

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TERESA POMPAY,

Case No.

Petitioner,

v.

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

Respondent.

RULE CHALLENGE DIRECTED TO PROPOSED RULES 61D-6.0051 AND 61D-6.006, F.A.C.

Pursuant to Fla.Stat. 120.56(2), Petitioner Teresa Pompay hereby files this Petition seeking an administrative determination of the invalidity of proposed Rules 61D-6.0051 and 61D-6.006, F.A.C. as published in the Florida Administrative Register on April 27, 2017 and after consideration at a Final Hearing held May 23, 2017, on the grounds that the proposed rules are invalid exercises of delegated legislative authority and, in support thereof, states as follows:

1. Petitioner Teresa Pompay is a thoroughbred racehorse trainer holding a professional occupational license issued by Respondent State of Florida, Department of Professional & Business Regulation, Division of Pari-Mutuel Wagering (hereinafter the "Division").

2. Pursuant to rulemaking instituted by the Division on March 24, 2017, which included a workshop held on April 11, 2017, and thereafter a Final Hearing on May 23, 2017, the Division has proposed Rules 61D-6.0051 and 61D-6.006, F.A.C., as attached hereto as Exhibit "A," for adoption.

3. Petitioner is substantially affected by proposed Rules 61D-6.0051 and 61D-6.006, F.A.C. as horses she trains and races at Division licensed race tracks in Florida will be subject to the sample collection and split sample procedures set forth in said proposed rules.

4. Petitioner contends that the Division's adoption of proposed Rules 61D-6.0051 and 61D-6.006 F.A.C., as they pertain to the collection, shipping, storage, access, and continuous integrity of the "B" samples described and referenced in said rules exceeds the authority delegated by the legislature in Fla. Stat. 550.0251(3), 550.2415(5),(12) and (13) (2016).

5. Specifically, Petitioner contends that the Division's adoption of the proposed rules as set forth in Rule 61D-6.006 will be an "invalid exercise of delegated legislative authority" within the meaning of Fla. Stat. 120.52(8)(b) as the Division has exceeded its grant of rulemaking authority and Fla. Stat. 120.52(8)(d) as the proposed rules are vague.

6. Although the proposed rules, when read together, do provide for the collection of a separate "B" sample of both blood and urine to be used for split sample testing, the rules are totally silent as to what happens to the "B" samples once they are collected, placed in lockable storage in the detention barn enclosure and sent to the laboratory under contract with the Division via common carrier in a locked, tamper proof container. Although subsection (7)(c) of proposed Rule 61D-6.0051 states that "[s]pecimens shall be shipped to the laboratory under contract with the division via common carrier in a locked, tamper proof container maintained in a manner to preserve the integrity of the specimens," neither proposed Rule 61D-6.0051 nor proposed Rule 61D-6.006 provides any further mandate as to what specifically happens to the "B" samples thereafter, between the time that they arrive

at the laboratory and the time that they are shipped to an independent laboratory for confirmation testing if requested by a licensed trainer in connection with a disciplinary proceeding.

7. The proposed rules do not address what happens to the “B” blood and urine samples once they arrive at the laboratory under contract with the Division and delegate the Division’s rulemaking authority to said laboratory as to the continued maintenance of the integrity of samples, including, but not limited to, the following:

- a. Whether the “A” and “B” samples will be stored together or separately;
- b. Whether the “B” samples will remain sealed while at the laboratory;
- c. Who, if anyone, has access to the “B” samples while they are at the laboratory;
- d. Whether the trainer that requests a split sample test will have the opportunity to inspect the seals and integrity of the “B” samples at the laboratory before they are shipped to the independent laboratory for confirmation testing;
- e. Whether the trainer that requests a split sample test will have the opportunity to observe or otherwise participate in the packaging of the “B” samples before they are shipped to the independent laboratory for confirmation testing; and
- f. Whether the trainer that requests a split sample test will have the opportunity to observe or participate in the shipping of the “B” samples to the independent laboratory for confirmation testing.

This delegation of authority is in violation of Fla. Stat. 120.52(8)(b) as delegated by the legislature in Fla. Stat. 550.0251(3), 550.2415(5),(12) and (13) (2016).

8. The absence of guidance as to the issues set forth above in 7(a) - (f) also renders the rules vague in that, while the proposed rules require the “B” sample to be sent to a laboratory under contract with the Division, persons of common intelligence are left to guess as to how the laboratory will proceed and act with respect to the issues set forth in 7(a) - (f). Furthermore, persons of common intelligence could certainly differ as to how the laboratory should act with respect to the issues set forth in 7(a) - (f) and arrive at two different interpretations of the proposed rules. Accordingly, the proposed rules are vague pursuant to Fla. Stat. 120.52(8)(d). See, e.g., *State, Dep’t of Fin. Services v. Peter R. Brown Const., Inc.*, 108 So. 3d 723, 728 (Fla. 1st DCA 2013) (“An administrative rule is invalid under section 120.52(8)(d), Florida Statutes, if it forbids or requires the performance of an act in terms that are so vague that persons of common intelligence must guess at its meaning and differ as to its application.”)

