would more closely mimic a prohibited substance in a dog's urine.

37. Petitioner argued that the timing of the sampling is problematic for another reason, other than the holding period for the greyhounds. Many owners and trainers have more than one dog racing during a card. The ginny pit and the finish line are at different ends of the track. Therefore, a trainer or owner

may be collecting their dog(s) at the conclusion of a race at the same time the pre-race sample is being taken for the next race, making observation of the sampling difficult from a practical perspective. However, both Mr. Agganis and Mr. Chin acknowledged that there was nothing to directly prevent an owner or trainer from observing the sampling. Furthermore, there is nothing to prevent the owner or trainer, or even Petitioner's members collectively, from having an employee or agent witness the sampling on their behalf, since the rule allows "[t]he owner, trainer of record, or other authorized person" to witness the sampling.

38. In no fewer than 10 places in the Proposed Rule, actions are authorized to be taken by an "authorized representative" of the Division, or an "other authorized person." The Proposed Rule does not identify who those representatives or persons might be, or how they may come to be authorized.

39. Mr. Ehrhardt testified that the purpose of the less definitive description was "to figure out a way to make the rule flexible," to meet the possibility that a "job title is going to change."

40. During Mr. Ehrhardt's visit to the Orange Park greyhound racing facility, he was allowed into the restricted ginny pit area by "authorized personnel from the division," who

he described as "veterinarian assistants, chief inspector, investigators, people like that." Petitioner objected to the lack of specificity because it provided no assurances that these individuals are competent, or held to any particular standard.

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

Standing

42. Section 120.56(1)(a) provides that "any person substantially affected by . . . a proposed 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."

43. In order to demonstrate that a person is "substantially affected," that person must establish "a real and sufficiently immediate injury in fact" and that the interest involved is within the "zone of interest to be protected or regulated." See Ward v. Bd. of Trs. of the Int. Imp. Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995); Coal. of Mental Health Prof'ls v. Dep't of Prof'l Reg., 546 So. 2d 27 (Fla. 1st DCA 1989).

44. The PBGKA is an association that consists of nine dues-paying kennel owners who own and race greyhounds at the

Palm Beach Kennel Club. As such, their racing greyhounds, and trainers under their employ, are subject to the rules regarding the collection, storage, and shipment of greyhound urine samples designed to detect the presence of impermissible substances. If allowed to become effective, PBGKA and its members would be governed by the Proposed Rule and therefore each is substantially affected in a manner and degree sufficient to confer administrative standing in this case. See, e.g., Abbott Labs. v. Mylan Pharms., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009); Dep't of Prof'l Reg., Bd. of Dentistry v. Fla. Dental Hygienist Ass'n, 612 So. 2d 646, 651 (Fla. 1st DCA 1993); see also Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg., 688 So. 2d 404, 407 (Fla. 1st DCA 1997)(recognizing that "a less demanding standard applies in a rule challenge proceeding than in an action at law, and that the standard differs from the 'substantial interest' standard of a licensure proceeding").

45. Associations have standing to bring a rule challenge when:

> a substantial number of [the association's] members, although not necessarily a majority, are "substantially affected" by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be the type appropriate for a trade association to receive on behalf of its members.

Fla. Home Builders Assn' v. Dep't of Labor and Emp. Sec., 412 So. 2d 351, 353-54 (Fla. 1982); see also NAACP, Inc. v. Bd. of Regents, 863 So. 2d 294, 298 (Fla. 2003).

46. Section 550.2415(1)(a) provides in part:

> The racing of any animal with any drug, medication, stimulant, depressant, hypnotic, local anesthetic, or drug-masking agent is prohibited. It is a violation of this section for any person to administer or cause to be administered any drug, medication, stimulant, depressant, hypnotic, narcotic, local anesthetic, or drug-masking agent to an animal which will result in a positive test for such substance based on samples taken from the racing animal immediately prior to or immediately after the racing of the animal.

