STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES F. MCCLELLAN AND NATASHA NEMETH,

Petitioners,

vs. Case No. 17-5238RU

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

Respondent.
_____/

FINAL ORDER

Pursuant to notice, Lawrence P. Stevenson, Administrative Law Judge, Division of Administrative Hearings ("DOAH"), conducted a formal hearing in the above-styled case on December 14, 2017, in Jacksonville, Florida.

APPEARANCES

For Petitioners: Jeremy E. Slusher, Esquire
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STATEMENT OF THE ISSUE

Whether Florida Administrative Code Rules 61D-6.007 and/or 61D-6.012 constitute an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On September 21, 2017, Petitioners filed a "Petition for Administrative Determination of the Invalidity of: (1) Agency Policies and Statements as Unpromulgated Rules; and (2) Rules 61D-6.007, 61D-6.012, F.A.C." (the "Petition"). Petitioners' Motion for Summary Final Order as to Count I of the Petition was granted at the outset of the final hearing, disposing of the unpromulgated rule portion of the case. A written Partial Summary Final Order as to Count I of the Petition was issued on December 22, 2017. As of the date of this Final Order, an appeal of the Partial Summary Final Order taken by Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the "Division"), is pending at the First District Court of Appeal, Case No. 1D18-128.

This Final Order is limited to Count II of the Petition, which concerns the validity of rules 61D-6.007 and 61D-6.012.

The final hearing in this case was initially scheduled for October 13, 2017. Two continuances were granted. The hearing was ultimately scheduled for December 14 and 15, 2017, in Jacksonville. The granting of the Motion for Summary Final

Order as to Count I served to shorten the time required for the hearing, which was commenced and completed on December 14, 2017.

At the hearing, the parties offered Joint Exhibits 1 through 9, 27 through 30, and 47 which were admitted into evidence.

Petitioners offered the testimony of Margaret Wilding, the associate director of the University of Florida Racing Laboratory; James Roche, a kennel owner and dog trainer who races his animals at Orange Park Kennel Club; and Dr. Thomas Tobin, a veterinarian, pharmacologist and toxicologist. Petitioners also offered the deposition testimony of Pablo Medina, chief inspector for the Division; Casey Martin, veterinary assistant for the Division; Dr. Cynthia Cole, former director of the University of Florida Racing Laboratory; Jill Blackman, former chief operations officer of the Division; Glenda Ricks, chief operating officer of the Division; David Tiffany, the quality assurance manager at the University of Florida Racing Laboratory; and Dr. Tobin. Petitioners' Exhibits 10 through 26, 31 through 46, and 48 through 50 were admitted into evidence.

The Division presented testimony by Ms. Wilding and Mr. Tiffany. The Division's Exhibits 1 through 15 were admitted into evidence.

A two-volume Transcript of the hearing was filed at DOAH on January 5, 2018. On January 8, 2018, the undersigned entered an Order granting the parties' joint motion for an extension of time for the filing of proposed final orders to January 22, 2018. A second joint motion for extension was filed on January 18, 2018. On January 19, 2018, a second Order granting extension was entered, allowing the parties until January 24, 2018, to file their proposed final orders. Both parties timely filed their Proposed Final Orders. Both parties' proposals have been given careful consideration in the preparation of this Final Order.

Unless otherwise indicated, all statutory references in this Final Order are to the 2017 version of the Florida Statutes and all references to rules are to the current version of the Florida Administrative Code.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, the following Findings of Fact are made:

1. Petitioners, Charles L. McClellan and Natasha Nemeth, hold suspended Pari-Mutuel Wagering Individual Occupational Licenses that authorize them to train racing greyhounds. As licensees, Petitioners are subject to the provisions of

chapter 550, Florida Statutes, and the rules promulgated thereunder, specifically chapter 61D-6.

2. The Division is a state agency delegated the responsibility for the implementation and enforcement of Florida's pari-mutuel laws under chapter 550, including the licensing and regulation of all pari-mutuel activities in the state.

3. As licensees subject to disciplinary action by the Division, Petitioners have standing to bring this action.

4. Section 550.2415(1)(a), Florida Statutes, prohibits the racing of an animal that has been impermissibly medicated or determined to have a prohibited substance in its system. To enforce section 550.2415, Division employees collect urine samples from racing greyhounds at the track prior to the greyhounds' race. Fla. Admin. Code R. 61D-6.005(2). These samples are secured and shipped to the University of Florida Racing Laboratory ("UF Lab") to be tested for impermissible substances.

5. The Division and the UF Lab have entered into a contract pursuant to which the UF Lab conducts the drug testing analysis for all of the urine samples collected from racing animals at pari-mutuel tracks in Florida.

6. At all relevant times, each of the Petitioners was working as the trainer of record for racing greyhounds in the

Jacksonville area. The Division collected urine samples from Petitioners' greyhounds and sent them to the UF Lab for testing. The UF Lab tested the urine samples and reported a total of 24 drug positives for benzoylecgonine ("BZE") and/or ecgonine methyl ester ("EME"), both of which are metabolites of cocaine.

7. Margaret Wilding, associate director of the UF Lab, testified that the lab currently reports as "positive" any reading for cocaine metabolites at or above 10 nanograms per milliliter ("ng/mL"), the UF Lab's current limit of quantification.

8. The Division filed Administrative Complaints against Petitioners alleging that they were the trainers of record for racing greyhounds whose urine was collected, tested, and found to contain BZE and/or EME. The proposed penalty would be imposed pursuant to rule 61D-6.012. Those complaints were referred to DOAH and are being held in abeyance pending the outcome of this proceeding.[1/]

9. Section 550.2415(1) provides, in relevant part:

> (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. The division may solicit input from the Department of Agriculture and Consumer Services and adopt rules that specify normal physiological concentrations of naturally occurring substances in the natural untreated animal and rules that specify acceptable levels of environmental contaminants and trace levels of substances in test samples.
>
> (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.

10. Section 550.2415(2) provides that the Division may take administrative action against an occupational licensee "responsible pursuant to rule of the division for the condition of an animal that has been impermissibly medicated or drugged in violation of this section." Rule 61D-6.002(1) provides that the trainer of record "shall be responsible for and be the absolute insurer of the condition of the . . . racing greyhounds" that he or she enters in a race.[2/]

11. Section 550.2415(7) provides as follows:

> (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. [referenced herein as the ARCI Medication Schedule].[3/] 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.

(c) The division rules must include a classification system for drugs and substances and a corresponding penalty schedule for violations which incorporates the Uniform Classification Guidelines for Foreign Substances, Version 8.0, revised December 2014, by the Association of Racing Commissioners International, Inc. [referenced herein as the ARCI Guidelines].[4/] The division shall adopt laboratory screening limits approved by the Association of Racing Commissioners International, Inc., for drugs and medications that are not included as controlled therapeutic medications, the presence of which in a sample may result in a violation of this section.

