STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE FLORIDA HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, INC., A FLORIDA NONPROFIT CORPORATION, AND GULFSTREAM PARK RACING ASSOCIATION, INC. A FLORIDA CORPORATION,

Petitioners,

vs. Case No. 21-1184RP

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

Respondent.
_______________________________________/

SUMMARY FINAL ORDER

On April 20, 2021, Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the "Division"), filed a Motion for Summary Final Order pursuant to section 120.57(1)(h), Florida Statutes.[1] On May 3, 2021, Petitioners, Florida Horsemen's Benevolent and Protective Association, Inc. ("FHBPA"), and Gulfstream Park Racing Association, Inc. ("Gulfstream Park") ("Petitioners"), filed a response to the Division's Motion for Summary Final Order as well as their own Motion for Summary Final Order. The parties have stipulated that there are no disputed issues as to any material fact and this case is ripe for summary decision.

APPEARANCES

For Petitioner: Bradford J. Beilly, Esquire
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[1] Unless otherwise indicated, all references to Florida Statutes are to the 2020 edition.

For Respondent: Ross Marshman, Esquire
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STATEMENT OF THE ISSUE

The issue is whether the proposed amendment to Florida Administrative Code Rule 61D-3.001 is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On March 10, 2021, the Division published a Notice of Proposed Rule in the Florida Administrative Register. The stated "Purpose and Effect" of the proposed amendment to rule 61D-3.001, Procedures for Stewards' Hearings, was "to update procedures for hearings before stewards with the goal of streamlining certain enforcement actions, including equine drug positive cases, against licensees. The rule amendment is also intended to provide clarity to procedures related to stewards' hearings." The proposed amendment constituted a substantial rewording of the text of current rule 61D-3.001.

On March 31, 2021, Petitioners filed at the Division of Administrative Hearings ("DOAH") a "Rule Challenge Directed Toward Proposed Rule 61D-3.001, F.A.C." The rule challenge alleged that the proposed amendment to rule 61D-3.001 "enlarges, modifies, or contravenes the specific provisions of the law implemented," specifically section 120.80(4)(a), which provides:

> (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:
>
> 1. Horse riding, harness riding, greyhound interference, and jai alai game actions in violation of chapter 550.
>
> 2. Application and usage of drugs and medication to horses, greyhounds, and jai alai players in violation of chapter 550.
>
> 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.
>
> 4. Suspensions under reciprocity agreements between the Division of Pari-mutuel Wagering and regulatory agencies of other states.
>
> 5. Assault or other crimes of violence on premises licensed for pari-mutuel wagering.
>
> 6. Prearranging the outcome of any race or game.

Petitioners contend that the proposed amendments do not provide for actual "alternative procedures" for the listed violations, but simply graft DOAH discovery and hearing processes onto the board of stewards' hearings referenced in the statute implemented, and that the proposed rules directly modify and contravene the statute by providing that a board of stewards is without jurisdiction to resolve "genuine issues of material fact" as to whether a respondent committed the violation alleged. Under the proposed amendment, a board of stewards would be limited to resolving issues as to the penalties to be imposed for undisputed violations. Cases involving

disputed issues of material fact would be forwarded to DOAH for the conduct of a hearing by an Administrative Law Judge ("ALJ").

On April 20, 2021, the Division filed a Motion for Summary Final Order. On April 23, 2021, the Division filed an Amended Motion for Summary Final Order. In its amended motion, the Division argues that the statute implemented provides no definition of "alternative procedures" to hearings conducted pursuant to sections 120.569 and 120.57(1) and that the procedures set forth in the proposed amendment to rule 61D-3.001 should be found as a matter of law to be harmonious with section 120.80(4)(a). The fact that the hearings would be held before boards of stewards rather than ALJs itself constitutes an "alternative procedure." The fact that there would be some overlap between the hearing procedures prescribed by DOAH and by boards of stewards would not negate the "alternative" nature of the hearings before the latter entities.

