

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACKSONVILLE KENNEL CLUB, INC.,
AND ORANGE PARK KENNEL CLUB,
INC.,

Petitioners,

vs.

Case No. 14-1002RU

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

Respondent.

_____ /

FINAL ORDER

Administrative Law Judge John D. C. Newton, Division of
Administrative Hearings, conducted the final hearing in this case
on April 4, 2014, in Tallahassee, Florida.

APPEARANCES

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For Respondent: William Nicholson Spicola, Esquire
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STATEMENT OF THE ISSUE

Are the February 13, 2014, letters of Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Division), requiring totalisator reports to "identify the Florida [permitholder] in reports as both host and guest when applicable," statements that amount to a rule, as defined in section 120.52(16), Florida Statutes (2013).^{1/}

PRELIMINARY STATEMENT

On March 4, 2012, the Jacksonville Kennel Club, Inc. (JKC), and Orange Park Kennel Club, Inc. (OPKC) (collectively Racetracks), filed a Petition, as permitted by sections 120.54(1)(a) and 120.56(4), seeking a final order determining that the statements in February 13, 2014, letters from the Division constituted an unpromulgated and invalid rule in violation of section 120.54(1)(a). The Petition also sought payment of costs and fees. The Division contested the Racetracks' claims and maintained that they did not have standing to bring the action.

The undersigned conducted the final hearing in Tallahassee, Florida, on April 4, 2014. The parties' Joint Exhibits 1 through 6 were accepted into evidence. Matthew Kroetz, chief operating officer of Jacksonville Greyhound Racing, Inc. (Jacksonville Greyhound Racing), testified on behalf of the Racetracks. Kyle Casey, the Division's chief auditing officer,

testified on behalf of the Division. The parties requested and were granted additional time to submit proposed final orders. They timely submitted the proposed final orders, which have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Florida permits and regulates betting on greyhound racing,^{2/} jai alai games,^{3/} quarter horse racing,^{4/} and harness racing.^{5/}

2. The Division is responsible for administration of Florida's statutes and rules governing this betting.

3. JKC and OPKC are separate, individually permitted facilities. Jacksonville Greyhound Racing owns and operates both the JKC and the OPKC. It is not, however, a party to this proceeding.

4. The betting system is a pari-mutuel system. This "means a system of betting on races or games in which the winners divide the total amount bet, after deducting management expenses and taxes, in proportion to the sums they have wagered individually and with regard to the odds assigned to particular outcomes."^{6/} Each race, contest, or game is an "event."^{7/}

5. The aggregate wagers called "contributions" to pari-mutuel pools are labeled "handle." § 550.002(13), Fla. Stat.

6. An "intertrack wager" is "a particular form of pari-mutuel wagering in which wagers are accepted at a permitted, in-state track, fronton, or pari-mutuel facility on a race or game transmitted from and performed live at, or simulcast signal rebroadcast from another in-state pari-mutuel facility."^{8/}

7. The JKC offers intertrack wagering at its permitted facility located in Jacksonville, Florida. It does not offer live events.

8. The OPKC offers intertrack wagering and wagering on live events conducted at its permitted facility in Orange Park.

9. The Racetracks are host tracks when they transmit live greyhound racing to other in-state and out-of-state facilities for off-track wagers.^{9/} They are guest tracks when wagers are made at their separate permitted locations on pari-mutuel races or games conducted at third-party facilities.^{10/}

10. Florida statutes and the Division's rules require detailed reports from permitholders to the Division and other permitholders, including tables of wagers, pool data, and winnings.^{11/}

11. These reports are generated by "totalisators."

12. A totalisator is "the computer system used to accumulate wagers, record sales, calculate payoffs, and display wagering data on a display device that is located at a pari-mutuel facility."^{12/}

13. The Division's Form DBPR-PMW-3570 requires host permitholders to report intertrack wagering "handle" by guest on a monthly basis. The host permitholders must sign and attest to the accuracy of the information submitted in the form. Also, Florida Administrative Code Rule 61D-7.023(2) requires generation of reports for each pool within each contest to be printed immediately after the official order of finish is declared.

14. On March 9, 2012, the Division issued a letter to AmTote International ("AmTote"), a licensed totalisator company, and copied Jacksonville Greyhound Racing, notifying AmTote that Florida permitholders and the Division would need a breakdown of the handle of the Racetracks in order to pay appropriate purses, taxes, or other liabilities. It sent a similar letter to other totalisator companies. This was an effort to be accommodating and flexible.

15. The letter concluded: "Please continue to provide handle information broken down by source, which is required by rule to all those in the state of Florida who have been users of that information in the past."

16. The Racetracks rely upon AmTote to provide their totalisator services. Between March 2012 and March 2014, AmTote commingled the Racetracks' wagering data into a single "community," reporting all wagering as coming from the OPKC in order to reduce interface fees paid for the totalisator service.

17. The guest track wagering data and reports exchanged with the other totalisator companies from the Racetracks show up on the AmTote settlement files as OPKC. The reports do not differentiate between wagers made at each of the Racetracks. Before March 1, 2012, AmTote segregated wagering data as coming from either JKC or OPKC.

