STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL ALLEN LERMAN,

Petitioner,

vs. Case No. 21-1072RX

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

Respondent.
_____/

SUMMARY FINAL ORDER

This case is before the undersigned on the parties' Motions for Summary Final Order. Based on the Motions filed, there is no dispute of material fact, and a Summary Final Order determining the issues of law presented by the Rule Challenge Directed to Rule 61D-6.008, F.A.C. is appropriate.

STATEMENT OF THE ISSUE

The issue presented for resolution is whether Florida Administrative Code Rule 61D-6.008 is an invalid exercise of delegated legislative authority as described in section 120.52(8)(c), Florida Statutes.

PRELIMINARY STATEMENT

On March 18, 2021, Petitioner, Michael Lerman (Petitioner or Mr. Lerman), filed a Rule Challenge Directed to Rule 61D-6.008, F.A.C. (Petition), asserting that rule 61D-6.008 is an invalid exercise of delegated legislative authority within the meaning of section 120.52(8)(b) and (c). The case was assigned to Administrative Law Judge Suzanne Van Wyk and on March 23, 2021, was scheduled for hearing on April 19, 2021, to be conducted by means of Zoom technology.

On March 30, 2021, the Department of Business and Professional Regulation (Respondent or the Department) filed a Motion for Summary Final Order, to which Petitioner responded in part on April 6, 2021.

On April 6, 2021, Respondent filed an Emergency Motion for Protective Order, asserting that Petitioner was seeking to depose Dr. Cynthia Cole, Director of the University of Florida's Racing Laboratory, and anticipated a request to depose the Assistant Lab Director, Craig Jones. Petitioner also sought through discovery the laboratory's determination of the testing methodologies and measurement uncertainties for controlled therapeutic medications between January 10, 2016, and March 4, 2021. Respondent asserted that all of this information was irrelevant to the determination of whether rule 61D-6.008 is an invalid exercise of delegated legislative authority.

Judge Van Wyk agreed and issued a Protective Order and Order Quashing Request for Production, which states in part:

> The instant proceeding is a challenge to Florida Administrative Code Rule 61D-6.008, adopted on January 10, 2016, titled "Permitted Medications for Horses." Communications between Respondent and the laboratory in 2021 are not relevant to a rule challenge to a rule adopted in 2016.
>
> Rule 61D-6.008 establishes the permitted concentrations of an exhaustive list of prescription medications which "shall not be reported by the racing laboratory to the Division as a violation of Section 550.2415, F.S." As noted by Petitioner in its "Rule Challenge Directed to Rule 6.008, F.A.C. (2016)," the subject rule does not establish either the testing methodologies or the measurement uncertainties for screening specimens to confirm the presence of the listed medications. As such, communications regarding the testing methodologies and measurement of uncertainties

> are irrelevant to Petitioner's contention that rule 61D-6.008 is an "invalid exercise of delegated legislative authority." (footnote omitted).

On April 9, 2021, Petitioner also filed a Motion for Summary Final Order. On April 14, 2021, the parties filed a Joint Stipulation of Material Facts, and those facts are included in the Findings of Fact below. On April 15, 2021, the case was transferred to the undersigned, and both motions were heard in a motion hearing conducted by Zoom on April 16, 2021.

The parties agree that, at this point, there are no disputed issues of fact, and the case can be resolved based on the issues of law presented. The parties were offered the opportunity to file proposed final orders after the oral argument held on the motions, and both parties elected to rely on the motions for summary final order and the arguments presented on those motions. The parties also indicated in a Joint Response to Order that neither party intended to file the transcript of the oral argument on the Motions for Summary Final Order.

All statutory references are to the 2020 codification unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner is a thoroughbred racehorse trainer holding a professional occupational license issued by the Division of Pari-Mutuel Wagering (PMW).

2. Petitioner has standing to bring this rule challenge under chapter 120.

3. In 2015, the Legislature amended section 550.2415, Florida Statutes (2015), with respect to the Division's responsibility "to adopt certain rules relating to the conditions of use of maximum concentrations of medications, drugs, and naturally occurring substances." Ch. 2015-88, Laws of Fla. As amended, section 550.2415(7) provides in pertinent part:

> (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.
>
> (b) The division rules must designate the appropriate biological specimens by which the administration of medications, drugs, and naturally occurring substances is monitored and must determine the testing methodologies, including measurement uncertainties, for screening such specimens to confirm the presence of medications, drugs, and naturally occurring substances.