The Division also argued that section 120.80(4)(a) is procedural in nature. It does not establish the jurisdiction of stewards; it addresses only procedural matters and identifies certain types of stewards' hearings that are exempt from the requirements of sections 120.569 and 120.57(1)(a). This was as close as the Amended Motion for Summary Final Order came to directly addressing Petitioners' argument that the proposed rule contravenes section 120.80(4)(a) by preventing boards of stewards from resolving factual issues as to whether a violation was committed.

On May 3, 2021, Petitioners filed their own Motion for Summary Final Order as well as their response to the Division's Motion for Summary Final Order. On May 7, 2021, Petitioners filed a "Motion for Leave to File an Amended Rule Challenge Directed to Proposed Rule 61D-3.001, F.A.C." The

motion was granted by Order dated May 12, 2021.[2] The amended petition added an allegation that the proposed rule amendment was arbitrary and capricious.

On May 10, 2021, the Division filed its response to Petitioners' Motion for Summary Final Order.

On May 24, 2021, the parties filed a Joint Stipulation of Facts.

On June 9, 2021, Petitioners filed their "Motion for Leave to File a Second Amended Rule Challenge Directed to Proposed Rule 61D-3.001, F.A.C." On June 16, 2021, the Division filed its written opposition to the motion. By Order dated June 18, 2021, the undersigned granted Petitioners' leave to amend their petition a second time. This Summary Final Order is based on Petitioners' "Second Amended Rule Challenge Directed to Proposed Rule 61D-3.001, F.A.C." ("Second Amended Petition"). The Second Amended Petition adds some clarifying factual allegations but retains the main legal allegations of the amended petition: the proposed rule enlarges, modifies, or contravenes specific provisions of the law implemented and/or is arbitrary and capricious.

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[2] In a subsequent pleading, the Division complained that the undersigned entered the Order Granting Leave to Amend prior to the running of the period for the Division to file a written response in opposition. The Division's complaint is accurate. However, the undersigned concludes that the error was harmless in that no subsequent pleading filed by the Division ever demonstrated that it was or would be prejudiced by allowing Petitioners to amend their petition. Under the authority for liberal amendment of pleadings in cases such as *City of West Palm Beach v. Palm Beach County*, 253 So. 3d 623, 627 (Fla. 4th DCA 2018), *Optiplan, Inc. v. School Board of Broward County*, 710 So. 2d 569, 571-72 (Fla. 4th DCA 1998), and *Key Biscayne Council v. Department of Natural Resources*, 579 So. 2d 293, 294-95 (Fla. 3d DCA 1991), as well as the Division's later response to Petitioners' Second Motion to Amend, the undersigned finds that the Division was very unlikely to have established that Petitioners were not entitled to amend their petition.

FINDINGS OF FACT

1. The Division is the agency responsible for enacting administrative rules within the scope of its delegated legislative authority as set forth in chapter 550, Florida Statutes, as the statutes contained therein are amended from time to time.

2. Petitioner, FHBPA, is a Florida not-for-profit corporation whose purposes, as set forth in its Amended and Restated Articles of Incorporation filed with the Secretary of State on December 5, 2005, include, but are not limited to, the following:

> A. to advance, foster, and promote, generally, the sport of thoroughbred horse racing and the thoroughbred horse racing industry in the State of Florida;
>
> * * *
>
> D. to establish standards for racetrack conditions and equine care, safety, health, treatment, and well-being;
>
> * * *
>
> F. to foster professional integrity among horsemen and the horse racing industry and to develop a code of ethics governing the behavior of those persons engaged therein;
>
> * * *
>
> G. to cooperate with equine and humane organizations and public and private agencies, regulatory authorities, racing associations, racing commissions and other organizations located in Florida including, for example, the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the "Division"), and its departments and sub-divisions. and the public, in formulating fair and appropriate laws, rules, regulations and conditions that affect in any manner pari-mutuel wagering and awards, and are deemed to be in the best interests of horsemen,

> their employees, backstretch personnel, and the horse racing industry in general, and to ensure the enforcement of such rules is fair and equitable;
>
> * * *
>
> J. to represent the interests of its members, before any local, state, or federal administrative, legislative, and judicial fora including, but not limited to, the Division with regard to all matters affecting horsemen and the horse racing industry.

