

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF PARI-MUTUEL WAGERING

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

Petitioner,
v.

DBPR Case No.: 2019-012336
DOAH Case No.: 19-2390

DACHIELL RIOS,

Respondent.

_____ /

FINAL ORDER

The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (“Division”), hereby enters this Final Order for the above styled matter. This cause came before the Division for the purpose of considering the Recommended Order issued by the Honorable Robert S. Cohen, Administrative Law Judge, on September 18, 2019, in DOAH Case Number 19-2390 (“Recommended Order”), a copy of which is attached hereto as “Exhibit 1.” The Division filed exceptions to the Recommended Order. A true and correct copy of the Division’s Exceptions is attached hereto as “Exhibit 2.”

BACKGROUND

On or about March 9, 2019, Respondent was observed marking cards during a poker game at Isle Casino, in order to gain an advantage in the game. Isle Casino ejected Respondent from the facility.

On or about March 12, 2019, Isle Casino permanently excluded Respondent from the facility.

On or about April 3, 2019, Petitioner filed an administrative complaint seeking an order permanently excluding Respondent from all licensed pari-mutuel facilities in the State of Florida, based on his permanent exclusion from Isle Casino on March 12, 2019.

On April 25, 2019, Respondent requested a formal hearing pursuant to sections 120.569(2)(a) and 120.57(1), Florida Statutes. The formal hearing took place on August 5, 2019.

On September 18, 2019, the Administrative Law Judge issued a Recommended Order which recommended that the Division enter a Final Order excluding Respondent from all pari-mutuel facilities in the State of Florida. On October 3, 2019, Petitioner submitted exceptions to the Administrative Law Judge's Recommended Order. After a complete review of the record in this matter, the Division rules as follows:

AGENCY STANDARD FOR REVIEW

Pursuant to section 120.57(1)(l), Florida Statutes, when rejecting or modifying conclusions of law or interpretations of administrative rules, the agency must state with particularity its reasons for rejecting or modifying such conclusions of law or interpretations of administrative rules and must make a finding that its substituted conclusions of law or interpretation of administrative rules are as or more reasonable than those which were rejected or modified. Crim. Justice Standards & Training Comm'n v. Bradley, 596 So. 2d 661, 663-64 (Fla. 1992) (citing Hambley v. Dep't of Prof'l Reg., Div. of Real Estate, 568 So. 2d 970, 971 (Fla. 2d DCA 1990) (Altenbernd, J., dissenting)); see e.g., Phillips v. Bd. of Dentistry, Dep't of Health, 884 So. 2d 78, 81 (Fla. 4th DCA 2004) (board did not err in modification of hearing officer's penalty when it expressly adopted agency's filed exceptions and incorporated them into its final order).

RULINGS ON PETITIONER'S EXCEPTIONS

Exceptions to the Conclusions of Law

1. Petitioner takes exception to the conclusions of law set forth in Paragraphs #32 through #34, page 10, of the Recommended Order which state that:

32. The Division has the burden to prove by clear and convincing evidence that Respondent was excluded from Isle Casino.

33. The applicable disciplinary statutes in this proceeding are penal, and so they "must be construed strictly in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 584 (Fla. 3d DCA 2002).

34. The clear and convincing standard of proof has been articulated by the Supreme Court of Florida:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting with approval from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983) (further citations omitted)).

2. Generally speaking, the standard of proof applicable in administrative hearings is a preponderance of the evidence. See M.H. v. Dep't of Children and Family Servs., 977 So. 2d 755, 762 (Fla. 2d DCA 2008). According to section 120.57(1)(j), Florida Statutes, "[F]indings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized."

3. In Pam Stewart, as Comm'r of Educ. v. Silva of S. Fla., Inc., Case No. 17-3898SP (DOAH December 11, 2017; DOE March 13, 2018), the Administrative Law Judge determined that revoking a private school's participation in a scholarship program, while it had penal overtones, was NOT penal in nature because participation by a private school in the scholarship program was not a vested right or an entitlement, but rather a privilege. Id. at Footnote 7.

4. Similar to the above referenced matter, there is no vested right or entitlement to access a pari-mutuel facility. Additionally, Respondent has no property rights in attendance at a pari-mutuel facility. Rather, such is a privilege. See Borrego v. Agency for Health Admin., 675 So. 2d 666, 668 (Fla. 1st DCA 1996) (holding that a professional license is not a right, but a privilege granted by the state).

5. Additionally, the Florida Supreme Court held that when a state agency is to recover a "civil penalty," the agency is not required to prove the allegation by clear and convincing evidence, but rather by preponderance of the evidence." S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC, 139 So. 2d 869, 875 (Fla. 2014). The court differentiated between administrative fines and civil penalties. Id. at 874. There is no "administrative fine" in this matter, nor a fine of any kind.

6. As such, the applicable burden of proof is "preponderance of the evidence" not "clear and convincing evidence."

FINDINGS OF FACT

7. The Findings of Fact contained in the Recommended Order are hereby adopted as the Findings of Fact of the Division.

CONCLUSIONS OF LAW

8. Administrative Law Judge Cohen's Conclusions of Law in Paragraphs 31, and 35 through 42 set forth in "Exhibit 1" are approved, adopted, and incorporated into this Final Order by reference.

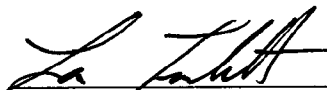
9. Based on the record, Administrative Law Judge Cohen's Conclusions of Law in Paragraphs 32 through 34 set forth in "Exhibit 1" are rejected and substituted with the more reasonable conclusions of law set forth in the Rulings on Petitioner's Exceptions to the aforementioned Conclusions of Law set forth herein. Those substituted conclusions of law are approved, adopted and incorporated into this Final Order by reference.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law adopted from the Recommended Order of the Division of Administrative Hearings, it is hereby ORDERED that:

- 1) Respondent shall be **PERMANENTLY EXCLUDED** from all licensed pari-mutuel facilities within the State of Florida.
- 2) This Final Order shall become effective on the date of filing with the Agency Clerk of the Department of Business and Professional Regulation.

DONE AND ORDERED this 21 day of November, 2019, in Tallahassee, Florida.



LOUIS TROMBETTA, DIRECTOR
Division of Pari-Mutuel Wagering
Department of Business and Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399-1035

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 26th day of November 2019, that a true and correct copy of the foregoing Final Order has been provided by electronic mail and U.S. mail to:

Dachiell Rios
250 N.W. 55th Court
Miami, Florida 33126

Brandon M. Nichols

AGENCY CLERK'S OFFICE

NOTICE OF RIGHT TO APPEAL UNLESS WAIVED

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 Rules 9.110 and 9.190, Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Department of Business and Professional Regulation, Attn: Ronda L. Bryan, Agency Clerk, 2601 Blair Stone Road, Tallahassee, Florida 32399 (agc.filing@myfloridalicense.com) and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Florida Appellate District where the Party Resides. The Notice of Appeal must be filed within thirty (30) Days of Rendition of the Order to be reviewed.