(d) The division rules must include conditions for the use of furosemide to treat exercise-induced pulmonary hemorrhage.

(e) The division may solicit input from the Department of Agriculture and Consumer Services in adopting the rules required

> under this subsection. Such rules must be adopted before January 1, 2016.
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> (f) This section does not prohibit the use of vitamins, minerals, or naturally occurring substances so long as none exceeds the normal physiological concentration in a race-day specimen.

12. Section 550.2415 does not define "medication," "impermissibly medicated," "prohibited substance," "drug," "naturally occurring substance," "environmental contaminant," or "laboratory screening limits," except by reference to publications issued by the Association of Racing Commissioners International, Inc. ("ARCI").

13. ARCI is the umbrella organization of the official governing bodies for professional horse and greyhound racing in the United States. ARCI sets standards for racing regulation, medication policy, drug testing laboratories, and other matters pertaining to racing for participating jurisdictions.

14. The ARCI "Uniform Classification Guidelines for Foreign Substances and Recommended Penalties and Model Rule" ("ARCI Guidelines") are intended to assist stewards, hearing officers, and racing commissioners in evaluating the seriousness of alleged violations of medication and prohibited substance rules in racing jurisdictions.

15. The ARCI Guidelines employ a "Drug Classification Scheme" based on pharmacology, drug use patterns, and the

appropriateness of a drug for use in the racing animal.[5/] Drugs that are known to be potent stimulants or depressants are placed in higher classes, while those that have (or would be expected to have) little effect on the outcome of a race are placed in lower classes. Drugs that are clearly not intended for use in racing animals are placed in higher classes, particularly if they may affect the outcome of a race. The ARCI Guidelines do not set screening limits or testing thresholds for any of the listed substances.

16. The ARCI Guidelines classify cocaine and/or its metabolites as "Class 1 drugs" which are defined as:

> [S]timulant and depressant drugs that have the highest potential to affect performance and that have no generally accepted medical use in the racing horse. Many of these agents are Drug Enforcement Agency (DEA) schedule II substances. These include the following drugs and their metabolites: Opiates, opium derivatives, synthetic opioids, and psychoactive drugs, amphetamines and amphetamine-like drugs as well as related drugs. . . .

17. The ARCI Guidelines state that Class 1 drugs "have no generally accepted medical use in the racing horse and their pharmacologic potential for altering the performance of a racing horse is very high."

18. Rule 61D-6.007, titled "Permitted Medications for Racing Greyhounds," provides as follows:

The following medications are permitted to be administered to racing greyhounds in the dosages and under the conditions listed below:

(1) The administration of testosterone or testosterone-like substances, when used for the control of estrus in female racing greyhounds, is permitted, subject to the following conditions:

(a) Track veterinarians may administer injectable testosterone on the grounds of the permitholder to female racing greyhounds for the control of estrus.

(b) Kennel owners may use their regular Florida licensed veterinarian or may enter into a collective agreement for the services of a Florida licensed veterinarian to administer injectable testosterone to female racing greyhounds for the control of estrus.

(c) The administration of oral testosterone shall be permitted provided it is validly prescribed and properly labeled.

(d) Veterinarians that administer injectable or oral testosterone shall be responsible for maintaining security, inventory, and a retrievable records/log in accordance with the Drug Enforcement Agency (DEA) regulations pertaining to a Schedule III drug under the federal Controlled Substances Act and shall be accountable for all syringes and needles used therewith and their disposal in accordance with approved biomedical hazardous waste methods.

(2) Sulfa drug(s) is/are permitted to be administered to a racing greyhound providing:

(a) The racing greyhound is under the care of a veterinarian currently licensed pursuant to Chapters 474 and 550, Florida Statutes; and

(b) The sulfa drug(s) is/are prescribed by a veterinarian currently licensed pursuant to Chapters 474 and 550, Florida Statutes; and

(c) The sulfa drug(s) is/are not administered within 24 hours prior to the officially scheduled post time of the race.

(3) The following permitted medications shall not be reported by the racing laboratory to the division as a violation of Section 550.2415, F.S.:

(a) The detection of caffeine at a urinary concentration less than or equal to 200 nanograms per milliliter;

(b) The detection of theophylline and theobromine at a urinary concentration less than or equal to 400 nanograms per milliliter;

(c) The detection of procaine at a urinary concentration less than or equal to 2 micrograms per milliliter; and

(d) The detection of flunixin at a urinary concentration less than or equal to 250 nanograms per milliliter.

(4) All prescription medication, regardless of method of administration, shall be safeguarded under lock and key when not being actively administered.

19. Rule 61D-6.012, titled "Penalty Guidelines for Class I-V Drug Violations in Greyhounds," provides as follows:

(1) The penalties in this rule shall be imposed when the Division finds that the following substances have been identified by the state laboratory in a urine sample or blood sample collected from a greyhound participating in a pari-mutuel event:

(a) Any drug or medication that:

1. Is not approved for veterinary use in the United States by the Food and Drug Administration;

2. Cannot be detected by the state laboratory in a urine or blood sample unless the medication was administered within 24 hours of the race; or

3. Is detected in urine or blood concentrations that indicate a level of dosage that would constitute a threat to the health and safety of the greyhound.

a. First violation of this chapter	$1,000 to $2,500 fine and suspension of license zero to one year, or revocation of license;
b. Any subsequent violation of this chapter	$2,500 to $5,000 fine and revocation of license.

(2) The penalty for any medication or drug which is not described in subsection (1) above shall be based upon the classification of the medication or drug found in the Uniform Classification Guidelines for Foreign Substances, revised December 2014, as promulgated by the Association of Racing Commissioners International, Inc., which is hereby incorporated and adopted by reference, https://www.flrules.org/Gateway/reference.asp?No=Ref-06400. A copy of this document may be obtained at www.myfloridalicense.com/dbpr/pmw or by contacting the Department of Business and Professional Regulation, 2601 Blair Stone Road, Tallahassee, Florida 32399. The penalty schedule shall be as follows:

(a) Class I substances:	
1. First violation of this chapter	$500 to $1,000 fine and suspension of license zero to one year, or revocation of license;
2. Any subsequent violation of this chapter	$1,000 to $5,000 fine and suspension of license no less than one year, or revocation of license.
(b) Class II substances:	
1. First violation of this chapter	$100 to $1,000 fine and suspension of license zero to 30 days;
2. Second violation of this chapter	$250 to $1,000 fine and suspension of license no less than 30 days, or revocation of license;
3. Third violation or any subsequent violation of this chapter	$500 to $1,000 fine and suspension of license no less than 60 days, or revocation of license.
(c) Class III substances:	
1. First violation of this chapter	$50 to $500 fine;

2. Second violation of this chapter	$150 to $750 fine and suspension of license zero to 30 days;
3. Third violation or any subsequent violation of this chapter	$250 to $1,000 fine and suspension of license zero to 60 days.

