

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.

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PARTIAL SUMMARY FINAL ORDER

This matter is before the undersigned on Petitioners' renewed Motion for Summary Final Order as to Count I of the Petition for Administrative Determination of the Invalidity of: (1) Agency Policies and Statements as Unpromulgated Rules; and (2) Florida Administrative Code Rules 61D-6.007 and 61D-6.012 (referenced herein as the "Petition"). The Petition was originally filed on September 21, 2017. The Motion for Summary Final Order as to Count I of the Petition (the "Motion") was filed on November 17, 2017. Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the "Division"), filed a written Response Opposing the Motion on November 22, 2017. On November 28, 2017, Petitioners filed a reply in support of the Motion. On December 4, 2017, a

telephonic hearing was convened on the motion; and on December 7, 2017, an Order was entered denying the Motion.

At the hearing on December 4, 2017, the undersigned explained that he denied the Motion reluctantly because Petitioners' arguments for summary decision were persuasive. The undersigned stated that he was denying the Motion only because he wished to give the Division every opportunity to mount a credible factual defense to the allegation that it was continuing to rely on the substance of Section 3 of the Greyhound Veterinary Assistant Procedures Manual issued on March 31, 2010 (the "2010 Manual") as the basis for agency action, even after Section 3 was held to be an unpromulgated rule in Dawson v. Department of Business & Professional Regulation, Case No. 14-5276RU (Fla. DOAH Jan. 29, 2015).

At the outset of the final hearing on December 14, 2017, Petitioners renewed their Motion, pointing out that in the Pre-Hearing Stipulation filed on December 12, 2017, the Division had stipulated that it was "still following the protocols and procedures outlined in Section 3 of the 2010 Manual as its protocol for sampling racing greyhounds' urine."

Following oral argument, the undersigned granted the renewed Motion and held that Petitioners were entitled to a summary final order as to Count I of the Petition. This Partial Summary Final Order memorializes that ruling.

The final evidentiary hearing went forward on only Count II of the Petition.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether the purported agency statements identified by Petitioners, Charles F. McClellan and Natasha Nemeth, constitute rules that have not been properly adopted through formal rulemaking procedures.

PRELIMINARY STATEMENT

Petitioners are licensed racing greyhound trainers. The Division has served five Administrative Complaints on Petitioner, Charles L. McClellan, that have been referred to the Division of Administrative Hearings ("DOAH") and consolidated for final evidentiary hearing: DOAH Case Nos. 17-3341PL, 17-3342PL, 17-3343PL, 17-3344PL, and 17-3556PL. The Division has served four Administrative Complaints on Petitioner, Natasha

Nemeth, that have been referred to DOAH and consolidated for final evidentiary hearing: DOAH Case Nos. 17-0877PL, 17-3582PL, 17-3583PL, and 17-5000PL. All of the Administrative Complaints cite violations of section 550.2415(1)(a), Florida Statutes (2017), based on allegations that urine samples taken from Petitioners' racing greyhounds tested positive for cocaine metabolites. Petitioners' licenses have been suspended pending the outcome of the DOAH hearings.

On September 21, 2017, Petitioners filed the Petition, Count I, of which alleges that the underlying Administrative Complaints are based on urine samples collected, handled, and tested pursuant to the Division's urine sample collection policy as detailed in the 2010 Manual and incorporated in the Greyhound Detention Enclosure Guidelines issued on June 2, 2016 (the "2016 Guidelines"). The Petition alleges that the Division's policy, the 2010 Manual, and/or the 2016 Guidelines, constitute unadopted rules.

All of the DOAH hearings on the Administrative Complaints have been placed on hold pending the outcome of this proceeding. Unless otherwise noted, all references to the Florida Statutes are to the 2017 edition.

#### FINDINGS OF FACT

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 section 550, and the rules promulgated thereunder, Florida Administrative Code 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. Petitioners have standing to bring this action.

4. The Division has filed Administrative Complaints against Petitioners. The complaints allege Petitioners were the trainers of record for racing greyhounds, whose urine was collected, tested, and found to contain benzoylecgonine ("BZE") and/or ecgonine methyl ester ("EME"), which are metabolites of cocaine.

5. Section 3 of the 2010 Manual contained nine subsections: 3.1 Greyhound Sampling Priority; 3.2 The Collection Process; 3.3 Meeting and Identifying the Greyhound; 3.4 Collecting the Specimen; 3.5 Sealing the Sample; 3.6 Completing the Required Forms; 3.7 Storing the Sample; 3.8 Preparing Samples for Shipment; and 3.9 Shipment of Samples. As indicated by their titles, these provisions set forth the specific procedures by which greyhound samples are to be

collected, preserved, and transported for laboratory testing. The Division used the 2010 Manual to train its employees in the specific protocols and procedures for the sampling of racing greyhounds' urine.