47. Section 550.2415(1)(c) provides that "[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." The statute also provides that when a racing animal has been impermissibly medicated or drugged, action may be taken "against an occupational licensee responsible pursuant to rule of the division" for the animal's condition. § 550.2415(2), Fla. Stat. Consistent with this statute, Respondent has adopted rule 61D-6.002, the "absolute insurer rule," making trainers of racing animals, including greyhounds, strictly responsible for the presence of a prohibited substance in the urine of the animal.

48. Petitioner's members are either licensed trainers, subject themselves to the absolute insurer rule, or kennel owners who employ trainers upon whom the kennel owners' livelihood depends. Thus, Petitioner and its members are substantially affected by the rule establishing the accuracy of urine collection measures for determining whether a greyhound has raced with an impermissible substance in its system.

49. Based on the record of this proceeding, Petitioner meets the standards for associational standing.

Burden of Proof

50. In a challenge to a proposed agency rule, the petitioner has the burden of "going forward," and the agency then has the burden of proving by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. § 120.56(2)(a), Fla. Stat. Petitioner met its burden of "going forward" in this case.

51. When a substantially affected person seeks a determination of the invalidity of a proposed rule pursuant to section 120.56(2), the proposed rule is not presumed to be valid or invalid. § 120.56(2)(c), Fla. Stat.

Rulemaking Standards

52. Section 120.52(8) defines an "invalid exercise of delegated legislative authority." The provisions at issue in this proceeding are as follows:

> (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:
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> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
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> (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. . . .

53. Petitioner did not allege that the Proposed Rule would result in excessive regulatory costs (section 120.52(8)(f)), or that the Proposed Rule exceeded the Division's grant of rulemaking authority or failed to implement or interpret the

specific powers and duties granted by the enabling statute as set forth in the "flush left" paragraph of section 120.52(8).

54. The Division's interpretation of chapter 550, a statute it is charged with administering, is entitled to "great deference unless there is clear error or conflict with the intent of the statute." Lakeland Reg'l Med. Ctr., Inc. v. Ag. for Health Care Admin., 917 So. 2d 1024, 1029 (Fla. 1st DCA 2006); see also Level 3 Commc'ns, LLC v. Jacobs, 841 So. 2d 447, 450 (Fla. 2003); Verizon Fla., Inc. v. Jacobs, 810 So. 2d 906, 908 (Fla. 2002); Fla. Hosp. (Adventist Health) v. Ag. for Health Care Admin., 823 So. 2d 844, 847 (Fla. 1st DCA 2002). The basis for such deference has been described as follows:

> Agencies generally have more expertise in a specific area they are charged with overseeing. Thus, in deferring to an agency's interpretation, courts benefit from the agency's technical and/or practical experience in its field.

Rizov v. Bd. of Prof'l Eng'rs, 979 So. 2d 979 (Fla. 3d DCA 2008); see also Avatar Dev. Corp. v. State, 723 So. 2d 199, 207 (Fla. 1998)("Under the complexities of our modern system of government, the Legislature has recognized that [the Department of Environmental Protection], as a specialized administrative body, is in the best position to establish appropriate standards and conditions.").

55. "[I]t is well established that the legislature has broad discretion in regulating and controlling pari-mutuel wagering and gambling under its police powers." Div. of Pari-Mutuel Wagering, Dep't of Bus. Reg. v. Fla. Horse Council, Inc., 464 So. 2d 128, 130 (Fla. 1985). Thus, the authority of the Legislature to empower the Division to adopt pari-mutuel rules to implement and establish standards for "holding, conducting, and operating of all racetracks, race meets, and races held in this state," including the collection of race-day specimens for the detection impermissible medications or substances, is recognized by the undersigned.

Statutory Authority for the Proposed Rules

56. The statutory provisions cited by the Division as rulemaking authority for the Proposed Rule are sections 120.80(4)(a), 550.0251(3), and 550.2415(12) and (13).