(d) Class IV or V substances:

1. First violation of this chapter	$50 to $250 fine;
2. Second violation of this chapter	$100 to $500 fine;
3. Third or subsequent violation of this chapter	$200 to $1,000 fine and suspension of license zero to 30 days.

(3) The Division may consider mitigation or aggravation to deviate from these penalty guidelines.

(4) Circumstances which may be considered for the purposes of mitigation or aggravation of any penalty shall include the following:

(a) The impact of the offense to the integrity of the pari-mutuel industry.

(b) The danger to the public and/or racing animals.

(c) The number of repetitions of offenses.

(d) The time periods between offenses.

(e) The number of complaints filed against the licensee or permitholder, which have resulted in prior discipline.

(f) The length of time the licensee or permitholder has practiced.

(g) The deterrent effect of the penalty imposed.

(h) Any efforts at rehabilitation.

(i) Any other mitigating or aggravating circumstances.

(5) Absent mitigating circumstances, the division judge or the division shall order the return of any purse, prize, or award from any pari-mutuel event for redistribution when a postive test for a drug or medication described in paragraphs (1)(a), (1)(b), (1)(c), (2)(a), or (2)(b) is reported by the state laboratory and confirmed through the hearing process.

(6) The judges or the division shall specify in writing the reasons for requiring the return of any purse, prize, or award for redistribution when the positive test of a drug or medication reported by the state laboratory is not described in paragraphs (1)(a), (1)(b), (1)(c), (2)(a), or (2)(b) of this rule.

(7) Nothing in this rule modifies the provisions of Rule 61D-6.008 or 61D-3.002, F.A.C., or rules promulgated under Section 550.2415, F.S.

20. Count II of the Petition alleges that the challenged rules arbitrarily and capriciously fail to address environmental contamination of racing greyhound urine samples. It also alleges that the rules deprive racing greyhound trainers of due process, are vague in that they fail to establish adequate standards for agency decisions, and vest unbridled discretion in

the agency. Finally, it alleges that the rules exceed and contravene the Division's delegated legislative authority.

21. Petitioners point out that section 550.2415(1)(b) acknowledges the presence of "naturally occurring substances" and "environmental contaminants" in an animal. The statute authorizes the Division to adopt rules that specify "normal physiological concentrations" of naturally occurring substances and that specify acceptable levels of environmental contaminants.

22. Petitioners also observe that section 550.2415(7)(c) requires the Division to adopt rules that include a classification system for "drugs and substances" and a corresponding penalty schedule for violations in accordance with the ARCI Guidelines. The Division is also required to adopt ARCI-approved "laboratory screening limits" for drugs and medications that are not classified as controlled therapeutic medications.

23. Petitioners note that, despite the statutory language, rule 61D-6.007 provides screening limits for only a few foreign substances. The rule addresses permitted administrations of testosterone and sulfa drugs to racing greyhounds and provides screening limits for caffeine, theophylline, procaine, and flunixin. Petitioners contend that this list is inconsistent with the ARCI Medication Schedule, which lists 26 medications

and their recommended screening limits for the urine samples of racing animals.

24. Petitioners further note that rule 61D-6.012 establishes a penalty schedule that incorporates the ARCI Guidelines without regard to the amount of the substance found in the urine sample.

25. The Division counters that its rule follows the ARCI Guidelines, which do not contain laboratory screening limits (or thresholds) for cocaine, BZE, or EME. Cocaine, BZE, and EME are also not identified within the ARCI Medication Schedule.

26. The Division reads the exclusions of laboratory screening limits for cocaine as evidencing ARCI's "zero tolerance policy" for the presence of cocaine and its metabolites in the race-day sample of a racing animal. Rule 61D-6.012 incorporates the ARCI Guidelines and therefore the same "zero tolerance policy" for the presence of cocaine, BZE, and EME that the Division presumes, both the ARCI Guidelines and ARCI Medication Schedule recommend.

27. However, the only laboratory screening limits found in any of the ARCI materials are those related to the 26 "controlled therapeutic medications" listed in the ARCI Medication Schedule. The ARCI Guidelines list approximately 750 "drugs/substances" and contain screening limits for none of them. Thus, the Division's point about "zero tolerance" for

cocaine based on the ARCI documents could be made as to several hundred other drugs/substances, including several items for which the Division's own rule 6D-6.007(3) establishes screening limits well above zero.[6/]

28. The ARCI Schedule recommends that cocaine, almost alone among Class 1 drugs,[7/] be given a "Class B" penalty rather than the typical "Class A" penalty. The ARCI-recommended Class B penalty for a licensed trainer's first offense is a minimum 15-day suspension and $500 fine, absent mitigating circumstances. The presence of aggravating factors can increase the penalty to a 60-day suspension and a fine of $1,000. In contrast, the ARCI-recommended Class A penalty for a first offense is a minimum one-year suspension and minimum fine of $10,000. Aggravating factors can increase the Class A penalty to a three-year suspension and a fine of $25,000. The lesser recommended penalty indicates that if ARCI has singled out cocaine, it has been for more lenient treatment, and not for harsher treatment than for other Class 1 drugs.

29. Dr. Cynthia Cole is a veterinarian and pharmacologist, who acted as the director of the UF Lab from 2003 to 2006. Dr. Cole testified that BZE and EME are "naturally occurring substances," in the strict sense that they are metabolites of cocaine and would be naturally produced by any animal that has ingested cocaine.

30. Dr. Cole also conceded that levels of cocaine below 100 (ng/mL) would be very unlikely to have any effect on a racing animal's performance, and that such low levels could be the result of environmental contamination. Of the 24 positive tests cited against Petitioners, the highest concentration of a cocaine metabolite was 36.5 ng/mL. Even that appeared to be an outlier, as most of the concentrations were in the range of 10 to 15 ng/mL.

31. Dr. Thomas Tobin, a veterinarian, pharmacologist, and toxicologist, testified that trace amounts of cocaine are present virtually everywhere in North American human society. Dr. Tobin stated that less than 50 ng/mL of urinary BZE is indicative of nothing more than that the subject lives in North America. Dr. Tobin testified that a very small concentration of cocaine metabolites in the urine is likely attributable to environmental contamination. Dr. Tobin stated that when the concentration is below pharmacological significance, it should not be called a positive. He noted that in human drug testing, a sample is first screened at 150 ng/mL and then confirmed at 100 ng/mL, at which point it is reported as positive. Dr. Tobin could think of no scientific reason why there should be a regulatory reporting threshold for humans but not for racing animals.