3. Currently, the FHBPA represents more than 200 Florida licensed thoroughbred horse trainers and more than 5,000 Florida licensed thoroughbred horse owners. Pursuant to its Amended and Restated Articles of Incorporation and applicable law, the FHBPA has associational standing to file and prosecute this petition challenging the proposed amendment to rule 61D-3.001 on behalf of its members.

4. Petitioner, Gulfstream Park, is the holder of a pari-mutuel permit issued by the Division authorizing thoroughbred horse racing at its permitted facility in Broward County. It is directly and substantially affected by the proposed amendment to rule 61D-3.001.

5. Current rule 61D-3.001(2) provides that alleged violations of chapter 550 or chapter 61D in horseracing "shall be heard by a board of stewards. Each horseracing permitholder shall establish a board of three stewards, at least one of whom shall be the state/division steward selected and hired by the division." Current rule 61D-3.001(19) provides, in relevant part:

> (19) Orders.
>
> (a) In the event the stewards … determine a statute or rule has been violated and a penalty of a license suspension of 60 days or less, or a fine not to exceed $1,000 is sufficient to address the violation, the stewards or division judge shall enter an order within 14 days after the hearing. The

> order shall include a caption, time and place of the hearing, findings of fact, statement of rules or statutes violated, and a ruling stating the length of any suspension and the amount of the fine imposed for each violation.
>
> (b) In the event the stewards … determine a statute or rule has been violated and a penalty of a license suspension of greater than 60 days, or a fine of greater than $1,000 should be imposed for the violation, the stewards or division judge shall forward a recommendation to the division stating their findings of fact, statement of statutes or rules violated, and recommended penalty within 14 days after the hearing. The recommendation shall be served to each party at the time it is forwarded to the division. A party shall have 14 days from the date the recommendation is issued in which to file a response with the division prior to the entry of a final order.

6. Subsection (19) of the current rule plainly contemplates that the stewards may make factual findings sufficient to permit them to "determine a statute or rule has been violated." The language of subsection (19) has been in place since June 26, 2011.

7. Section 120.80 is titled "Exceptions and special requirements; agencies." The statute sets forth various exceptions to the requirements of chapter 120 for specific agencies in specific situations. Section 120.80(4) sets forth the exceptions and special requirements for the Department of Business and Professional Regulation. Section 120.80(4)(a) is the provision cited by the Division as one of the statutes implemented by both the current rule and the proposed amendment to rule 61D-3.001. Section 120.80(4)(a) provides:

> (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:
>
> 1. Horse riding, harness riding, greyhound interference, and jai alai game actions in violation of chapter 550.
>
> 2. Application and usage of drugs and medication to horses, greyhounds, and jai alai players in violation of chapter 550.
>
> 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.
>
> 4. Suspensions under reciprocity agreements between the Division of Pari-mutuel Wagering and regulatory agencies of other states.
>
> 5. Assault or other crimes of violence on premises licensed for pari-mutuel wagering.
>
> 6. Prearranging the outcome of any race or game.

8. Section 120.569 is titled "Decisions which affect substantial interests." Subsection (1) provides as follows:

> (1) The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under s. 120.573 [mediation of disputes] or s. 120.574 [summary hearings]. *Unless waived by all parties, s. 120.57(1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, s. 120.57(2) applies in all other cases. If a disputed issue of material fact arises during a proceeding under s. 120.57(2), then, unless waived by all parties, the proceeding under s. 120.57(2) shall be terminated and a proceeding under s. 120.57(1) shall be*

> *conducted.* Parties shall be notified of any order, including a final order. Unless waived, a copy of the order shall be delivered or mailed to each party or the party's attorney of record at the address of record. Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review; and shall state the time limits which apply. (emphasis added).

9. Section 120.57 is titled "Additional procedures for particular cases." Section 120.57(1) sets forth "additional procedures applicable to hearings involving disputed issues of material fact" and section 120.57(2) sets forth "additional procedures applicable to hearings not involving disputed issues of material fact." Subsection (1)(a) provides:

> (a) Except as provided in ss. 120.80 and 120.81, an administrative law judge assigned by the division shall conduct all hearings under this subsection, except for hearings before agency heads or a member thereof. If the administrative law judge assigned to a hearing becomes unavailable, the division shall assign another administrative law judge who shall use any existing record and receive any additional evidence or argument, if any, which the new administrative law judge finds necessary.