18. During the two years reported by the Racetracks as a single community, the Racetracks separately provided Florida host tracks a supplemental report breaking down the sources within the common community. The Racetracks provided these supplemental reports--via email or other means--to assist Florida host tracks with reporting requirements. They did not provide them simultaneously with the other reports and data. There were frequently errors that had to be identified and corrected.

19. In an effort to be flexible and work with the Racetracks, the Division tolerated this method of reporting for two years. But it created problems for both the Division and for the other permitholders in the state.

20. On February 13, 2014, the Division prepared and issued correspondence to AmTote, as well as the two other Florida totalisator companies, announcing that it intended to require proper reporting of the data required by rule, including reports of each permitholder.

21. The letter states:

This letter is to address the issue of proper and complete identification of each individual permitholder in totalisator reports.

Rule 61D-7.024(1), Florida Administrative Code, requires all Florida pari-mutuel permitholders to use an electronically operated totalisator. Rule 61D-7.023(9), F.A.C. states in part, ". . . Each report shall include the permitholder's name . . .," and Rule 61D-7.024(4), F.A.C. states in part, ". . . reports shall be kept logically separate . . ." Further, Rule 61D-7.023(1), F.A.C. states, "The totalisator licensee shall be responsible for the correctness of all tote produced mutual accounting reports. . . ."

In accordance with Florida Administrative Code, the division requires each permitholder to be properly and uniquely identified by totalisator reports provided to the division and to the permitholders. In addition, the totalisators are responsible for the correctness of all tote produced mutual accounting reports. Reports provided after February 28, 2014 must properly identify the Florida Permitholder in reports as both host and guest when applicable. Improper identification of permitholders will be considered a violation of the Florida Administrative Code.

22. On March 11, 2014, AmTote began segregating wagering data from the Racetracks in compliance with the February 13, 2014, letter.

23. The Racetracks will incur additional financial costs if AmTote ends the reporting of all wagering data as coming from OPKC for purposes of reports provided to other totalisator

companies licensed in Florida and begins segregating their wagering data by individual permitholders. These costs stem from additional interface fees incurred outside the regulatory jurisdiction of Florida.

24. The only evidence of these costs is the testimony of Matthew Kroetz, vice-president of Operations for Jacksonville Greyhound Racing. The testimony of Mr. Kroetz about the cost of the required change is confusing because he mingles assumed costs for a third closed track as if it were reactivated and operational.

25. Bayard Raceways is that track. The Racetracks' parent company owns it. But the likelihood and timing of that reactivation is speculative. In addition, Bayard is not a party to this proceeding. Neither is the parent company.

26. Mr. Kroetz' testimony establishes that the current cost for the two petitioners is a total of \$1,500 per month. He projects that costs for reporting, as the letter requires, would be \$4,500 per month for the two Petitioners and the track that may reopen in the future. That testimony is unrebutted and consistent with his testimony that the recurring fees for all three tracks would total over \$50,000 annually. It is accepted as accurate.

27. But the \$3,000 increase from \$1,500 to \$4,500 per month is not due solely to the reporting requirement. It is also due

to lumping in the non-active track. The evidence does not support including that track, the opening of which is speculative.

28. The monthly fee for the two operating tracks is \$1,500 divided by two or \$750. Subtracting that, as the current cost for an existing track, from the \$3,000 increase, lowers the estimated increase to \$2,250. Dividing that by three gives the increased monthly cost per track, or \$750 per track. This results in the projected annual cost increase for each of the Racetracks of \$9,000.

29. Although Mr. Kroetz testified in summary that the changes would result in an increased cost of "about a thousand dollars per month per facility," that testimony is not persuasive. It is inconsistent with the more detailed testimony relied upon above and would require the improbable and unsupported conclusion that the monthly increase would be more than the existing fees.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.56(4), 120.569 and 120.57(1), Florida Statutes.

31. In order to prosecute this action the Racetracks must prove that they are substantially affected by the requirements

imposed on the totalisators by the February 13 letter. They must establish: "(1) a real and sufficiently immediate injury in fact; and (2) that the alleged interest is arguably within the zone of interest to be protected or regulated." Ward v. Bd. of Trs. of the Int. Imp. Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995). If a rule has the effect of directly regulating a person's profession, chances are the person is substantially affected for purposes of rule challenge standing. Id. See also Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery, Inc., 808 So. 2d 243, 250 (Fla. 1st DCA 2002). Standing must be determined solely by the impact upon the Racetracks.

32. If the rule directly regulates a party's behavior or limits its rights, it will cause injury in fact to the party. Reiff v. N.E. Fla. State Hosp., 710 So. 2d 1030 (Fla. 1st DCA 1998); Coal. of Mental Health Professions, 546 So. 2d 27 (Fla. 1st DCA 1989); Prof'l Firefighters v. Dep't of HRS, 396 So. 2d 1194 (Fla. 1st DCA 1981).