32. Cocaine is rapidly absorbed and metabolized, and may enter a dog's body through the mouth, the mucous membranes, or through the skin. Dr. Tobin opined that the very small concentrations of cocaine metabolites found in Petitioners' greyhounds suggest exposure to the drug via touch, soon before the urine sample was taken. He found this significant because of the manner in which urine is collected from racing greyhounds in Florida.

33. Shortly before the first race begins for each 15-race card, greyhound trainers customarily arrive at the track detention facility with their greyhounds for weigh-in. The trainers then leave their greyhounds in the care of track personnel. Between weigh-in and the end of a greyhound's race, the dog has no physical contact with its trainer, while it has extensive contact with track personnel.

34. After weigh-in, and approximately 30 minutes before the first race begins, track personnel identified as "lead-outs," take the greyhounds into a locked area called a "ginny pit." Track personnel supervise the dogs in this area; trainers and owners are not allowed to be present. The urine sampling of a racing greyhound takes place just prior to the greyhound's scheduled race. Depending on when a greyhound is scheduled to race, its urine may be sampled several hours after its last contact with its trainer.

35. Veterinarian assistants employed by the Division catch racing greyhounds' urine during the sampling process. The Division does not drug-test its veterinarian assistants.

36. David Tiffany is the quality assurance manager for the UF Lab. Mr. Tiffany testified in agreement with Ms. Wilding that the UF Lab's current limit of quantification for cocaine, also called a "decision limit" or "cut-off," is 10 ng/mL. Mr. Tiffany uses the term "cut-off" to describe the detection level at which the lab has informally decided not to expend the effort required to establish the quantity of a substance at a lower level.

37. Mr. Tiffany stated that the UF Lab is able to detect cocaine down to 5 ng/mL, and that this "limit of detection"--the smallest concentration of a substance that can be confidently identified by a testing methodology--is one factor in determining the limit of quantification. He testified that several factors influence the ability to confidently see a drug all the way down to its limit of detection, including "noise" (other compounds) in the sample, and whether the testing instrument is in need of service and recalibration.

38. Mr. Tiffany wrote the UF Lab's procedures for determining measurement uncertainty. He explained that multiple measurements of an item yield small variations. The degree of that variation is the "precision of measurement." The lab looks

at various factors that affect the variation and sets a range of measurement uncertainty, i.e., the probability that the measurement for a certain substance will fall between an upper and a lower limit. Mr. Tiffany stated that the common level of a range is a 95-percent probability that the value of the sample is within the range. The standard format is to state the concentration of the substance, plus or minus the value of the range of measurement uncertainty.

39. Mr. Tiffany testified that the UF Lab calculates and attaches to its report a measurement of uncertainty only when dealing with a "threshold drug," meaning a drug for which a statute or rule sets an allowable level. For such drugs, the lab must be certain that the entire range of variation sits above the threshold. If the value of the measurement minus the measurement of uncertainty still exceeds the threshold, the lab calls it a positive finding.

40. The UF Lab does not report a measurement of uncertainty for cocaine and its metabolites because no rule or statute sets a threshold for cocaine. Mr. Tiffany stated that a measurement of uncertainty is not needed to detect the mere presence of a substance, as opposed to making a precise measurement of the quantity of that substance. The lab can determine that something is present without giving it a number.

41. Mr. Tiffany testified that the UF Lab used to simply report the qualitative results of its tests for cocaine, but that the Division then would ask whether there was a lot or a little cocaine in the sample. As an aid to the Division, the lab began reporting quantitative results for cocaine, with the proviso that the reported amounts were estimates.

42. At some point, the lab began restricting its "positive" reports for cocaine metabolites to those results that met or exceeded the lab's limit of quantification, 10 ng/mL. Ms. Wilding and Mr. Tiffany resisted calling this 10 ng/mL line a "threshold" because a "threshold" is an allowable level of a substance established by statute or rule.

43. However, as a practical matter, the Division has allowed the limit of quantification for cocaine metabolites to act as a threshold for taking action against a licensee. If the Division's policy were actually "zero tolerance," it would require the UF Lab to report cocaine down to its limit of detection and would discipline licensees accordingly. In either event, the laboratory screening limit should be reflected in the Division's rules, as required by section 550.2415(7)(c).

44. It was never explained at the hearing how the UF Lab knows which drugs are "threshold" drugs for purposes of reporting positive results to the Division. The Division's annual report includes a listing of positive drug tests for the

previous fiscal year. Apart from cocaine and its metabolites, the drugs found in the positive drug tests for fiscal years 2014-2015 and 2015-2016 were: acepromazine metabolite; methylprednisolone; amphetamine; betamethasone; caffeine; theophylline; theobromine; clenbuterol; dexamethasone; methocarbamol; phenylbutazone; 5-hydroxy dantrolene; despropionyl fentanyl; xylazine; dextrorphan; dimethyl sulfoxide; firocoxib; flunixin; ketoprofen; glycopyrrolate; ibuprofen; isoflupredone; methylprednisolone; triamcinolone acetonide; ketoprofen; lidocaine; 3-hydroxy lidocaine; mepivacaine; 3-hydroxy mepivacaine; omeprazole sulfide; oxycodone; oxymorphone; procaine; testosterone; nandrolone; boldenone; carprofen; isoxsuprine; naproxen; and zipaterol.

45. Apart from caffeine, theophylline, theobromine, procaine, and flunixin, the Division's rules (and the record of this proceeding) are silent as to the laboratory screening limits for these drugs. There appear to be three possibilities: the Division informally provided the UF Lab with a screening limit for these drugs; the Division instructed the UF Lab to report positive tests down to the limit of detection, i.e., "zero tolerance," for these drugs; or the UF Lab was allowed to set its own "screening limit" by way of its limit of quantification, as Mr. Tiffany testified has been done for

cocaine. However, the Division offered no evidence in support of any of the possibilities.

46. Mr. Tiffany testified that measurements of uncertainty vary between labs and can change within a single lab upon review of the methodologies and current equipment. Mr. Tiffany testified that there is no technical reason why the UF Lab could not report measurement uncertainties for BZE and EME if the Division requested that information. He believed that adopting the current UF Lab's measurement of uncertainty in a Division rule would become a "false restriction on the data," as it would become a limitation on the lab's ability to lower the uncertainty measurement with new equipment and techniques.[8/]

47. Several jurisdictions have established screening limits for BZE in racehorses. New Mexico, Ohio, Illinois, and Oklahoma prohibit disciplinary action unless the test sample results exceed 150 ng/mL. The state of Washington has set the screening limit at 50 ng/mL. Illinois and Oklahoma refer to BZE under the heading "environmental contaminants." New Mexico references BZE under the heading "environmental contaminants and substances of human use." Washington lists BZE under the heading "environmental substances."