9. Petitioner has retained the undersigned counsel to represent her in this proposed Rule Challenge and has agreed to pay a reasonable attorney’s fee for services rendered in this proceeding.

WHEREFORE, Petitioner requests, pursuant to the requirements of Fla.Stat. 120.56(1), that the Division of Administrative Hearings’ director assign an administrative law judge who shall conduct a hearing on this proposed Rule Challenge within thirty (30) days thereafter, that the administrative law judge declare that the proposed rules are invalid and that Petitioner be awarded her reasonable attorney’s fees pursuant to Fla.Stat. 120.595(3).

Dated this 2nd day of June, 2017.

Notice of Proposed Rule

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

Division of Pari-Mutuel Wagering

RULE NOS.:RULE TITLES:

61D-6.0051 Procedures for Collecting Samples from Racing Horses

61D-6.0052 Procedures for Collecting Samples from Racing Greyhounds

61D-6.006 Procedures Relating to Split Samples

PURPOSE AND EFFECT: To create, amend, and implement administrative rules relating to sample collection and split sample procedures of pari-mutuel racing animals for purposes of the analysis and detection of permissible and/or impermissible substances in the race-day specimen of an animal in order to make a determination of potential violations of Section 550.2415, F.S.

SUMMARY: The proposed rulemaking creates Rules 61D-6.0051 and 61D-6.0052, as they relate to sample collection procedures for racing horses and greyhounds respectively, and amends Rule 61D-6.006, Procedures Relating to Split Samples.

SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS AND LEGISLATIVE RATIFICATION:

The Agency has determined that this will not have an adverse impact on small business or likely increase directly or indirectly regulatory costs in excess of \$200,000 in the aggregate within one year after the implementation of the rule. A SERC has not been prepared by the Agency.

The Agency has determined that the proposed rule is not expected to require legislative ratification based on the statement of estimated regulatory costs or if no SERC is required, the information expressly relied upon and described herein: the economic review conducted by the Agency.

Any person who wishes to provide information regarding a statement of estimated regulatory costs, or provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

RULEMAKING AUTHORITY: 120.80(4)(a), 550.0251(3), 550.2415(12), (13), FS.

LAW IMPLEMENTED: 120.80(4)(a), 550.0251, 550.1155, 550.2415(5), FS.

IF REQUESTED WITHIN 21 DAYS OF THE DATE OF THIS NOTICE, A HEARING WILL BE SCHEDULED AND ANNOUNCED IN THE FAR.

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE IS: Bryan Barber, Division of Pari-Mutuel Wagering, bryan.barber@myfloridalicense.com, 2601 Blair Stone Rd., Tallahassee, FL 32399, (850)717-1761.

THE FULL TEXT OF THE PROPOSED RULE IS:

61D-6.0051 Procedures for Collecting Samples from Racing Horses

(1) Identification of Horses for Sampling:

(a) Any horse the judges, stewards, division, or track veterinarian designate, shall be sent immediately after the race to the detention enclosure for examination by the authorized representative of the division and for the taking of urine, or blood specimens as shall be directed for the monitoring and detection of both permissible and impermissible substances.

(b) The division veterinarian and veterinarian assistant or authorized division representative shall verify the identity of the horse to be sampled by checking the horse's lip tattoo, freeze-brand, microchip, or physical description on its registration papers.

(2) Collection of Specimens:

(a) Urine specimens shall be collected only by authorized representatives of the division. If representatives of the division are unable to collect a urine specimen from a horse which has remained in the detention enclosure for up to ninety minutes, they have the option to accompany the horse to its own barn for additional attempts at collecting a specimen. The owner, trainer of record, groom, or other authorized person shall accompany the horse and division personnel to its barn and shall remain with the horse until a specimen is collected, and is permitted to

EXHIBIT "A"

accompany the division personnel and specimen back to the detention enclosure for sealing of the specimen container(s).

(b) Blood specimens shall be collected only by a Florida licensed veterinarian or designee and witnessed by the horse's trainer of record, owner, or designee. The veterinarian or designee shall obtain at least four, but not more than six, full blood tubes from each horse sampled.

1. When four full blood tubes are obtained, three of the full blood tubes shall be considered the primary or "A" sample. The other full blood tube shall be considered the secondary, or "B" portion of the specimen.

2. When more than four full blood tubes are obtained, a single blood tube shall be considered the secondary or "B" portion of the specimen, and the other tubes shall be considered the primary or "A" portion.