57. Section 120.80(4)(a), entitled "Exceptions and special requirements; agencies," provides that:

> (4) DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION.—
>
> (a) Business regulation.—The Division of Pari-mutuel Wagering is exempt from the hearing and notice requirements of ss. 120.569 and 120.57(1)(a), but only for stewards, judges, and boards of judges when the hearing is to be held for the purpose of the imposition of fines or suspensions as provided by rules of the Division of Pari-mutuel Wagering, but not for revocations, and only upon violations of subparagraphs

> 1.-6. The Division of Pari-mutuel Wagering shall adopt rules establishing alternative procedures, including a hearing upon reasonable notice, for the following violations:
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> * * *
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> 2. Application and usage of drugs and medication to horses, greyhounds, and jai alai players in violation of chapter 550.
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> 3. Maintaining or possessing any device which could be used for the injection or other infusion of a prohibited drug to horses, greyhounds, and jai alai players in violation of chapter 550.

58. Section 550.0251(3), entitled "[t]he powers and duties of the Division of Pari-mutuel Wagering of the Department of Business and Professional Regulation," provides that:

> The division shall administer this chapter and regulate the pari-mutuel industry under this chapter and the rules adopted pursuant thereto, and:
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> * * *
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> (3) The division shall 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. Such rules must be uniform in their application and effect, and the duty of exercising this control and power is made mandatory upon the division.

59. Sections 550.2415(12) and (13) provide that:

> (12) The division shall adopt rules to implement this section.

> (13) The division may implement by rule medication levels for racing greyhounds recommended by the University of Florida College of Veterinary Medicine developed pursuant to an agreement between the Division of Pari-mutuel Wagering and the University of Florida College of Veterinary Medicine. The University of Florida College of Veterinary Medicine may provide written notification to the division that it has completed research or review on a particular drug pursuant to the agreement and when the College of Veterinary Medicine has completed a final report of its findings, conclusions, and recommendations to the division.

60. The statutory provisions cited by the Division as the law implemented by the Proposed Rule are sections 120.80(4)(a), 550.0251, 550.1155, and 550.2415. Having reviewed the statutes, the undersigned concludes that not all of the subsections of the identified statutes are implemented by the Proposed Rule. The applicable provisions are identified herein.

61. The applicable provisions of Section 120.80(4)(a) as cited above.

62. The applicable provision of section 550.0251 implemented by the Proposed Rule, in addition to section 550.0251(3) cited above, is section 550.0251(11), which provides that "[t]he division shall supervise and regulate the welfare of racing animals at pari-mutuel facilities."

63. Section 550.1155 generally establishes the authority of stewards at a dog track to impose a civil penalty against an occupational licensee for violation of the pari-mutuel laws or

rules of the Division, and the disposition of such fines. That section has little direct applicability to the Proposed Rule.

64. The following subsections of section 550.2415 appear to be implemented by the Proposed Rule:

> (1)(a) 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 . . . .
>
> (b) It is a violation of this section for a race-day specimen to contain a level of a naturally occurring substance which exceeds normal physiological concentrations . . . .
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> (c) The 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.
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> * * *
>
> (3)(b) The division, notwithstanding chapter 120, may summarily suspend the license of an occupational licensee responsible under this section or division rule for the condition of a race animal if the division laboratory reports the presence of a prohibited substance in the animal or its blood, urine, saliva, or any other bodily fluid, either before a race in which the animal is entered or after a race the animal has run.
>
> (c) If an occupational licensee is summarily suspended under this section, the division shall offer the licensee a prompt

postsuspension hearing within 72 hours, at which the division shall produce the laboratory report and documentation which, on its face, establishes the responsibility of the occupational licensee. Upon production of the documentation, the occupational licensee has the burden of proving his or her lack of responsibility.

* * *

(5) The division shall implement a split-sample procedure for testing animals under this section.

(a) The division shall notify the owner or trainer, the stewards, and the appropriate horsemen's association of all drug test results. If a drug test result is positive, and upon request by the affected trainer or owner of the animal from which the sample was obtained, the division shall send the split sample to an approved independent laboratory for analysis. The division shall establish standards and rules for uniform enforcement and shall maintain a list of at least five approved independent laboratories for an owner or trainer to select from if a drug test result is positive.

(b) If the division laboratory's findings are not confirmed by the independent laboratory, no further administrative or disciplinary action under this section may be pursued.