48. Petitioners contend that the Division has effectively delegated to the UF Lab the setting of a threshold or screening limit for cocaine and its metabolites. The UF Lab's limit of

quantification operates as the screening limit for disciplinary action taken by the Division, and is subject to change whenever the lab alters its equipment or methods. In support of their contention, Petitioners point out that in 2014, the UF Lab employed a more sensitive testing technology than it currently uses, which resulted in the prosecution of a greyhound trainer whose dog's urine yielded only 3.7 ng/mL of BZE. Petitioners argue that this 2014 case demonstrates that the lab's limit of quantification serves as a de facto substitute for the screening limits that section 550.2415(7)(c) requires the Division to adopt by rule.[9/] The evidence fully supports Petitioners' argument on this point.

49. In summary, section 550.2415(7) places several mandatory rulemaking requirements on the Division. Paragraph (a) expressly directs the Division to adopt rules establishing the conditions of use and maximum concentrations of "medications, drugs, and naturally occurring substances" identified in the ARCI Medication Schedule, to ensure "the safety and welfare of racing animals." "Controlled therapeutic medications" are limited to those medications and allowable concentrations as identified and approved by ARCI.

50. The Division has not implemented this directive as to greyhounds. Rule 61D-6.007(3) prescribes allowable dosages for caffeine, theophylline, theobromine, procaine, and flunixin, of

which only flunixin is listed in the ARCI Medication Schedule. The ARCI Medication Schedule lists dosage thresholds, withdrawal guidelines and dosing specifications for 26 "controlled therapeutic medications." The ARCI Guidelines include caffeine (Drug Class 2, Penalty Class B), theophylline (Drug Class 3, Penalty Class B), theobromine (Drug Class 4, Penalty Class B), and procaine (Drug Class 3, Penalty Class B).[10/]

51. In its Proposed Final Order, the Division argues, for the first time, that the ARCI Medication Schedule does not apply to greyhounds at all. It concedes that section 550.2415(7)(a) mandates the adoption of rules establishing thresholds for medications, drugs, and naturally occurring substances identified in the ARCI Medication Schedule, but argues that this provision applies only to racehorses. The Division has adopted rule 61D-6.008, applying the ARCI Medication Schedule to horses, but has not done so for greyhounds.[11/]

52. The Division's assertion is not supported by the statute. In fact, section 550.2415(7)(a) is not limited to horses but expressly states that it applies to "racing animals." The only textual support of any kind the Division offers is the assertion that the full title of the ARCI Medication Schedule is "ARCI Controlled Therapeutic Medication Schedule for Horses--Version 2.1." The copy of the ARCI Medication Schedule entered

into evidence in this proceeding does not contain the words "for Horses," or any language excluding greyhounds.

53. Even if the ARCI Medication Schedule were limited to horses, the same point could be made as to the ARCI Guidelines, the classification definitions of which describe the impact of the listed drugs on "the racing horse." The Division makes much of the fact that the word "greyhound" does not even appear in the ARCI Medication Schedule; neither does the word occur in the ARCI Guidelines. The record evidence in no way supports the Division's contention that the statute's provisions as to the ARCI Medication Schedule are inapplicable to greyhounds.

54. Section 550.2415(7)(b) expressly directs the Division to adopt rules that designate the appropriate biological specimens for testing and that "determine the testing methodologies, including measurement uncertainties, for screening such specimens" for medications, drugs, and naturally occurring substances. (emphasis added).

55. The Division has not implemented this directive. As set forth in the above Findings of Fact, the Division has left it to the UF Lab to establish measurement uncertainties. The UF Lab determines measurement uncertainties only for threshold substances, and these measurement uncertainties change over time. While the Division offered a cogent and reasonable explanation as to why it makes sense for the UF Lab to set

measurement uncertainties, the statute does not give the Division discretion to entirely delegate this responsibility to another entity. The Division's rules must determine the testing methodologies, including measurement uncertainties, not hand off that determination to a laboratory. The Division's rules must make this determination for all "medications, drugs, and naturally occurring substances" that are screened by the lab, not only those substances it and/or the UF Lab deem "threshold" substances.[12/]

56. Section 550.2415(7)(c) expressly directs the Division to adopt rules that include a classification system for "drugs and substances" and a corresponding penalty schedule for violations. The classification system and penalty schedules must incorporate the ARCI Guidelines.

57. The Division has implemented this requirement in rule 61D-6.012(2), which expressly adopts the classifications of the ARCI Guidelines and sets forth penalties based on the ARCI classifications.

58. However, section 550.2415(7)(c) also expressly directs the Division to adopt rules that include laboratory screening limits approved by ARCI for drugs and medications that are not included in ARCI's Medication Schedule as "controlled therapeutic medications." The statute states that the presence

of such drugs and medications in a sample "may result in a violation of this section."

59. The Division has not implemented this requirement. The ARCI Guidelines do not approve laboratory screening limits for drugs and medications other than "controlled therapeutic medications." The Division has argued that the lack of screening limits for cocaine and its metabolites is evidence that ARCI supports a "zero tolerance" policy for cocaine. However, the same argument would apply to any of several hundred substances listed in the ARCI Guidelines that are not also listed as "controlled therapeutic medications" in the ARCI Medication Schedule.

60. The Division has offered no principled distinction between cocaine and, for example, caffeine. Caffeine also appears in the ARCI Guidelines, with the same recommended penalty as cocaine. The ARCI Guidelines prescribe no screening limit for caffeine. Caffeine is not a controlled therapeutic medication. By the Division's stated rationale, caffeine should be a "zero tolerance" substance. However, rule 61D-6.007(3)(a) allows up to 200 ng/mL of caffeine in the urine before the lab must report the finding to the Division.

61. It could be objected that caffeine is merely a Class 2 drug, unlike cocaine, which is Class 1 and has no generally accepted medical use in racing animals. However, rule 61D-

6.012(2) provides penalties for substances all the way down to Class 5. If there were a "zero tolerance" policy for caffeine, a prosecution for a Class 2 substance violation could result in a $1,000 fine and a 30-day suspension. Fla. Admin. Code R. 61D-6.012(2)(b). The point remains that neither the Division's rule nor the Division's arguments at hearing articulate a principled distinction as to which substances the Division will, in practice,[13/] treat with a "zero tolerance" policy.