4. Rule 61D-6.008 was adopted on January 10, 2016.

5. Subsections (1) through (3) of rule 61D-6.008 contain 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., as mandated by section 550.2415(7)(a).

6. Subsection (2) of the rule sets forth the "appropriate biological specimens by which the administration of medications, drugs, and naturally occurring substances is monitored" as mandated by section 550.2415(7)(b).

7. Neither rule 61D-6.008 nor any other rule of the Division, with the exception of Emergency Rule 61DER21-2 (adopted March 4, 2021), contain a provision that designates the testing methodologies, including measurement uncertainties, for screening the designated biological specimens listed in

rule 61D-6.008(2) and (3) to confirm the presence of medications, drugs, and naturally occurring substances in horses, as mandated by section 550.2415(7)(b).

8. The Department has noticed proposed rule 61D-6.007, which Petitioner is challenging, in DOAH Case No. 21-1292RP. The proposed rule provides testing methodologies and measurement uncertainties, items that are absent from rule 61D-6.008. However, neither the emergency rule adopted prior to the notice of the proposed rule nor any version of the proposed rule was in existence when rule 61D-6.008 was adopted in 2016.

9. Petitioner's challenge states the following with respect to rule 61D-6.008:

> 8. Fla. Stat. 550.2415(7)(b) mandated that the Division [of Pari-Mutuel Wagering] adopt rules designating:
>
> a) "the appropriate biological specimens by which the administration of medications, drugs, and naturally occurring substances is monitored",
>
> b) the "testing methodologies", and
>
> c) "measurement uncertainties" for screening such specimens to confirm the presence of medications, drugs, and naturally occurring substances.
>
> 9. While the Rule does designate the appropriate biological specimens to be monitored for each permitted medication, the Rule does not establish the "testing methodologies" and the "measurement uncertainties", for screening such specimens to confirm the presence of medications, drugs, and naturally occurring substances.
>
> 10. Instead of adopting a rule establishing the "testing methodologies" and the "measurement uncertainties", for screening specimens to confirm the presence of medications, drugs, and naturally occurring substances as required by Fla. Stat.

550.2415(7)(b), the Division has instead, delegated the determination of both the "testing methodologies" and the "measurement uncertainties" to the University of Florida Racing Laboratory.

11. Petitioner is directly affected by the Division's failure to include both the "testing methodologies" and the "measurement uncertainties" within the Rule, as both the methodology used to test post-race serum samples and the measurement uncertainty for each permitted medication affects the determination of whether there was an amount of permitted medication in excess of the maximum quantum of the permitted medication found in the post-race same taken from the racehorse "Calina's Song".

CONCLUSIONS OF LAW

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

11. Section 120.56(1)(a) provides that any person substantially affected by a rule or proposed rule may file a challenge on the ground that the rule or proposed rule is an invalid exercise of delegated legislative authority. With respect to existing rules, the petition must state "the particular provisions alleged to be invalid and a statement of the facts or grounds for the alleged invalidity," and "facts sufficient to show that the petitioner is substantially affected by the challenged rule." § 120.56(1)(b), Fla. Stat.

12. The parties have stipulated that Petitioner has standing to bring this challenge. Petitioner is a licensed trainer regulated by the Department who is subject to discipline based, at least in part, on the rules adopted pursuant to section 550.2415.

13. Challenges to existing rules may be filed at any time during which the rule is in effect, and a petitioner has the burden of proving by a

preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised. § 120.56(3), Fla. Stat.

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

15. Section 120.52(8) defines "invalid exercise of delegated legislative authority" 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:
>
> (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 and 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 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 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 any agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

16. Petitioner alleges that rule 61D-6.008 is an invalid exercise of delegated legislative authority as defined in section 120.52(8)(b), by exceeding its grant of rulemaking authority, and section 120.52(8)(c), by enlarging, modifying, or contravening the specific provisions of law implemented. Petitioner's challenge fails for the reasons listed below.