(c) If the independent laboratory confirms the division laboratory's positive result, the division may commence administrative proceedings as prescribed in this chapter and consistent with chapter 120. For purposes of this subsection, the department shall in good faith attempt to obtain a sufficient quantity of the test fluid to allow both a primary test and a secondary test to be made.

(d) For the testing of a racing greyhound, if there is an insufficient quantity of the

> secondary (split) sample for confirmation of the division laboratory's positive result, the division may commence administrative proceedings as prescribed in this chapter and consistent with chapter 120.
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> * * *
>
> (6)(e) The division may inspect any area at a pari-mutuel facility where racing animals are raced, trained, housed, or maintained, including any areas where food, medications, or other supplies are kept, to ensure the humane treatment of racing animals and compliance with this chapter and the rules of the division.
>
> * * *
>
> (12) The division shall adopt rules to implement this section.

65. Based on the totality of the evidence in this proceeding, by its publication and intent to adopt the Proposed Rule, the Division has not exceeded its grant of rulemaking authority, nor does the Proposed Rule enlarge, modify, or contravene the specific provisions of law implemented.

Applicable Rulemaking Procedures

66. Petitioner has alleged that the failure of the Division to hold a rule workshop constituted a material failure to follow the applicable rulemaking procedures.

67. Section 120.54(2)(c) provides, in pertinent part, that:

> An agency may hold public workshops for purposes of rule development. An agency must hold public workshops, including

> workshops in various regions of the state or the agency's service area, for purposes of rule development if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary. The explanation is not final agency action subject to review pursuant to ss. 120.569 and 120.57. The failure to provide the explanation when required may be a material error in procedure pursuant to s. 120.56(1)(c).

68. The reason set forth by the Division for declining to hold a workshop was valid and legitimate. There is no established statutory period that the rule development phase of rulemaking must remain open. By the time a workshop was requested on February 6, 2018, the rule development phase of the rulemaking set forth in section 120.54(2), though temporally abbreviated, was complete. The rule adoption process set forth in section 120.54(3) had commenced. The Notice of Proposed Rule had been published on January 29, 2018, and the "clock" was ticking. Thus, the explanation provided by the Division was consistent with the procedures established in section 120.54.

69. For the reason set forth herein, the Division's decision to decline to hold a workshop was not a material failure to follow the applicable rulemaking procedures or requirements set forth in chapter 120, and thus was not an invalid exercise of delegated legislative authority pursuant to section 120.52(8)(a).

Authorized Representatives

70. As set forth in the Findings of Fact, the Proposed Rule allows certain actions to be taken by authorized representatives of the Division. Mr. Ehrhardt's testimony as to the reason for that language is accepted. It is not unreasonable to conclude that Division personnel, not specified by job title, may be called upon in exigent circumstances to assist in the sampling. Furthermore, representatives involved in the sampling will be identified in the chain of custody. Thus, the Division's decision to allow participation by its "authorized representatives" does not enlarge, modify, or contravene the specific provisions of law implemented; is not vague; does not fail to establish adequate standards for agency decisions, or vest unbridled discretion in the agency; and is not arbitrary or capricious.

Timing of Sampling

71. It is clear from the totality of the competent, substantial, and credible evidence adduced in this proceeding, that a -- if not the -- primary concern of Petitioner is that greyhounds are not tested at the time they are delivered by the kennel to the track, but rather are held to be tested immediately before a race, which can be hours after control over the animal is surrendered by the kennel owner or trainer to track employees. Given the consequences of the "absolute

insurer" rule, having greyhounds tested while all affected parties are present, and before the stipulated "expos[ure] to environmental substances during the time between the trainer relinquishing it at the track and the sampling" could occur, makes sense. However, the question is not whether the sampling regimen implemented by the Division is the best alternative. Rather, review is limited to whether the decision of the Division is an invalid exercise of delegated legislative authority.