62. The literal terms of the laboratory screening limits portion of section 550.2415(7)(c) require the Division to obtain ARCI's approval of a list of laboratory screening limits for drugs and medications that are not included as controlled therapeutic medications. Despite the mandatory language of the statute, nothing in the record suggests that the Division has made any effort to implement this provision, either by submitting a list to ARCI or even by making an inquiry to ARCI as to whether it would consider such a submission. Rather, the Division has passively chosen to interpret the lack of ARCI-approved laboratory screening limits as endorsing a "zero tolerance" policy for all ARCI Guideline substances not included in the ARCI Medication Schedule.

63. It is patently arbitrary for the Division to use the lack of screening limits as an opportunity to pick cocaine from among 700-plus substances in the ARCI Guidelines for "zero

tolerance" treatment. Some distinguishing principle must be articulated to separate cocaine from the other substances in the ARCI Guidelines, given the lack of evidence that the Division in fact treats all drugs and substances that are not on the ARCI Medication Schedule with a "zero tolerance" policy. The Division could eliminate this ambiguity by following its statutory directive to adopt a rule setting laboratory screening limits for drugs and medications that are not included as controlled therapeutic medications.

64. Section 550.2415(1) includes some permissive rulemaking actions that the Division may choose to take. Paragraph (1)(b) provides that the Division may solicit input from the Department of Agriculture and Consumer Services and may adopt rules that specify "normal physiological concentrations of naturally occurring substances in the natural untreated animal." The Division also may adopt rules that specify acceptable levels of environmental contaminants and trace levels of substances in test samples. Several other states have chosen to treat BZE as an environmental contaminant and to set acceptable concentration levels for the drug in the system of a racing animal. This practice appears sensible and consistent with the accepted science, but the statute does not require the Division to follow it. However, the Division fails to adopt rules at its own enforcement peril.[14/]

65. In its Proposed Final Order, the Division uses paragraph (1)(b) to defend its failure to adopt thresholds for cocaine and its metabolites, arguing that the statute is permissive as to adopting rules that establish screening limits for environmental contaminants such as cocaine. Throughout the hearing, the Division resisted the notion that BZE or EME are environmental contaminants, and thus its late embrace of that categorization is somewhat disingenuous.

66. In any event, the Division fails to read paragraph (1)(b) in its entirety. The first sentence provides: "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." To find a violation, the Division must first determine what level of a naturally occurring substance is excessive. Due process for the licensee requires no less. The Division fails to explain how it can enforce the quoted prohibition without a rule that specifies "acceptable levels of environmental contaminants and trace levels of substances in test samples." However, the permissive language of the statute gives the Division discretion to avoid such an explanation until it attempts to enforce the prohibition. A rule is not required.

67. Finally, the Division attempts to justify its failure to establish screening limits by reference to section 550.2415(13), which provides:

> 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.

68. The Division argues that subsection (13) means that any medication levels adopted in the Division's rules must be based on a recommendation from the UF Lab, and that the UF Lab has not recommended a threshold for cocaine or its metabolites. The Division argues that it would be an invalid exercise of delegated legislative authority to adopt any threshold for racing greyhounds without a recommendation from the UF Lab.

69. This argument is not well taken. Subsection (13) does not refer narrowly to the UF Lab but to the University of Florida College of Veterinary Medicine ("College"). The statute contemplates a contract between the Division and the College under which the College would use its medical knowledge to recommend "medication levels for racing greyhounds." There is

at least an implication that a medical opinion beyond the laboratory testing expertise of the UF Lab is contemplated.

70. Also, subsection (13) is entirely permissive. It allows the Division to implement by rule medication levels recommended by the College, should the Division and the College choose to enter into a contract for that purpose. If the Division's argument were accepted, then it could evade any responsibility for adopting rules by the simple expedient of never entering a contract with the College. In fact, nothing in the language of subsection (13) exempts the Division from the mandatory rulemaking requirements of subsection (7).

CONCLUSIONS OF LAW

71. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding according to section 120.56(1) and (3), Florida Statutes.

72. Section 120.56 provides in pertinent part:

> (1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.--
>
> (a) 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.
>
> (b) The petition challenging the validity of a proposed or adopted rule under this section must state:

> 1. The particular provisions alleged to be invalid and a statement of the facts or grounds for the alleged invalidity.
>
> 2. Facts sufficient to show that the petitioner is substantially affected by the challenged adopted rule or would be substantially affected by the proposed rule.
>
> * * *
>
> (3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.--
>
> (a) A petition alleging the invalidity of an existing rule may be filed at any time during which the rule is in effect. The 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.

73. Petitioners are licensees subject to the requirements of section 550.2415 and chapter 61D-6. The Division has proposed revocation of Petitioners' licenses because urine samples taken from their racing greyhounds were found to contain BZE and EME. Petitioners are affected persons with standing to challenge the validity of rules 61D-6.007 and 61D-6.012. See Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94 (Fla. 1st DCA 1999).

74. As the moving party asserting the affirmative by attacking the validity of an existing agency rule, Petitioners in this case retain the burden of proof throughout the entire proceeding. Beshore v. Dep't of Fin. Servs., 928 So. 2d 411,

414 (Fla. 1st DCA 2006); Espinoza v. Dep't of Bus. & Prof'l Reg., 739 So. 2d. 1250, 1251 (Fla. 3d DCA 1999); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977); § 120.56(3), Fla. Stat.

75. The party attacking an existing rule has the burden to prove that the rule constitutes an invalid exercise of delegated legislative authority. Cortes v. State Bd. of Regents, 655 So. 2d 132, 136 (Fla. 1st DCA 1995). The standard of proof is a preponderance of the evidence. See § 120.56(3), Fla. Stat.

76. An Administrative Law Judge may invalidate an existing rule only if it is an invalid exercise of delegated legislative authority. See § 120.56(1)(a) and (3)(a), Fla. Stat.

77. Section 120.52(8) defines "invalid exercise of delegated legislative authority" to mean:

> [A]ction 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 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; 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 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.

78. Petitioners specifically allege that rules 61D-6.007 and 61D-6.012 are arbitrary and capricious in that they fail to address environmental contamination of racing greyhound urine samples. Petitioners allege that the rules are vague in that they fail to establish adequate standards for agency decisions

and vest unbridled discretion in the Division. Petitioners allege that the rules exceed and contravene the Division's delegated legislative authority.

79. One difficulty in this proceeding is that Petitioners' attack is not on the text of the rules but on what is missing from the text. Rather than the typical allegation that an agency has overstepped its legislative bounds and exceeded its grant of authority, this case involves the Division's failure to undertake the rulemaking required by section 550.2415(7). The statute directs the Division to adopt rules establishing the conditions of use and maximum concentrations of the substances identified in the ARCI Medication Schedule; determining the testing methodologies, including measurement uncertainties, for screening designated specimens of medications, drugs, and naturally occurring substances; and adopting laboratory screening limits approved by ARCI for drugs and medications not included as controlled therapeutic medications.