17. First, as a preliminary matter, the Petition does not identify "particular provisions alleged to be invalid" as required by section 120.56(1)(b). Petitioner is not challenging the current contents of the rule, but rather, is challenging the omission of items required to be the subject of rulemaking by section 550.2415(7). In short, he is challenging not what the rule contains, but what it does not.

18. However, the plain meaning of section 120.56(1)(b) requires that a petition identify the particular provisions of the rule being challenged. The only viable interpretation of this language is that a petitioner must actually

challenge something contained in the rule. The Petition in this case does not comply with this basic requirement.

19. Second, section 550.2415(7) lists several items that the Department must adopt by rule. It does not require that all of those items be in the same rule. Section 550.2415(7) expressly states that "the division shall adopt *rules"* and "[t]he division *rules* must designate" the identified items, including testing methodologies and medical uncertainties. § 550.2415(7)(a) and (b), Fla. Stat. Given the Legislature's repeated use of the plural term, rules, as opposed to the singular, rule, there is no requirement that all of the items identified are required to be in the same rule.

20. To exceed the Legislature's grant of authority in violation of section 120.52(8), an agency rule must go further than the grant of authority the agency is given. *See, e.g., MB Doral v. Dep't of Business and Prof'l Reg.* 295 So. 3d 850, 853-54 (Fla. 1st DCA 2020); *Ortiz v. Dep't of Health*, 882 So. 2d 402, 405 (Fla. 4th DCA 2004). Here, it appears that initially, the Department did not go far enough. However, under the circumstances presented in this case, failing to complete the task does not invalidate the rule actually adopted. Therefore, rule 61D-6.008 is not an invalid exercise of delegated legislative authority as defined in section 120.52(8)(b).

21. Petitioner also alleges that rule 61D-6.008 "enlarges, modifies, or contravenes the specific provisions of law implemented," in violation of section 120.52(8)(c).

22. Where the Legislature has not specifically defined the words used in a statute, the plain and ordinary meaning should govern, *Greenfield v. Daniels*, 51 So. 3d 421, 426 (Fla. 2010), and it "is appropriate to refer to dictionary definitions when construing statutes in order to ascertain the plain and ordinary meaning of the words used there." *Id.* at 426 (quoting *Sch. Bd. of Palm Beach Cty. v. Survivors Charter Schs., Inc.,* 3 So. 3d 1220, 1223 (Fla. 2009). To "contravene" is to "go or act contrary to: violate" or to "oppose in argument: contradict." Merriam-Webster Dictionary, at http://www.merriam-

webster.com (last visited May 3, 2021). In discussing the right synonym for the word contravene, Merriam Webster states:

> DENY, GAINSAY, CONTRADICT, CONTRAVENE mean to refuse to accept as true or valid. DENY implies a firm refusal to accept as true, to grant or concede, or to acknowledge existence or claims of. // *denied the charges.* // GAINSAY implies disputing the truth of what another has said. // no one can *gainsay* her claims. // CONTRADICT implies an open or flat denial. // her account *contradicts* his. // CONTRAVENE implies not so much an intentional opposition as some inherent incompatibility. // law that *contravene* tradition. //

23. Petitioner has not pointed to any part of rule 61D-6.008 that is incompatible with section 550.2415(7). Likewise, Petitioner has not pointed to any provision contained in rule 61D-6.008 that enlarges or modifies section 550.2415(7).

24. Neither party cited the recent decision in *Southern Baptist Hospital of Florida v. Agency for Health Care Administration*, 270 So. 3d 488 (Fla. 1st DCA 2019), which contains facts that are similar but not identical to what is presented in this case. *Southern Baptist* involves a rule governing the calculation of reimbursement to hospitals for outpatient services under Medicaid. While the facts are somewhat convoluted, the Agency was required to implement a recurring methodology in the Outpatient Plan that could include certain enumerated factors. The Outpatient Plan was adopted by reference in Florida Administrative Code Rule 59G-6.030. Rule 59G-6.030 did not set out the methodology the Agency used to calculate the 2011 unit cost base or the unit costs for subsequent years. Instead, the Agency used an unadopted fraction methodology (which it referenced as "just math"), and at some point changed the fraction methodology by using a different denominator.