72. Section 550.2415(1)(a) provides, in pertinent part, that "[i]t 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." (emphasis added). The proposed sampling procedure squarely meets that legislative charge. The fact that the Legislature allows post-race sampling as a sampling option confirms that time in the ginny pit was not an unforeseen or unauthorized consequence of the sampling program.

73. Based on the foregoing, the Proposed Rule's requirement that racing greyhounds be sampled prior to their scheduled races does not enlarge, modify, or contravene the specific provisions of law implemented; is not vague; does not

fail to establish adequate standards for agency decisions, or vest unbridled discretion in the agency; and is not arbitrary or capricious.

Witnessing Sampling

74. As set forth in the Findings of Fact, Petitioner argues that the practicalities of race-day activities hinder the ability of owners and trainers to witness the collection of race-day specimens.

75. The Proposed Rule provides that "[t]he owner, trainer of record, or other authorized person is permitted to witness when the sample is collected from their greyhound." Mr. Agganis testified as to the ease of observation if sampling were performed at the time of delivery of greyhounds to the track. Both he and Mr. Chin expressed concern that testing a greyhound immediately before its race made it impractical for a trainer or kennel owner to witness the collection of the sample. However, both acknowledged that there is nothing in the rule that prevents an owner or trainer, or someone authorized to observe on their behalf, from observing the sampling.

76. Based on the foregoing, the Proposed Rule's provision for allowing owners, trainers, or persons acting on their behalf to witness the collection of race-day specimens does not enlarge, modify, or contravene the specific provisions of law implemented; is not vague; does not fail to establish adequate

standards for agency decisions, or vest unbridled discretion in the agency; and is not arbitrary or capricious.

Selection of Greyhounds and Kennels

77. As set forth in the Findings of Fact, the rule establishes no standards to guide the Division's exercise of discretion in selecting the greyhounds for sampling. Although it was Mr. Ehrhardt's preference that the selection be random, and that greyhounds from different kennels be selected, the rule, as written, does not require either. Thus, that provision of proposed rule 61D-6.0052(1)(b) regarding the selection of greyhounds for race-day sampling fails to establish adequate standards for the Division's decisions, or vests unbridled discretion in the Division.

Identification of Greyhounds

78. The Proposed Rule provides that the sample card include a record of "the identification tattoo, microchip or name of the greyhound sampled or attempted to be sampled." Petitioner argues that racing greyhounds are not microchipped, though there is no evidentiary support for that assertion; that the rule does not describe how a dog's tattoo is to be identified; and that the rule does not describe how a greyhound's name can be found.

79. The Proposed Rule provides a reasonable method of identifying the dogs subject to collection of a race-day

specimen, particularly given the stipulation that "racing greyhounds are tattooed [] for identification purposes." Thus, the Proposed Rule provision for identifying greyhounds does not enlarge, modify, or contravene the specific provisions of law implemented; is not vague; does not fail to establish adequate standards for agency decisions, or vest unbridled discretion in the agency; and is not arbitrary or capricious.

Types of Specimens

80. Petitioner argues that the Proposed Rule purports to address the "taking of urine and/or other samples," but its procedures are only applicable to the collection of race-day specimens of urine, which is the current method of sampling racing greyhounds.

81. Section 550.2415 allows for the suspension of a pari-mutuel license "if the division laboratory reports the presence of a prohibited substance in the animal or its blood, urine, saliva, or any other bodily fluid." The Proposed Rule makes it a violation of the rule "for a licensee to threaten to interfere, actually interfere or prevent the taking of urine, blood, saliva or other samples authorized by Chapter 550, F.S."

82. It is not disputed that the Proposed Rule is intended to, and does, establish procedures for the collection of urine from racing greyhounds. It was stipulated that "[t]he Proposed Rule does not contain any provisions for the drawing of blood,

'other specimens,' or other fluids from the racing greyhound." The fact that the Proposed Rule incidentally (and unnecessarily) refers to "other samples" does not enlarge, modify, or contravene the specific provisions of law implemented; does not make the Proposed Rule vague; does not fail to establish adequate standards for agency decisions, or vest unbridled discretion in the agency; and is not arbitrary or capricious. If, at some point in the future, the Division determines that race-day specimens of blood, saliva, or other bodily fluids may be collected using the procedures established in the Proposed Rule, there is nothing to prevent that. If, as is more likely, different procedures are required, the rule can be amended. However, in its present form, the procedures established in the Proposed Rule are adequate for the collection of urine.