80. The Division's adopted rules undertake none of these legislative directives. Far from exceeding its grant of rulemaking authority, the Division has declined to adopt rules that section 550.2415 mandates. Yet the Division has moved forward with disciplinary action against Petitioners because of positive urine tests for BZE and EME, based not on laboratory

screening limits established by Division rule but on the UF Lab's "limit of quantification" for cocaine and its derivatives.

81. Petitioners have made no allegation that the existing text of the rules runs afoul of the definition set forth in section 120.52(8). Rather, Petitioners argue that the text of the rules is insufficient to support the disciplinary actions undertaken by the Division, in light of the Division's failure to adopt rules required by section 550.2415(7).

82. "Where a statute requires an agency to adopt rules for implementing the purpose of the statute, the courts should not allow the agency to proceed with ad hoc determinations." Herre v. Dep't of Rev., 617 So. 2d 390, 396 (Fla. 3d DCA 1993) (Jorgenson, J., concurring in part, dissenting in part). See also Sheridan v. Deep Lagoon Marina, 576 So. 2d 771, 774 n.3 (Fla. 1st DCA 1991)("The mandatory language of the statute makes it clear that wetlands water quality standards can be established by the department in only one fashion, i.e. through the formal rulemaking process."); Perkins v. Dep't of HRS, 452 So. 2d 1007, 1009 (Fla. 1st DCA 1984)(agency could not impose "workfare" sanctions where it had failed to comply with statute mandating adoption of workfare rules); Bigelow v. Dep't of Envtl. Reg., 375 So. 2d 12 (Fla. 4th DCA 1979)(agency could not reduce employee salaries where it had not adopted statutorily-required rule on the subject).

83. In the absence of the rules that section 550.2415(7) requires the Division to adopt, the Division cannot impose sanctions on Petitioners based upon the UF Lab's ad hoc determination of what constitutes a "reportable" concentration of cocaine and its metabolites in the samples taken from Petitioners' greyhounds. Because the Division's rules regarding allowable medications for greyhounds and penalties for drug violations in greyhounds do not provide the standards demanded by the statute, they are vague, they fail to establish adequate standards for agency decisions, and they vest in the agency unbridled discretion to bring actions against licensees, in violation of section 120.52(8)(d).

84. Petitioners' specific allegation that the statute requires the Division to adopt a rule addressing environmental contamination is rejected. The record establishes that there is plentiful scientific evidence supporting the notion that cocaine is an environmental contaminant, that several jurisdictions have recognized that evidence by way of their horseracing rules, and that section 550.2415(1)(b) allows the Division to adopt rules that specify acceptable levels of environmental contaminants. However, nothing in section 550.2415 requires the Division to adopt such rules.[15/]

85. 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).

86. Petitioners have established that rule 61D-6.007 is arbitrary and capricious as the Division has applied it by way of its interpretation of section 550.2415(7). The rule sets forth a list of "permitted medications" for greyhounds. Standing alone, the text of the rule is unobjectionable. The arbitrariness lies in the Division's treatment of drugs and medications that are not on its very short "permitted" list. The Division states that it treats cocaine and "over 500 other

substances" listed in the ARCI Guidelines with a "zero tolerance" policy. As demonstrated in the Findings of Fact above, the Division does not apply a zero tolerance policy to all of the substances listed in the ARCI Guidelines. The Division does not apply a zero tolerance policy even as to cocaine, the drug at the center of this litigation.

87. Rather, the Division has, without authority, effectively delegated its statutory responsibility for setting "laboratory screening limits" to the UF Lab, which determines the threshold at which a drug test is reported as "positive" and therefore determines which trainers are subject to discipline by the Division.

88. The evidence demonstrated that this threshold has shifted over time, depending on the UF Lab's current equipment and testing protocols. In 2014, a drug test showing 3.7 ng/mL of BZE resulted in prosecution. The same test today would not be reported as a positive. In neither case would a trainer be able to find a screening limit for BZE from the text of the Division's rule. Section 550.2415(7)(c) requires the Division to adopt discernible laboratory screening limits, not employ arbitrary, shifting standards set by an outside entity.

89. In its Proposed Final Order, the Division makes reference to things that are "obvious," and to matters of which "the Division and the industry are aware." These statements

could not be credited because they were unsupported by record evidence. Nonetheless, the undersigned well knows that his practical knowledge of the greyhound racing industry is less than that of every other participant in this proceeding. In that light, none of the criticisms made in this Final Order should be read as prescriptive. The policy wisdom of treating prohibited substances with zero tolerance and of treating cocaine as an environmental contaminant are beyond the remit of this tribunal. There is no reason to believe the Division is incapable of crafting rules that embody its statutorily authorized policies in a manner that provides clear standards and affords due process to licensees. The issue is that it failed to do so.

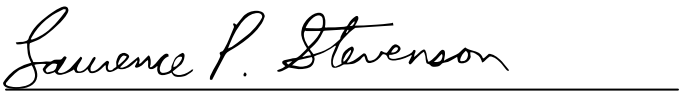
ORDER

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

ORDERED that Florida Administrative Code Rules 61D-6.007 and 61D-6.012 are invalid exercises of delegated legislative authority to the extent that they fail to comply with the mandatory rulemaking requirements of section 550.2415(7), Florida Statutes. Jurisdiction is retained for the purpose of determining whether attorney's fees and costs are warranted and, if so, the amount. Any motion to determine fees and costs as to

Count II of the Petition shall be filed within 60 days of the issuance of this Final Order.

DONE AND ORDERED this 7th day of March, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 7th day of March, 2018.

ENDNOTES

[1/] Eighteen of the positive tests were for dogs trained by Petitioner Charles F. McClellan and resulted in the five Administrative Complaints against Mr. McClellan that are the subject of DOAH Case Nos. 17-3341PL, 17-3342PL, 17-3343PL, 17-3344PL, and 17-3556PL. Six of the positive tests were for dogs trained by Petitioner Natasha Nemeth and results in the four Administrative Complaints against Ms. Nemeth that are the subject of DOAH Case Nos. 17-0877PL, 17-3582PL, 17-3583PL, and 17-5000PL.

[2/] Appellate courts have upheld the "absolute insurer" rule on several occasions, most recently in Hennessey v. Department of Business & Professional Regulation, 818 So. 2d 697, 700-01 (Fla. 1st DCA 2002). Petitioners in the instant case did not directly challenge it.