10. In the absence of an exception in section 120.80 or 120.81, a case involving a disputed issue of material fact must be heard by an ALJ or an agency head or member thereof. Section 120.57(2) gives agencies greater discretion in hearings not involving disputed issues of material fact to agency discretion:

> (2) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS NOT INVOLVING DISPUTED ISSUES OF MATERIAL FACT.— In any case to which subsection (1) does not apply:

(a) The agency shall:

1. Give reasonable notice to affected persons of the action of the agency, whether proposed or already taken, or of its decision to refuse action, together with a summary of the factual, legal, and policy grounds therefor.

2. Give parties or their counsel the option, at a convenient time and place, to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or to its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction.

3. If the objections of the parties are overruled, provide a written explanation within 7 days.

(b) An agency may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority.

(c) The record shall only consist of:

1. The notice and summary of grounds.

2. Evidence received.

3. All written statements submitted.

4. Any decision overruling objections.

5. All matters placed on the record after an ex parte communication.

6. The official transcript.

> 7. Any decision, opinion, order, or report by the presiding officer.

11. Section 120.80(4)(a) exempts the Division from the hearing and notice requirements of sections 120.569 and 120.57(1) for hearings before stewards "when the hearing is to be held for the purpose of the imposition of fines or suspensions" for violations of subparagraphs 1.-6. Section 120.80(4)(a) does not exempt the Division from the hearing and notice requirements of sections 120.569 and 120.57(1)(a) for license revocations. The statute requires the Division to adopt rules establishing "alterative procedures" for the stewards' hearings under subparagraphs 1.-6.

12. It is notable that section 120.80(4)(a) does not under any circumstance exempt the Division from section 120.57(1)(b)-(n), which provides the procedural due process rights of parties to administrative hearings involving disputed issues of material fact. The narrow exemption provided by section 120.80(4)(a) allows the Division to retain jurisdiction over cases involving disputed issues of material fact rather than refer them to DOAH or have them heard by the agency head or a member thereof as would otherwise be required by sections 120.569(1) and 120.57(1)(a). Stewards may hold formal hearings that carry the penalty of fines or suspensions for the violations listed in section 120.80(4)(a)1.-6., but must respect the procedural rights established by section 120.57(1)(b)-(n).

13. Nothing about the interplay of sections 120.57 and 120.80 suggests that stewards lack the authority to resolve disputed issues of material fact in the hearings subject to their jurisdiction. The Legislature's exemption of the Division from *only* subsection (1)(a) of section 120.57 strongly suggests the opposite. The Division's current rule 61D-3.001 clearly anticipates that stewards will resolve disputed issues of material fact in order to determine whether a statute or rule has been violated.

14. The text of the proposed rule amendment indicates that the Division has revised its view of the statutory authority conferred by section

120.80(4)(a). The following are the most problematic portions of the proposed amendment:

> <u>(1) Hearings Conducted by a Board of Stewards:</u>
>
> <u>(a) All proceedings for alleged violations indicated in subsection (1)(b) of this rule shall be heard by a Board of Stewards unless the division indicates in its administrative complaint that it is seeking revocation of a licensee's pari-mutuel license or the Board of Stewards relinquishes jurisdiction as required by the Florida Administrative Code and/or Florida Statutes.</u>
>
> <u>(b) Allegations of the following violations shall be heard by a Board of Stewards:</u>
>
> > <u>1. Horse riding and harness riding actions in violation of Chapter 550, F.S.</u>
> >
> > <u>2. Application and usage of drugs and medication to horses in violation of Chapter 550, F.S.</u>
> >
> > <u>3. Maintaining or possessing any device which could be used for the injection or other infusion of a prohibited drug to horses in violation of Chapter 550, F.S.</u>
> >
> > <u>4. Suspensions under reciprocity agreements between the Division of Pari-Mutuel Wagering and regulatory agencies of other states involving horse racing.</u>
> >
> > <u>5. Assault or other crimes of violence on premises licensed for horse racing.</u>
> >
> > <u>6. Prearranging the outcome of any pari-mutuel horse racing event.</u>
>
> * * *
>
> <u>(2) Procedures Applicable to Hearings by a Board of Stewards:</u>