25. Several hospitals challenged the Agency's rules because of the failure to identify the methodologies used. In response, the Agency published a

proposed amendment to rule 59G-6.030, and the Hospitals challenged both the existing and proposed rules. The hospitals argued, successfully, that the Agency had not engaged in rulemaking to adopt the methodologies used *into the Outpatient Plan*, as required.

26. Notably, the agency was required to adopt the recurring methodologies in the Outpatient Plan, which was included in rule 59G-6.030. The administrative law judge made findings of fact that no recurring methodology was provided, but that the existing and proposed rules did not enlarge, modify, or contravene the specific provisions of law implemented. The First District Court of Appeal noted that the decision rested "entirely upon deference to the Agency's interpretation of the implementing statutes," which the Court found to be in error. *Id.* at 502. The First DCA found that, given the recent constitutional amendment to Article V, Section 21 of the Florida Constitution, the deference is not appropriate. The court stated that, even if deference is appropriate, "judicial adherence to the agency's view is not demanded when it is contrary to the statute's plain meaning." *Id.* at 503. The clear statutory directive was to implement a recurring methodology in the Outpatient Plan. The court found that the existing rule contravened the statute because it failed to adopt a methodology as required. The court also found that the existing and proposed rules were vague, failed to establish adequate standards for agency decisions, and vested unbridled discretion in the Agency.[1]

27. At first blush, *Southern Baptist* appears to mandate a finding in Petitioner's favor. However, in *Southern Baptist,* the Agency was required to identify the recurring methodology in a specific place, the Outpatient Plan. It did not do so. The Hospitals could point to the Outpatient Plan contained in the rule and clearly show where it was deficient and not compliant with the

[1] Petitioner did not challenge rule 61D-6.008 on these grounds.

statutory directive for the Plan. Section 550.2415(7), by contrast, simply directs the Department to adopt *rules* identifying those items included in paragraphs (1) and (2). Petitioner does not take issue with the contents of rule 61D-6.008, whereas the hospitals in *Southern Baptist* took issue with the absence of a ratemaking methodology in the Outpatient Plan. While, in *Southern Baptist*, AHCA contravened the legislative directive to adopt a ratemaking methodology in the Outpatient Plan, rule 61D-6.008, as adopted, does not go further than the Legislature intended, and does not enlarge, modify, or contravene the statute.

28. There is no dispute that the Department was woefully late in adopting a rule, be it an emergency rule or otherwise, to address the methodology for testing and the medical uncertainties, despite being directed to do so in 2015. However, the remedy for such an oversight is not a challenge aimed at invalidating the rule that addresses the other items the Legislature identified for rulemaking.

29. Section 120.56(3)(b) provides that an administrative law judge may declare all or part of a rule invalid, which is consistent with the directive in section 120.56(1)(b)1. that a petition to invalidate the rule must state the particular provisions alleged to be invalid. If a rule or portion of a rule is declared invalid, the rule or portion thereof becomes void when the time for filing an appeal expires. Here, Petitioner has not identified a portion of the rule that is challenged, and invalidating the entire rule would result in a situation where nothing the Legislature directed is accomplished.

30. A more appropriate remedy is contained in section 120.54(7) which provides that where an agency has failed to adopt rules as directed, a substantially affected person may file a petition to initiate rulemaking. Petitioner did not pursue this avenue, and once the failure to address

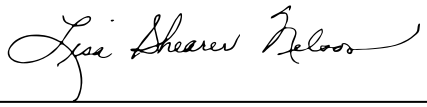
methodologies and medical uncertainties was brought to the Department's attention, the Department began the rulemaking process.[2]

31. In summary, the Department is not required to address all of the issues identified in section 550.2415(7) in the same rule, and the failure to do so does not render rule 61D-6.008 an invalid exercise of delegated legislative authority in violation of section 120.52(8)(b) or (c).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Rule Challenge Directed to Rule 61D-6.008, F.A.C. be dismissed.

DONE AND ORDERED this 6th day of May, 2021, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of May, 2021.

[2] Petitioner apparently did not challenge the emergency rule, but has challenged the validity of the proposed rule addressing testing methodologies and medical uncertainties. *See Lerman v. Dep't of Business and Prof'l Reg.,* DOAH Case No. 21-1292RP. The merits of the challenge to the proposed rule is not at issue in this proceeding.

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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.