6. In Dawson, Case No. 14-5276RU, FO at 1, p. 32, Administrative Law Judge F. Scott Boyd concluded that Section 3 of the 2010 Manual constitutes a rule within the meaning of section 120.52(16), Florida Statutes, and that it had not been adopted under the rulemaking procedures set forth in section 120.54. ALJ Boyd ordered as follows:

Section 3 of the Greyhound Veterinary Assistant Procedures Manual meets the definition of a rule and has not been adopted pursuant to rulemaking procedures, in violation of section 120.54(1)(a), Florida Statutes. Section 120.56(4)(d)<sup>[1/]</sup> provides that the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, must immediately discontinue all reliance upon Section 3, or any substantially similar statement, as a basis for agency action.

7. It is undisputed that the Division has not adopted Section 3 of the 2010 Manual or any substantially similar statement as a rule subsequent to the Dawson case.

8. The Division states that it has ceased distributing the 2010 Manual to its employees. Persons employed by the Division to collect and preserve greyhound urine samples receive "on the job training" rather than direct instruction from the

2010 Manual. However, the Division concedes that the protocols and procedures by which racing greyhounds' urine is sampled have not changed post-Dawson. The methods used are substantially similar, if not identical, to those set forth in the 2010 Manual.

9. In the Pre-hearing Stipulation submitted to this tribunal two days before the final hearing convened, the Division frankly stipulated as follows:

The Division and its representatives are still following the protocols and procedures outlined in Section 3 of the 2010 Manual as its protocol for sampling racing greyhounds' urine.

10. It is therefore undisputed that the Division has acted contrary to the Dawson order and section 120.56(4) (e).

#### CONCLUSIONS OF LAW

11. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to section 120.56(4), Florida Statutes.

12. Section 120.52(16) sets forth the following definition, in relevant part:

"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. . . .

13. Section 120.54(1) (a) provides, in relevant part:

Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by section 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

14. Section 120.56(4) (a) provides:

Any person substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement violates section 120.54(1) (a). The petition shall include the text of the statement or a description of the statement and shall state facts sufficient to show that the statement constitutes an unadopted rule.

15. To demonstrate that he is "substantially affected" by an agency statement, a person 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." Lanoue v. Dep't of Law Enf., 751 So. 2d 94, 96 (Fla. 1st DCA 1999) (quoting Ward v. Bd. of Trs. of the Int. Imp. Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995)).

16. Petitioners have standing to bring this proceeding. The challenged agency statements were employed to collect, preserve, and transport urine samples from racing greyhounds trained by Petitioners. The testing of these samples led to the Administrative Complaints directed to Petitioners. The Administrative Complaints place Petitioners at risk of administrative fines and loss of their occupational licenses.



17. The Dawson case established that Section 3 of the 2010 Manual was an unadopted rule and ordered the Division to "immediately discontinue all reliance upon Section 3, or any substantially similar statement, as a basis for agency action." The quoted language from the Dawson order tracks the language of section 120.56(4)(e). Post-Dawson, the Division was statutorily required to cease reliance on the substance of Section 3 of the 2010 Manual prior to adopting it as a rule.

18. In this case, the Division stipulated that it is still following the protocols and procedures set forth in Section 3 of the 2010 Manual as its basis for sampling racing greyhounds' urine.

#### ORDER

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

ORDERED that:

1. In violation of section 120.54(4)(e), Florida Statutes, the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, has continued to rely on Section 3 of the 2010 Greyhound Veterinary Assistant Procedures Manual, even after being ordered to cease all reliance on Section 3 or any substantially similar statement by Dawson. Agency action taken in reliance on Section 3 or any substantially similar statement subsequent to Dawson is invalid.

2. Jurisdiction is retained to conduct further proceedings as necessary to award attorneys' fees and costs pursuant to section 120.595(4). If the parties are unable to resolve the amount of fees and costs, a written request for hearing on attorneys' fees and costs shall be filed with the Division of Administrative Hearings. Any such request for hearing must be filed no later than 60 days after the date of the Final Order or other order resolving Count II of the Petition.

DONE AND ORDERED this 22nd day of December, 2017, in Tallahassee, Leon County, Florida.

*Lawrence P. Stevenson*

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LAWRENCE P. STEVENSON  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of December, 2017.

ENDNOTE

<sup>1/</sup> In 2016, this subsection was amended and renumbered as section 120.56(4)(e). Ch. 2016-116, § 3, Laws of Fla.

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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.