[3/] The current Association of Racing Commissioners International, Inc. Controlled Therapeutic Medication Schedule is Version 4, modified in April 2017. The statute has not been

amended to reflect updates since 2014. Therefore, Version 2.1 remains the version in effect for the Division's purposes.

[4/] The current Association of Racing Commissioners International, Inc. Uniform Classification Guidelines for Foreign Substances and Recommended Penalties Model Rule is Version 13.4, modified in January 2018. Version 8.0 remains the effective one for the Division and its licensees.

[5/] The term actually used by the ARCI Guidelines is "racing horse." Section 550.2415(7) makes the ARCI Guidelines applicable to horses and greyhounds in Florida.

[6/] The undersigned is aware that in paragraph 14 of its Proposed Final Order, the Division asserts that it "implements the same 'zero tolerance policy' for the presence of cocaine, BZE, and EME, and over 500 other substances, as both the ARCI Guidelines and ARCI Medication Schedule recommend." (Emphasis added.) There is no record evidence that the Division implements a zero tolerance policy for all of the substances listed in the ARCI Guidelines. The Division's own rule 61D-6.007(3) contradicts that assertion. At the hearing, all parties focused narrowly on the Division's treatment of cocaine, and the evidence presented showed that the Division does not have a zero tolerance policy as to cocaine but at present allows concentrations up to 10 ng/mL.

Not raised by the parties, but naturally arising from the Division's post-hearing assertions, is whether this "zero tolerance policy" would itself constitute an unadopted rule, as it is not expressly stated in any document produced by the Division. Because the evidence does not support the existence of this asserted policy, there is no need to address the unadopted rule issue.

[7/] The ARCI Guidelines list 56 Class 1 drugs by name, but also include all of DEA Schedule I, which itself lists approximately 200 drugs by name. 21 C.F.R. § 1308.11 Schedule I. The ARCI Guidelines recommend a Class A penalty for all of these drugs except cocaine, morphine, and strychnine.

[8/] Mr. Tiffany was not asked why the Division's rule could not simply be amended when the lab's measurement of uncertainty changed.

The undersigned acknowledges that section 550.2415(7)(b) is not pellucid as to the range of "medications, drugs, and

naturally occurring substances" for which the Division must determine testing methodologies and measurement uncertainties. It is possible to read paragraph (7)(b) in conjunction with the preceding paragraph (7)(a) and argue that "medications, drugs, and naturally occurring substances" should be limited to those listed in the ARCI Medication Schedule. (It is also possible to note that the term "naturally occurring substance" also appears in paragraph (1)(b) without the limitation of the ARCI Medication Schedule.) If the limited reading is accepted, then no "measurement uncertainty rule" would be required as to cocaine or any other substance outside of the ARCI Medication Schedule. Nonetheless, paragraph (7)(c) requires the Division to adopt laboratory screening limits for drugs and medications outside of the ARCI Medication Schedule, "the presence of which in a sample may result in a violation of this section." Crediting Mr. Tiffany's testimony, the adoption of laboratory screening limits would by definition include measurement uncertainties.

[9/] Evidence at the hearing further established that the Division, during the early 2000s, had an informal policy whereby it imposed greater discipline when the sample concentration exceeded 100 ng/mL than when it was below that number. Petitioners argue that this establishes that the Division itself had a threshold of sorts which it has since abandoned.

[10/] As noted above, the ARCI Guidelines contain no screening limit for any of the substances listed therein. Thus, following the Division's "zero tolerance" logic for cocaine, rule 61D-6.007(3) should contain no detection limit for caffeine, theophylline, theobromine, or procaine.

[11/] In its Proposed Final Order, the Division states that "the obvious difference in size between a horse and a dog . . . supports the idea that these animals would likely be affected by medications at different levels." The Division cited to no record evidence to support this statement. Dr. Tobin's unchallenged testimony contradicted this proposition, at least as to the effects of cocaine.

[12/] This is not to say that the statute necessarily requires the Division to set up its own laboratory and develop its own testing methodologies and measurement uncertainties. The undersigned can conceive of no obvious objection to the Division's adopting the UF Lab's measurement uncertainties, as of a given date, by reference in the rule. The lab would have to establish measurement uncertainties for all "medications,

drugs, and naturally occurring substances," not merely threshold substances. Ms. Wilding testified that determining measurement uncertainties is time consuming but not difficult to do. When the lab over time resets its measurement uncertainties, the Division could amend the reference date in the rule. By this method, the Division could comply with the statute and give licensees a fixed point of reference for compliance with the drug testing system.

See also endnote 8 above. It cannot be said with absolute conviction that the "medications, drugs, and naturally occurring substances" referenced in paragraph (7)(b) extend beyond those identified in the ARCI Medication Schedule. However, it is unquestioned that paragraph (7)(c) covers those "drugs and medications" not listed in ARCI Medication Guidelines, and requires the Division to adopt laboratory screening limits for those drugs and medications. The setting and use of laboratory screening limits necessarily include the establishment of a measurement uncertainty, in order for the lab to be certain that a given sample is above the screening limit before it reports a positive test. Thus, the practical effect of the Division's adopting rules consistent with section 550.2415(7)(a) through (c) would be the establishment of measurement uncertainties for every substance tested.

[13/] See endnote 6 above, regarding the Division's claim that it treats all substances lacking ARCI-approved screening limits with the same zero tolerance policy. The Division offered no evidence to support this claim.

[14/] In upholding the "absolute insurer" rule, the Hennessey court explained the justifying rationale as follows, in part:

> The trainer is singularly the best individual to hold accountable for the condition of a horse. The trainer is either going to be with the horse at all time [sic] or one of his or her employees or contractors is going to be with the horse at all times. . . . At no time prior to a race is a trainer or his employer prohibited from seeing to the security of the horse in the paddock. While there are other persons who come in contact with the horse prior to a race, the trainer due to his responsibility for the care and supervision of the animal

> stands in the best overall position to prevent improper medication of the horse.

818 So. 2d at 699. The court agreed with the administrative law judge below that "the only practical way the department could carry out its statutory mandate was through the use of the absolute insurer rule." Id. at 701.

The evidence presented in the instant case established that, unlike horses, greyhounds are taken from their trainers and placed in the sole care of Division and track personnel for hours at a time. Trainers and owners are not allowed to be present in the ginny pit where the urine samples are taken. Where the Division seeks to revoke the license of a trainer because of a trace amount of cocaine found in the urine sample of a greyhound that had been out of the trainer's hands for several hours, the "practicality" of the absolute insurer rule will naturally come into conflict with due process concerns.

[15/] The lack of a rule specifying acceptable levels would not preclude a licensee from employing environmental contamination as a factual defense in a disciplinary proceeding.

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Joint Administrative Procedures Committee
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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.