* * *

<u>(c) Conduct of Hearings Before a Board of Stewards</u>

<u>1. The division shall have an opportunity to present to the Board of Stewards the undisputed facts of the alleged violation and any evidence of mitigation or aggravation for purposes of deciding a penalty.</u>

<u>2. All parties shall have an opportunity to present evidence and witnesses regarding mitigation for purposes of deciding a penalty. All witnesses shall be sworn in by a member of the Board of Stewards and are subject to examination, cross-examination, and questioning by any member of the Board of Stewards.</u>

<u>3. All parties shall have an opportunity to present legal arguments to the Board of Stewards, including interpretation of applicable division rules and statutes.</u>

* * *

<u>(4) Disputes of Material Fact: The Board of Stewards does not have jurisdiction to hear cases involving genuine issues of material fact. For purposes of this rule, a material fact is a fact that is essential to the determination of whether the respondent committed the alleged violation. Once a disputed issue of material fact is presented, the Board of Stewards must relinquish jurisdiction over the proceeding back to the division to be governed by Section 120.57(1), F.S., and referred to the Division of Administrative Hearings.</u>

15. The Division’s rationale for the proposed amendment is that section 120.80(4)(a) only allows stewards to impose fines or suspensions upon licensees, not to make factual determinations as to the underlying violations. The Division argues that if a matter requires anything more than a decision

over the imposition of a fine or suspension when the violation is undisputed, then the exemption in section 120.80(4)(a) is no longer operative and the hearing and notice requirements of sections 120.569 and 120.57(1)(a) apply to force the stewards to refer the case to DOAH. The Division concludes that the proposed amendment does not limit the stewards' jurisdiction but merely restates the limitations imposed by section 120.80(4)(a).

16. The undersigned finds that the Division's reading of the statute, while colorable if one considers the language of section 120.80(4)(a) narrowly and in isolation from the other provisions it cites, is fundamentally backward. As noted above, the only portion of section 120.57 that the Division is ever exempted from is subsection (1)(a). Thus, under section 120.80(4)(a), when the stewards go forward with their hearings to impose fines or suspensions, they remain subject to the provisions of section 120.57(1)(b)-(n). These provisions contain repeated specific references to the disputed issues of material fact that the Division argues stewards lack the jurisdiction to decide. For example:

- Section 120.57(1)(b) states that parties must be provided the opportunity "to submit proposed findings of facts and orders." There would be no need to submit proposed findings of fact in the stewards' hearings contemplated by the Division.

- Section 120.57(1)(c) sets forth the limitation on the use of hearsay in a section 120.57(1) hearing, a provision that would not be necessary in a proceeding with no disputed facts.

- Section 120.57(1)(d) provides, in relevant part, "Notwithstanding s. 120.569(2)(g), similar fact evidence of other violations, wrongs, or acts is admissible *when relevant to prove a material fact in issue,* such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the

evidence is relevant solely to prove bad character or propensity." (Emphasis added.) Again, this provision would not be necessary for a stewards' hearing as contemplated by the Division, yet is fully applicable to the stewards' hearings under section 120.80(4)(a).

- Section 120.57(1)(j) provides that "Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized."

17. The jurisdictional authority of stewards is established by section 550.1155, the full text of which is as follows:

> 550.1155 Authority of stewards, judges, panel of judges, or player's manager to impose penalties against occupational licensees; disposition of funds collected.—
>
> (1) The stewards at a horse racetrack; the judges at a dog track[3]; or the judges, a panel of judges, or a player's manager at a jai alai fronton may impose a civil penalty against any occupational licensee for violation of the pari-mutuel laws or any rule adopted by the division. The penalty may not exceed $1,000 for each count or separate offense or exceed 60 days of suspension for each count or separate offense.
>
> (2) All penalties imposed and collected pursuant to this section at each horse or dog racetrack or jai alai fronton shall be deposited into a board of relief fund established by the pari-mutuel permitholder. Each association shall name a board of relief composed of three of its officers, with the general manager of the permitholder being the ex officio treasurer of such board. Moneys deposited into the

[3] References to dog racing in this section have been eliminated by section 13, CS/SB 8A, approved by the Governor on May 25, 2021. As of the writing of this Final Order, the bill has not been codified. Therefore, the statute has been quoted in its 2020 form.