(c) At the time of collection, the authorized representative of the division responsible for collecting the urine specimen shall wear gloves provided by the division.

(3) After collection, blood specimen tubes shall be sealed and labeled. The sealing and labeling process for blood specimens shall include:

(a) Assigning and affixing a sample number, unique to each horse sampled, to the blood specimen tubes,

(b) Assigning an "A" and "B" designation to the appropriate tubes, and

(c) Affixing evidence tape to the tubes.

(4) Centrifuging of Blood Specimens:

(a) Once collected, a blood specimen shall rest for at least 30 minutes.

(b) Blood specimens shall be centrifuged at the detention barn facility to separate serum from the blood specimen in preparation of refrigeration for shipment to the testing laboratory.

(5) Pouring of Urine Specimens:

(a) After collection, the urine specimen shall be brought into the detention barn office where it shall be poured directly into two containers, one designated as the primary or "A" sample, and one designated as the secondary or "B" sample.

(b) The containers shall be sealed before securing and freezing for shipping.

(c) Only authorized representatives of the division shall pour urine specimens.

(d) At least one authorized representative of the division shall be present to observe the pouring of the urine specimens.

(e) Once transferred, the containers shall be sealed and a sample number shall be affixed to the containers.

(f) Evidence tape shall be affixed to the containers before securing and freezing for shipping.

(6) Failure of an owner, trainer of record or other authorized person to witness and/or sign a sample tag shall not preclude the division from proceeding with sample analysis.

(7) Securing and Shipping of Specimens:

(a) Urine shall be stored in a lockable freezer in the detention enclosure.

(b) Centrifuged blood specimens shall be stored in a lockable refrigerator in the detention enclosure.

(c) Specimens shall be shipped to the laboratory under contract with the division via common carrier in a locked, tamper proof container maintained in a manner to preserve the integrity of the specimens.

(8) Authorized division personnel must record the horses name and tattoo number; time of collection; name of the trainer or owner's witness, if any; specimen ID number; the time that centrifuging of blood begins; and the time urine is decanted for each specimen collected and processed.

(9) Authority of the division:

(a) The division veterinarian or division investigator is authorized to confiscate any legend or proprietary drugs, medications, unlabeled medication, medication with altered labels, medicinal compounds (natural or synthetic) or other materials which are found in the stable area or elsewhere on race tracks, or in the possession of any person participating in or connected with racing, including veterinarians and trainers, and which are suspected of containing improper legend or proprietary drugs, medications, medicinal compounds (natural or synthetic) or other materials which are illegal or impermissible under these rules. Such legend or proprietary drugs, medications, unlabeled medication, medication with altered labels, medicinal compounds (natural or synthetic) or other materials shall be delivered to the laboratory under contract with the division for analysis.

(b) The division is authorized to confiscate any evidence that an illegal or impermissible legend or proprietary drug, medication, or medicinal compound (natural or synthetic) may have been administered to a racing animal.

(c) Any licensee who threatens to or interferes with, or fails to allow the taking of urine, blood or other specimens authorized by Chapter 550, F.S., is subject to any disciplinary action authorized by Chapter 550, F.S., or the rules promulgated thereunder.

Rulemaking Authority 120.80(4)(a), 550.0251(3), 550.2415(12), (13) FS. Law Implemented 120.80(4)(a), 550.0251, 550.1155, 550.2415 FS. History—New _____.

61D-6.0052 Procedures for Collecting Samples from Racing Greyhounds

(1) Any racing greyhound the judges, division, track veterinarian, or authorized division representative designate, shall be sent immediately prior to the race to the detention enclosure for examination by an authorized representative of the division for the taking of urine or other such samples as shall be directed for the monitoring and detection of both permissible and impermissible substances.

(2) Collection of Specimens:

(a) Urine specimens shall be collected in a urine container by an authorized representative of the division. At the time of collection, the authorized representative of the division responsible for collecting the specimen shall wear gloves provided by the division.

(b) After a specimen is collected, an authorized representative of the division shall record the tattoo number of the greyhound from which the specimen was collected.

(c) An authorized representative of the division shall collect as much urine as possible from each greyhound sampled.

(d) The owner, trainer of record, or other authorized person, is permitted to witness when urine is collected from their dog. Failure of an owner, trainer of record or other authorized person to witness and/or sign the sample tag shall not preclude the division from proceeding with sample analysis.

(3) Sealing and Labeling of Specimens:

(a) Collection containers for urine shall be closed immediately following collection of the specimen.

(b) Once closed, the collection container shall be immediately assigned a sample number. The sample number and evidence tape shall be affixed to the specimen container to complete the sealing process.

(c) The authorized representative of the division that sealed the specimen container shall initial the sample number tag and evidence tape after it has been affixed to the container.

(4) Urine specimens shall be stored in a lockable freezer in the detention enclosure for freezing until the time of shipping.