Chain of Custody

83. Petitioner argues that the procedures for establishing chain of custody of the samples are inadequate.

84. Each of the parties agreed that ensuring an adequate chain of custody of the race-day specimens is a vitally important step in the collection and analysis process.

85. Dr. Tobin described the process set forth in the Proposed Rule as an "outline," and had a number of suggestions as to how the container top could be sealed, how the tape could be affixed, how the tape could be signed, etc. Those details

are not of such significance as to cause the Proposed Rule to be an invalid exercise of delegated legislative authority.

86. Of interest to this analysis of the validity of the Proposed Rule is the stipulated fact that "[t]he Proposed Rule does not describe how all the individuals involved in the chain of custody of a racing greyhound sample record their involvement." The stipulation did not identify the stage at which the supposed defect in the chain of custody occurs, or the particular section of the Proposed Rule at issue. That the rule does not identify how a person materially involved in the process may record their involvement does not translate to a determination that their involvement is not recorded.

87. A review of the Proposed Rule, and the evidence adduced at the hearing, results in the conclusion that the Proposed Rule and the forms used by the Division, establish a sufficient basis for the identification of those persons directly involved in the collection, storage, shipment, and analysis of race-day specimens. Thus, provisions of the Proposed Rule that address the identification of Division personnel involved in the chain of custody of a racing greyhound sample is not impermissibly vague; does not fail to establish adequate standards for agency decisions; does not vest unbridled discretion in the agency; and is not arbitrary or capricious.

Sealing, Labeling, and Logging

88. As set forth in the Findings of Fact, the standards for sealing the sample cup, applying and signing the evidence tape, labeling the container, and logging the relevant information, including the greyhound's race and post, witness identification, and collector identification are sufficient to maintain the chain of custody. Thus, those provisions of proposed rule 61D-6.0052(2)(b), (2)(c), (3)(b) through (3)(d), and (4)(b) are not invalid exercises of delegated legislative authority.

"Lockable" Container

89. The rule requires that samples "shall be stored in a lockable freezer or container," but that the freezer or container need only be locked "[u]pon completion of packing the samples for shipment." Mr. Ehrhardt agreed that if the freezer or container is not locked, even though it is in a restricted area, the chain of custody could be broken, and all samples could, as a result, be invalidated. Although it was Mr. Ehrhardt's stated intent that the freezer or container should be locked at all times that it is not being accessed to place samples in it, the plain language of the rule suggests otherwise. By failing to require that the freezer or container be locked so as to maintain the chain of custody, the Proposed Rule is not supported by logic or the necessary facts, and is irrational. Thus, the "lockable"

container provision of proposed rule 61D-6.0052(4)(a) is, as written, arbitrary and capricious.

Maintaining Sample Temperatures

90. As set forth in the Findings of Fact, samples are preferably to be kept frozen but, in any case, at a minimum refrigerated. The purpose of maintaining the samples cold is to maintain their integrity, and to keep degraded metabolites of substances from causing a false positive reading of a prohibited substance in a dog's urine. The stipulated facts demonstrate that the Proposed Rule does not require race-day specimens to be stored frozen or refrigerated. The requirement of a "lockable freezer or container" does not remedy that deficiency.

91. Given the necessity of storing samples in a frozen or refrigerated state, and the failure of the Proposed Rule to require such, the "lockable" container provision of proposed rule 61D-6.0052(4)(a) fails to establish adequate standards for agency decisions, and is arbitrary or capricious.

