STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAYTONA BEACH KENNEL CLUB, INC.,

Petitioner,

vs. Case No. 20-5233RU

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

Respondent,

and

BAYARD RACEWAYS, INC. D/B/A ST. JOHNS GREYHOUND PARK,

Intervenor.
_____/

SUMMARY FINAL ORDER OF DISMISSAL

This cause comes before the undersigned on the Motion to Dismiss, or in the Alternative, Motion for Final Summary Order, filed by Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Division"); and the Motion for Summary Final Order filed by Intervenor, Bayard Raceways, Inc. ("Bayard") (together, "the Motions").

STATEMENT OF THE CASE

The issue to be determined is whether statements contained, or otherwise incorporated, in the Division's Notice of Intent to approve Bayard's Notice of

Relocation ("Division's Notice") constitute unadopted rules in violation of section 120.56(4), Florida Statutes (2020).[1]

## PRELIMINARY STATEMENT

On December 2, 2020, Petitioner, Daytona Beach Kennel Club, Inc. ("Petitioner"), filed a Petition for Administrative Determination of the Invalidity of Agency Statement as Unpromulgated Rule ("Petition") with the Division of Administrative Hearings ("DOAH"). The case was assigned to the undersigned, who held a scheduling conference on December 9, 2020, and scheduled the final hearing for January 27 and 28, 2021.[2]

The Division filed its Motion on December 11, 2020, and the undersigned conducted a telephonic hearing on the Division's Motion on December 22, 2020. The undersigned reserved ruling on the Division's Motion until after Intervenor's Motion was heard. Intervenor filed its Motion on December 22, 2020, and the undersigned conducted a hearing via Zoom Conference on Intervenor's Motion on December 30, 2020.

## FINDINGS OF FACT

The following relevant facts are undisputed:

1. The Division is the arm of the Department of Business and Professional Regulation with the duty and responsibility to permit and regulate pari-mutuel wagering facilities throughout the state. §§ 550.002(7) and 550.01215, Fla. Stat.

2. Petitioner is a pari-mutuel permittee that owns and operates the Daytona Beach Racing and Card Club in Volusia County, located at

[1] Unless otherwise noted, all references to the Florida Statutes are to the 2020 version, which was in effect when the Petition was filed.

[2] Petitioner waived the requirement in section 120.56(1)(c) that the final hearing be conducted within 30 days after assignment of the case.

960 South Williamson Boulevard in Daytona Beach, Florida ("Petitioner's facility").

3. Intervenor is a pari-mutuel permittee doing business as St. Johns Greyhound Park in St. Johns County, at a leased facility located at 6322 Racetrack Road, St. Johns, Florida ("Bayard's facility"), approximately 75 miles north of Petitioner's facility.

4. On July 8, 2020, Bayard filed with the Division a "Notice of Relocation" of Bayard's facility to an eight-acre parcel in St. Augustine, Florida, which it is under contract to purchase.

5. Bayard's Notice of Relocation was filed pursuant to section 550.054(14)(b), Florida Statutes, which reads, in pertinent part, as follows:

> The holder of a permit converted pursuant to this subsection or any holder of a permit to conduct greyhound racing located in a county in which it is the only permit issued pursuant to this section who operated at a leased facility pursuant to s. 550.475 may move the location for which the permit has been issued to another location within a 30-mile radius of the location fixed in the permit issued in that county, provided the move does not cross the county boundary and such location is approved under the zoning regulations of the county or municipality in which the permit is located, and upon such relocation may use the permit for the conduct of pari-mutuel wagering and the operation of a cardroom.

6. On September 11, 2020, the Division issued its Notice regarding Bayard's relocation. Finding that Bayard had satisfied all the criteria for relocation pursuant to section 550.045(14)(b), the Division approved the relocation of Bayard's permit to 2493 State Road 207 in St. Augustine, St. Johns County, Florida.

7. On December 2, 2020, Petitioner filed the Petition challenging the Notice as an unadopted rule in violation of section 120.56(4).

8. The Petition alleges, in pertinent part, as follows:

> 10. As part of the [Notice], the Division included a statement summarizing its application of the § 550.054(14)(b) relocation factors, yet failed to set forth any analysis of the conditions for relocation of greyhound permits set forth in § 550.0555(2). Based on this incomplete analysis of Bayard's Notice of Relocation, the Division approved Bayard's request to relocate.
>
> 12. Consequently, Petitioner is entitled to request a hearing challenging the Division's agency statement interpreting the applicability of § 550.054(14)(b), and lack of applicability of § 550.0555(2), in the [Notice] as an unpromulgated rule.
>
> 21. When analyzing whether to approve Bayard's request to relocate [Bayard's facility], the Division reviewed the factors listed in § 550.054(14)(b), but wholly disregarded the factors listed in § 550.0555(2). In other words, the Division determined, that a request, "pursuant to § 550.054(14)(b)" need not satisfy the requirements of § 550.0555(2), despite the fact that such an interpretation finds no support in the relevant statutes themselves. This interpretation of law represents an "agency statement of general applicability that implements, interprets or prescribes law or policy[.]" § 120.52(16), Fla. Stat. Since the Division did not properly adopt this interpretation as a rule, this means it is an invalid unpromulgated rule that cannot support agency action.