(5) Urine specimens shall be shipped to the laboratory under contract with the division via common carrier in a locked, tamper proof, container maintained in a manner to preserve the integrity of the specimens.

(6) Authorized representative of the division must record the greyhound's name and tattoo number; time of collection; name of the trainer or owner's witness, if any; and specimen ID number.

(7) Authority of the division:

(a) The division investigator or other authorized representative is authorized to confiscate any legend or proprietary drugs, medications, unlabeled medication, medication with altered labels, medicinal compounds (natural or synthetic) or other materials which are found on the grounds of greyhound race tracks and kennel compounds or in the possession of any person participating in or connected with greyhound racing, including veterinarians and trainers, and which are suspected of containing improper legend or proprietary drugs, medications, medicinal compounds (natural or synthetic) or other materials which are illegal or impermissible under these rules. Such legend or proprietary drugs, medications, unlabeled medication, medication with altered labels, medicinal compounds (natural or synthetic) or other materials shall be delivered to the laboratory under contract with the division for analysis.

(b) The division is authorized to confiscate any evidence that an illegal or impermissible legend or proprietary drug, medication, or medicinal compound (natural or synthetic) may have been administered to a racing animal.

(c) Any licensee who threatens to or interferes with, or fails to allow the taking of urine, blood or other specimens authorized by Chapter 550, F.S., is subject to any disciplinary action authorized by Chapter 550, F.S., or the rules promulgated thereunder.

Rulemaking Authority 120.80(4)(a), 550.0251(3), 550.2415(12), (13) FS. Law Implemented 120.80(4)(a), 550.0251, 550.1155, 550.2415 FS. History—New _____.

61D-6.006 Procedures Relating to Split Samples.

The following procedures shall be followed when requesting a split portion of an official sample for analysis at an independent laboratory:

(1) A trainer of record or owner of a racehorse or racing greyhound who has received a report of positive result may request that a split sample analysis be conducted on the corresponding portion of the specimen, or secondary ("B" portion), if applicable analyzed by the primary racing laboratory under contract with the Division. The trainer of record or owner may request that the split sample be sent to an independent laboratory approved by the Division for split sample analysis. The request must be made in writing or on Form DBPR PMW-3290, Split Sample Request, effective December 2015 and adopted herein by reference, which can be obtained at <https://www.flrules.org/Gateway/reference.asp?No=Ref-06325>, www.myfloridalicense.com/dbpr/pmw, or by contacting the Department of Business and Professional Regulation, 2601 Blair Stone Road, Tallahassee, Florida 32399, and submitted by certified mail or hand delivery to the State Steward, Division Hearing Officer, or the Division's Office of the General Counsel no later than ten (10) calendar days after receipt of the report of positive result.

(2) The party requesting the split sample shall select an independent laboratory from a list of laboratories approved by the Division to perform the split sample analysis. The party requesting a split sample analysis shall bear all costs of the analysis and provide the Division with proof of payment.

(3) Failure to request a split sample with an approved independent laboratory within ten (10) calendar days after receiving written notification of the report of positive result from the primary racing laboratory shall constitute a waiver of the right to a split sample. Failure to pay the independent laboratory in full for split sample analysis and provide proof of payment to the Division within ten (10) days of receipt of the request for split sample analysis by the Division shall constitute a waiver of the right to a split sample.

(4) Upon receipt of the split sample request, the Division shall notify the primary laboratory of the request, identifying only the number on the sample number on container from which the split sample analysis is to be performed ~~taken~~, the independent laboratory which has been selected, the volume requested by the independent laboratory, and the primary laboratory's internal tracking number. The primary racing laboratory shall send the split sample to the independent laboratory selected within ten (10) calendar days of receiving the request.

(5) The request of a split sample shall operate as a stay of any hearing before the stewards or judges until the analysis of the split sample has been completed. Failure by the requestor to pay the independent laboratory for a split sample test shall not operate as a stay of any hearing before the stewards or judges.

Rulemaking Authority 120.80(4)(a), 550.0251(3), (11), 550.2415(5), (12) FS. Law Implemented 120.80(4)(a), 550.0251, 550.2415 FS. History--New 10-20-96, Amended 12-15-97, 4-12-06, 6-26-11, 1-10-16, _____.

NAME OF PERSON ORIGINATING PROPOSED RULE: Bryan Barber, Division of Pari-Mutuel Wagering, bryan.barber@myfloridalicense.com, 2601 Blair Stone Rd., Tallahassee, FL 32399, (850)717-1761.

NAME OF AGENCY HEAD WHO APPROVED THE PROPOSED RULE: Matilde Miller, Interim Secretary, Department of Business and Professional Regulation

DATE PROPOSED RULE APPROVED BY AGENCY HEAD: April 25, 2017

DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAR: March 24, 2017