> board of relief fund shall be disbursed by the board for the specific purpose of aiding occupational licenseholders and their immediate family members at each pari-mutuel facility.

18. When section 550.1155 is read in conjunction with section 120.80(4)(a), it is clear that the Legislature contemplated racetrack stewards having full authority to hear cases and impose the limited discipline of fines and suspensions against occupational licensees for violation of the pari-mutuel laws or Division rules, including cases involving disputed issues of material fact. Section 120.80(4)(a) does not extend that authority to cases seeking license revocation, which is consistent with the provisions of section 550.1155.

19. The proposed amendment to rule 61D-3.001 provides that stewards may conduct only hearings not involving disputed issues of material fact. The board of stewards' jurisdiction is expressly limited to hearings in cases with "undisputed facts" as to the violation. Evidence may be presented only as regards to mitigation or aggravation of the penalty for the violation. The proposed amendment requires the board of stewards to relinquish jurisdiction of the case to DOAH whenever a disputed issue of material fact arises, meaning that it strictly follows section 120.57(1)(a) in the face of the express exemption from that provision set forth in section 120.80(4).

20. The authority of an agency to conduct hearings not involving disputed issues of material fact without resort to DOAH is codified in sections 120.569(1) and 120.57. The proposed amendment purports to implement section 120.80(4), but in fact ignores the exemption provided therein. In this, the proposed rule clearly contravenes the provisions of the statute it purports to implement.

21. The Division's reasoning, while erroneous, does not rise to the level of being arbitrary or capricious. The language of section 120.80(4)(a), restricting the exemption to hearings "held for the purpose of the imposition of fines or

suspensions," standing alone, could reasonably lead to the conclusion reached by the Division that the stewards' hearings should be limited to instances in which the facts of the violation are undisputed and the only question is the level of discipline to be imposed.

22. It is when section 120.80(4)(a) is placed in the context of sections 120.569(1), 120.57(1)(a), and 550.1155 that the Division's error becomes apparent. The Division should have made the observation that sections 120.569(1) and 120.57(1)(a) require the agency to send disputed fact hearings to DOAH, and that section 120.80(4) provides an exemption from that requirement. The Division then should have asked, "If the stewards are already precluded from hearing cases involving disputed issues of material fact by section 120.569(1), then what does the exemption in section 120.80(4)(a) *do*?" It being impermissible for an executive branch agency to read a statute as mere surplusage, the exemption must mean that certain defined disputed fact hearings may be conducted by the agency without the need to refer the matter to DOAH.[4]

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[4] This reading is supported by the fact that section 120.80 exempts several other entities from section 120.57(1)(a): section 120.80(2)(b) exempts the Department of Agriculture and Consumer Services from section 120.57(1)(a) for hearings held pursuant to the Florida Citrus Code, chapter 601, Florida Statutes; section 120.80(7) exempts the Department of Children and Families from section 120.57(1)(a) for certain social and economic programs; section 120.80(8)(a) exempts the Department of Highway Safety and Motor Vehicles from section 120.57(1)(a) for hearings regarding driver licensing pursuant to chapter 322, Florida Statutes, and section 120.80(8)(b) exempts the same agency from section 120.57(1)(a) for hearings to deny, suspend, or remove a wrecker operator from participating in the wrecker rotation system established by section 321.051, Florida Statutes; section 120.80(10)(c) exempts the Department of Economic Opportunity from section 120.57(1)(a) for hearings held under the Reemployment Assistance Program law, chapter 443, Florida Statutes; section 120.80(12) generally exempts the Public Employees Relations Commission from section 120.57(1)(a); and section 120.80(15) provides that the Department of Health is exempt from section 120.57(1)(a) for hearings conducted "in execution of the Special Supplemental Nutrition Program for Women, Infants, and Children; Child Care Food Program; Children's Medical Services Program; the Brain and Spinal Cord Injury Program; and the exemption from disqualification reviews for certified nurse assistants program." The language of these exemptions is not uniform. In most instances, the statute states that the agency may conduct the hearings in-house "notwithstanding s. 120.57(1)(a)." In some instances, the language appears to give the agency the option of sending the case to DOAH or keeping it in-house. In none of the exemptions is there any indication that the hearing to be conducted by the agency may not resolve disputed issues of material fact.