9. The crux of Petitioner's argument is that the Notice reflects an unwritten policy of the Division to apply only the factors in section

550.054(14)(b) to applications to relocate which are filed "pursuant to that section," and not apply the factors in section 550.0555(2).[3]

10. The Notice does not cite, analyze, or otherwise refer to, section 550.0555.

## CONCLUSIONS OF LAW

11. DOAH has jurisdiction over this action, and the parties thereto, pursuant to section 120.56.

12. "A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order." § 120.57(1)(h), Fla. Stat. This "standard for issuing a summary final order generally mirrors the standard for granting summary judgment under the Florida Rules of Civil Procedure." *Castiello v. Statewide Nominating Comm'n for Judges of Comp. Claims*,

[3] Section 550.0555(2) reads, in pertinent part, as follows:

> (2) Any holder of a valid outstanding permit for greyhound dogracing in a county in which there is only one dogracing permit issued … is authorized, without the necessity of an additional county referendum required under s. 550.0651, to move the location for which the permit has been issued to another location within a 30-mile radiuas of the location fixed in the permit issued in the county, provided the move does not cross the county boundary, that such relocation is approved under the zoning regulations of the county or municipality in which the permit is to be located as a planned development use, consistent with the comprehensive plan, and that such move is approved by the department after it is determined at a proceeding pursuant to chapter 120 in the county affected that the move is necessary to ensure the revenue-producing capability of the permittee without deteriorating the revenue-producing capability of any other pari-mutuel permittee within 50 miles; the distance shall be measured on a straight line from the nearest property line of one racing plant or jai alai fronton to the nearest property line of the other.

Case No. 17-0477RU, at ¶ 4 (Fla. DOAH Jan. 10, 2018) (granting a motion for summary final order).

13. Where, as here, the basic facts of the case "are clear and undisputed" and "only a question of law [must] be determined," entry of a summary final order is appropriate—just as entry of summary judgment would be. *See Duprey v. United Servs. Auto. Ass'n*, 254 So. 2d 57, 58 (Fla. 1st DCA 1971).

14. Section 120.52(16) defines a rule as follows:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

15. Section 120.52(20) provides that an "'[u]nadopted rule' means an agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of s. 120.54."

16. Section 120.54(1)(a) provides that "[r]ulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable."

17. The requirement for agency rulemaking, codified in section 120.54(1), prevents an administrative agency from relying on general policies that are not tested in the rulemaking process, but it does not apply to every kind of statement an agency may make. *See McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 581 (Fla. 1st DCA 1977) (stating that rulemaking requirements were never intended to "encompass virtually any utterance by an agency"), *superseded by statute on other grounds*, § 120.54(1)(a), Fla. Stat. (Supp. 1996), as recognized in *Dep't. of High. Saf. & Motor Veh. v. Schluter*, 705 So. 2d 81 (Fla. 1st DCA 1997). Rulemaking is required only for an agency statement that is the equivalent of a rule.

18. An agency's application of the law to a particular set of facts is not itself a rule. *See Amerisure Mut. Ins. Co. v. Fla. Dep't of Fin. Servs., Div. of Workers' Comp.*, 156 So. 3d 520, 531 (Fla. 1st DCA 2015) (concluding that the agency did not rely on an unadopted rule, but "simply applied the governing statute to the information" reported by the relevant entity), *superseded by state constitutional amendment on other grounds*, art. V, § 21, Fla. Const., as recognized in *Lee Mem'l Health Sys. Gulf Coast Med. Ctr. v. Ag. for Health Care Admin.*, 272 So. 3d 431, 437 (Fla. 1st DCA 2019); *see also* § 120.57(1)(e)1., Fla. Stat. (expressly authorizing "application of . . . applicable provisions of law to the facts").

19. Accordingly, where an agency statement analyzes existing law, as it applies to a particular set of circumstances, the statement is not itself a rule and is not subject to the rulemaking process. *Envtl. Trust v. State, Dep't of Envtl. Prot.*, 714 So. 2d 493, 498 (Fla. 1st DCA 1998). To conclude otherwise would effectively require an agency to adopt a rule for every possible circumstance that may arise. Instead, "an agency is free to simply apply a statute to facts … without engaging in rulemaking." *Office of Ins. Reg. v. Guarantee Trust Life Ins. Co.*, Case No. 11-1150 at ¶ 75 (Fla. DOAH Mar. 16, 2012; Fla. OIR June 28, 2012).

20. As the First District Court of Appeal explained:

> An agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is not itself a rule. If that were true, the agency would be forced to adopt a rule for every possible variation on a theme, and private entities could continuously attack the government for its failure to have a rule that precisely addresses the facts at issue. Instead, these matters are left for the adjudication process under section 120.57, Florida Statutes.

*Envtl. Trust*, 714 So. 2d at 498. Here, the statements contained in the Division's Notice simply apply section 550.045(14)(b) to the facts set forth in

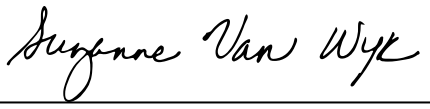
Bayard's Notice of Relocation and conclude that, based on those facts, Bayard has met the statutory criteria. The Notice does not contain any statement of general applicability which implements, interprets, or prescribes law or policy. Contrary to Petitioner's assertion, the Division's Notice does not ascribe to section 550.054(14)(b) any interpretation which is not apparent on its face; nor does it ascribe any meaning to section 550.0555(2).

21. Any error in an agency's application of the law to the particular facts may be remedied through the adjudicatory process provided in section 120.57.[4]

## CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, the Motions are Granted because the Division's Notice does not constitute an unpromulgated rule in violation of section 120.56(4). Petitioner's Petition is DISMISSED with prejudice.

DONE AND ORDERED this 8th day of January, 2021, in Tallahassee, Leon County, Florida.



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[4] Petitioner has filed a challenge to the Division's Notice pursuant to section 120.57, which, according to the parties, has been scheduled for an informal hearing, pursuant to section 120.57(2), as there are no material facts in dispute.

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of January, 2021.

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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.