33. The requirements articulated by the Division's February 13 letter impose a significant financial burden upon the Racetracks, which must pay for preparation of the reports. The record contains no evidence that would support a finding that annual additional costs of \$9,000 per year throughout the existence of a business is not a substantial burden. In addition, although the letter is directed to the totalisator

companies, it substantially affects the Racetracks since they are the entities that must pay for the creation and distribution of the totalisator reports.

34. An "unpromulgated rule challenge" presents a narrow and limited issue. That issue is whether an agency has by declaration or action established a statement of general applicability that is a "rule," as defined in section 120.52(16), without going through the required public rulemaking process required by section 120.54. The validity of the agency's statement is not an issue decided in an "unpromulgated rule challenge." The Petitioners bear the burden of establishing by a preponderance of the evidence that the challenged agency statements are unpromulgated rules. See Bravo Basic Material Co., Inc. v. Dep't of Transp., 602 So. 2d 632 (Fla. 2d DCA 1992); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

35. The Racetracks argue that the terms of the February 13, 2014, letter amount to an unpromulgated rule. The Division argues that the letter merely requires compliance with existing rules.

36. Section 120.52(16) defines rule, with exceptions that do not apply here, as:

"Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any

form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

37. The question is, does the Division's letter implement, interpret, or prescribe law or policy? Rules are:

"[T]hose statements which are intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." Agency for Health Care Admin. v. Custom Mobility, 995 So. 2d 984, 986 (Fla. 1st DCA 2008) (quoting McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977)). If the effect of an agency statement is to create certain rights or adversely affect other rights, it is a rule. Dep't of Admin. v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977).

Coventry First, LLC v. Ofc. of Ins. Reg., 38 So. 3d 200, 203 (Fla. 1st DCA 2010).

38. The Coventry opinion emphasizes that the effect of the statement is a consideration in answering the question. If the effect is to create certain rights or adversely affect other rights, the statement is a rule. Id. at 204.

39. The requirements of the February 13 letter do not create certain rights or adversely affect other rights. They recite requirements of existing rules and announce the termination of unsuccessful efforts to accommodate the Racetracks while still obtaining the data and reports required by law.

40. The letter merely requires compliance with the rules that it cites.

41. Florida Administrative Code Rule 61D-7.023 provides:

(1) The totalisator licensee shall be responsible for the correctness of all tote produced mutuel accounting reports. The Mutuels Manager shall be responsible for the correctness of the non-totalisator mutuel department accounting reports.

* * *

(9) All the above-indicated totalisator reports shall be printed at the pari-mutuel facility serving as a totalisator hub. In addition, each totalisator company shall provide electronic downloads of wagering data compatible with the division's centralized database. Each report shall include the permitholder's name, date of report, and time of generation. The totalisator operator shall provide to the division hub personnel a copy of each totalisator report produced pursuant to this rule immediately upon printing. (emphasis added).

42. Rule 61D-7.024(1) provides:

(1) All permitholders under the jurisdiction of the division are required to use electronically operated totalisators located at a site approved by the division.

* * *

(4) Each totalisator system shall be programmed to record, classify, accumulate wagering data, automatically determine winning priorities, perform calculations and provide reports. For intertrack wagering purposes, the intertrack wagering data and related accounting reports shall be kept

logically separate by host. (emphasis added).

43. The reports the Racetracks had been supplying represented wagers as coming only from the permitholder OPKC. They were inaccurate. Mr. Kroetz conceded that AmTote does not differentiate where the wagers are coming from and that the Racetracks send reports separate from the AmTote totalisator reports to accurately identify where the wagers originate. Consequently, all the February 13 letter did was require the end of the inaccurate reports and compliance with the existing rules.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Division's February 13, 2014, letters to AmTote International, Sportech Racing LLC, and United Tote Company are not statements that meet the definition of a rule that has not been adopted pursuant to section 120.54(1).

DONE AND ORDERED this 30th day of May, 2014, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of May, 2014.

ENDNOTES

1/ All references to Florida Statutes are to the 2013 codification, unless otherwise noted.

2/ "'Racing greyhound' means a greyhound that is or was used, or is being bred, raised or trained to be used, in racing at a pari-mutuel facility and is registered with the National Greyhound Association." § 550.002(29), Fla. Stat.

3/ Jai alai is "a ball game of Spanish origin played on a court with three walls." § 550.002(18), Fla. Stat.

4/ "'Quarter horse' means a breed of horse developed in the western United States which is capable of high speed for a short distance and used in quarter horse racing registered with the American Quarter Horse Association." § 550.002(28), Fla. Stat.

5/ "'Harness racing' means a type of horseracing which is limited to standard bred horses using a pacing or trotting gait in which each horse pulls a two-wheeled cart called a sulky, guided by a driver." § 550.002(14), Fla. Stat.

6/ § 550.002(22), Fla. Stat.

7/ § 550.002(8), Fla. Stat.

8/ § 550.002(17), Fla. Stat.

9/ § 550.002(16), Fla. Stat.

10/ § 550.002(12), Fla. Stat.

11/ Fla. Admin. Code R. 61D-7.023 and 61D-7.024

12/ § 550.002(36), Fla. Stat.

13/ § 550.002(13), Fla. Stat.

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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.