23. As explained above, the Division's reasoning went in another direction. The undersigned finds the Division's reasoning wrong but not irrational, or completely lacking in logic, and therefore not arbitrary or capricious.

24. In light of the findings above, it is unnecessary to make extensive findings as to Petitioners' other main contention, i.e., that the proposed amendment too closely mirrors DOAH procedures to be considered an "alternative procedure" under section 120.80(4)(a). The undersigned is persuaded that the Division had the better argument on this point. The statute does not define "alternative procedures." The "alternative procedures" the Division adopts in its rule would still have to be consistent with administrative due process and thus would be expected to bear at least some passing similarity to the procedures of the Administrative Procedure Act. How similar the alternatives may become before they cease to be "alternative" under the statute is a question for another day.

CONCLUSIONS OF LAW

25. DOAH has jurisdiction of the subject matter of and the parties to this proceeding. § 120.56, Fla. Stat.

26. Section 120.56(1)(a) provides that "any person substantially affected by a rule or 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."

27. Section 120.56(1)(b) provides that a petition challenging the validity of a proposed rule 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 would be substantially affected by the proposed rule.

28. Section 120.56(2)(a) provides that in challenges to proposed rules, "[t]he petitioner has the burden to prove by a preponderance of the evidence that the petitioner would be substantially affected by the proposed rule. The

agency then 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."

29. Section 120.56(2)(c) provides that in a proceeding to determine the invalidity of a proposed rule, "the proposed rule is not presumed to be valid or invalid."

30. Section 120.56(1)(e) provides that a rule challenge proceeding is de novo in nature and that the standard of proof is a preponderance of the evidence. The ALJ should consider and base the decision upon all of the available evidence, regardless of whether the evidence was placed before the agency during its rulemaking proceedings. *Dep't of Health v. Merritt*, 919 So. 2d 561, 564 (Fla. 1st DCA 2006)(concluding that the Legislature has overruled the court's holding in *Board of Medicine v. Florida Academy of Cosmetic Surgery,* 808 So. 2d 243 (Fla. 1st DCA 2002), that an ALJ's role in a proposed rule challenge is limited to a review of the record and a determination as to whether the agency action was supported by legally sufficient evidence).

31. To establish itself as a "person substantially affected" in this case, FHBPA must satisfy the elements of associational standing established in *Florida Home Builders Association v. Department of Labor*, 412 So. 2d 351, 353-54 (Fla. 1982):

> After reviewing the legislative history and purpose of chapter 120, we have concluded that a trade or professional association should be able to institute a rule challenge under section 120.56 even though it is acting solely as the representative of its members. To meet the requirements of section 120.56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule. 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 of the type appropriate for a

> trade association to receive on behalf of its members.

32. When an association seeks standing to challenge an administrative rule, its individual members are not required to participate; rather, "associational standing" for administrative challenges is contingent on the organization's demonstration that a substantial number of its members would be substantially affected by the rule. *NAACP, Inc. v. Fla. Bd. of Regents,* 863 So. 2d 294, 300 (Fla. 2003). There is no requirement that the association demonstrate "immediate and actual harm." *Id.*

33. To prove standing under the doctrine, the association must show that: (1) a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule; (2) the subject matter of the challenged rule is within the association's general scope of interest and activity; and (3) the relief requested is of the type appropriate for the association to receive on behalf of its members. *Fla. Home Builders*, 412 So. 2d at 351; *St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011); *Rosenzweig v. Dep't of Transp.*, 979 So. 2d 1050, 1053-54 (Fla. 1st DCA 2008).