Chain of Custody Form

92. Petitioner argues that the chain of custody form, referred to as the sample card or the 503 form, does not include the race number, the collector's name, or the witness's name(s). A review of the 503 form in evidence demonstrates that it includes spaces for the race and post, the trainer or owner's witness, and the collector's initials. Those are sufficient to

address Petitioner's concerns regarding the chain of custody form. The evidence adduced at the hearing was otherwise sufficient to allow for the conclusion that the chain of custody as described in the rule and the 503 form does not enlarge, modify, or contravene the specific provisions of law implemented; is not vague; does not fail to establish adequate standards for agency decisions, or vest unbridled discretion in the agency; and is not arbitrary or capricious.

Shipping

93. The Proposed Rule authorizes the Division to ship the samples via common carrier to the Division's contracted laboratory. The issue raised by Petitioner is the chain of custody from the transfer of the sample container to the common carrier and thence to the laboratory. The Proposed Rule describes forms providing information to ensure delivery of the locked containers via the common carrier, and the contents of the containers. Mr. Ehrhardt testified that there was no break in the chain from the Division, to UPS, which would have its own record of receipt and delivery, and the laboratory. His testimony is accepted. Thus, the evidence adduced at the hearing was sufficient to allow for the conclusion that the shipping chain of custody does not enlarge, modify, or contravene the specific provisions of law implemented; is not vague; does not fail to establish adequate standards for agency decisions, or

vest unbridled discretion in the agency; and is not arbitrary or capricious.

Confiscation

94. The Proposed Rule authorizes the Division to confiscate a variety of illegal or impermissible drugs, medications and "other materials." Petitioner has objected to the rule on several grounds, including "the level of suspicion" required to seize such alleged substances. That issue is not capable of a regulatory definition, but is more appropriate for disposition in the context of a fact-specific proceeding. Thus, the Division's decision to forego defining the cause or proof for confiscating illegal or impermissible substances does not enlarge, modify, or contravene the specific provisions of law implemented; is not vague; does not fail to establish adequate standards for agency decisions, or vest unbridled discretion in the agency; and is not arbitrary or capricious.

95. Petitioner also objects to the statement that it is a violation of the Proposed Rule to "threaten to interfere, actually interfere, or prevent the taking" of a sample, arguing that it provides no definition for those terms, and includes no procedures for samples other than urine samples. For the reasons set forth previously regarding the "Types of Specimens," omission of those definitions and allegedly superfluous procedures from the Proposed Rule does not enlarge, modify, or contravene the

specific provisions of law implemented; is not vague; does not fail to establish adequate standards for agency decisions, or vest unbridled discretion in the agency; and is not arbitrary or capricious.

96. Of greater concern with regard to the confiscation issue is the fact that it provides no procedure for handling, storing, or shipping such materials, and no chain of custody procedure, other than delivery to the Division's contract laboratory. The lack of any procedures in proposed rule 61D-6.0052(5)(a) and (5)(b) for handling confiscated materials constitutes a failure to establish adequate standards for agency decisions, and vests unbridled discretion in the agency.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

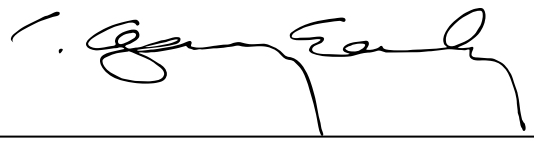
1. Except as set forth herein, proposed rule 61D-6.052 is not an invalid exercise of delegated legislative authority. Accordingly, Palm Beach Greyhound Kennel Association's Petition for Administrative Determination of the Invalidity of Proposed Rule 61D-6.0052, F.A.C., except as set forth herein, is dismissed.

2. Proposed rules 61D-6.0052(1)(b), related to the selection of greyhounds for race-day sampling; 61D-6.0052(4)(a), related to the use of "a lockable freezer or container" in which

to store race-day specimens; 61D-6.0052(4)(a), related to the temperature at which race-day specimens should be preserved; and 61D-6.0052(5)(a) and (5)(b) regarding the chain of custody of confiscated materials, are invalid exercises of delegated legislative authority.

3. Jurisdiction is 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. Any motion to determine fees and costs shall be filed within 60 days of the issuance of this Final Order.

DONE AND ORDERED this 1st day of October, 2018, in Tallahassee, Leon County, Florida.



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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.