34. The FHBPA has standing to bring this rule challenge proceeding. Its purpose is to advance, foster, and promote the thoroughbred horse racing industry in the State of Florida and to act in a representative capacity on behalf of its members before the Division, among other entities. The FHBPA represents more than 200 Florida licensed trainers and more than 5,000 Florida licensed horse owners. The proposed amendment to rule 61D-3.001 would directly affect many, if not all, of the FHBPA's members, and the relief sought by the FHBPA is appropriate for the association to receive because a determination of the invalidity of the proposed amendment will protect the interests of a substantial number of the FHBPA's members.

35. Gulfstream Park is the holder of a pari-mutuel permit issued by the Division authorizing it to conduct thoroughbred horse racing at its permitted

facility in Broward County. Gulfstream Park would be directly and substantially affected by the proposed amendment to rule 61D-3.001 and therefore has standing to pursue this rule challenge proceeding.

36. FHBPA has proven by a preponderance of the evidence that a substantial number of its members would be substantially affected by the proposed amendment to rule 61D-3.001 and Gulfstream Park has demonstrated that it would be substantially affected. Therefore, the burden shifts to the Division to prove by a preponderance of the evidence that the proposed amendment is not an invalid exercise of delegated legislative authority as to the objections raised. The Division has failed to carry this burden.

37. Section 120.52(8) states as follows:

> "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the

> necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

38. Petitioners challenged the proposed amendment to rule 61D-3.001 based on section 120.52(8)(c) and (e).

39. The proposed rule amendment cites sections 120.80(4)(a), 550.0251, 550.1155, and 550.2415 as the laws implemented. Sections 120.80(4)(a) and 550.1155 are quoted and amply discussed in the Findings of Fact above. Section 550.0251 generally sets forth the powers and duties of the Division, including its authority to 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.” § 550.0251(3), Fla. Stat. Section 550.2415 sets forth the Division’s

disciplinary authority as to impermissible medication of and prohibited substances found in racing animals.

40. For the reasons stated in the Findings of Fact above, the proposed amendment to rule 61D-3.001 contravenes the provision of section 120.80(4)(a) that exempts "stewards, judges, and boards of judges" from the hearing and notice requirements of sections 120.569 and 120.57(1)(a) for certain specified hearings. The exemption from section 120.57(1)(a), but not from the remainder of the formal hearing requirements of section 120.57(1), is a clear indication that the stewards, judges, and boards of judges are meant to conduct hearings involving disputed issues of material fact. The proposed rule ignores the exemption from sections 120.569 and 120.57(1)(a) and requires that disputed fact hearings be referred to DOAH. Therefore, the proposed amendment to rule 61D-3.001 violates section 120.52(8)(c).

41. Section 120.52(8)(e) provides: "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." Similarly, case law provides that an "arbitrary" decision is one not supported by facts or logic, or despotic, and a "capricious" decision is one taken irrationally, or without thought or reason. *Bd. of Clinical Lab. Pers. v. Fla. Ass'n of Blood Banks*, 721 So. 2d 317, 318 (Fla. 1st DCA 1998); *Bd. of Trs. of the Int. Imp. Trust Fund v. Levy*, 656 So. 2d 1359, 1362 (Fla. 1st DCA 1995). In undertaking this analysis, the undersigned is mindful that these definitions:

> [A]dd color and flavor to our traditionally dry legal vocabulary, but do not assist an objective legal analysis. If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious.

Dravo Basic Materials Co., Inc. v. Dep't of Transp., 602 So. 2d 632, 635 n.3 (Fla. 2d DCA 1992).

42. The proposed amendment to rule 61D-3.001 is not arbitrary or capricious. As the undersigned discussed at length above, the proposed amendment's restriction on the authority of stewards, judges, and boards of judges to hear cases involving disputed issues of material fact is based on a failure to read sections 120.569, 120.57, 120.80(4)(a), and 550.1155 *in pari materia*. As noted above, the Division's reading of section 120.80(4)(a) is colorable in isolation. A reading that is wrong but not unreasonable does not rise to the level of "arbitrary or capricious."

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that:

The proposed amendment to Florida Administrative Code Rule 61D-3.001 is an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 9th day of July, 2021, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
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Filed with the Clerk of the
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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.