**FILED**
Department of Business and Professional Regulation
AGENCY CLERK
CLERK: Ronda L. Bryan
Date: 6/30/2022
File #: 2022-05349

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,

DOAH Case No.: 2021-003600
DBPR Case No.: 2021-045686

v.

BIBI AMELIA DOWNLAT-HANIFF,

Respondent.
_____________________________________/

# FINAL ORDER

An Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted a Recommended Order to the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Division" or "Petitioner"), in the above captioned administrative proceeding on June 1, 2022. Petitioner timely filed exceptions to the Recommended Order on June 16, 2022. This matter is now before the Division for final agency action.

## BACKGROUND

On October 26, 2021, Petitioner filed an Administrative Complaint against Bibi Amelia Downlat-Haniff ("Downlat-Haniff" or "Respondent") alleging she was subject to statewide exclusion from all licensed pari-mutuel facilities and all facilities of a slot machine licensee, pursuant to sections 550.0251(6), and 551.112, Florida Statutes, based on her ejection and permanent exclusion from Magic City Casino, a licensed pari-mutuel facility in the state of Florida. On November 29, 2021, this matter was referred to the Division of Administrative Hearings.

On April 18, 2022, the final hearing in this matter was held. At the hearing, Petitioner's Exhibits 1 and 2 were admitted into evidence. Petitioner called one witness, Mr. Manuel Andreu, Security Supervisor of Magic City Casino. Respondent's Exhibits 1 and 2 were admitted into evidence. Respondent was the only witness called on behalf of the Respondent at the hearing.

The parties were instructed to submit proposed recommended orders within ten days after the transcript was filed with DOAH. The transcript of the final hearing was filed on May 2, 2022.

On May 12, 2022, Petitioner's Proposed Recommended Order was filed. Respondent's Proposed Recommended order was filed on May 13, 2022. On June 1, 2022, the ALJ's Recommended Order was filed. The Recommended Order is attached as Exhibit "A" to this Final Order.

On June 16, 2022, Petitioner filed its exceptions to the Recommended Order. Petitioner's Exceptions to DOAH's Recommended Order are attached to this Final Order as Exhibit "B."

The Division has duly considered the Recommended Order and exceptions in the drafting of this Final Order.

## STANDARD OF REVIEW

Pursuant to section 120.57(1)(l), Florida Statutes, when reviewing a Recommended Order, an agency may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence."

The agency's scope of review of the facts is limited to ascertaining whether the hearing officer's factual findings are supported by competent substantial evidence. City of N. Port v. Consol. Minerals, Inc., 645 So. 2d 485, 487 (Fla. 2d DCA 1994). The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence

to fit its desired ultimate conclusion. Heifetz v. Dep't of Bus. Regul., Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

An agency head reviewing a Recommended Order is free to modify or reject any erroneous conclusion of law over which the agency has substantive jurisdiction, even when exceptions are not filed. § 120.57(1)(l), Florida Statutes; Barfield v. Dep't of Health, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); Fla. Public Employe Council v. Daniels, 646 So.2d 814, 816 (Fla. 1st DCA 1944). Pursuant to section 120.57(1)(l), Florida Statutes, when rejecting or modifying such conclusions of law, the agency must state with particularity its reasons for rejecting or modifying such conclusions of law and must make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified.

## RULINGS ON EXCEPTIONS

The Division reviewed and considered the Petitioner's Exceptions to the Recommended Order. An explicit ruling on each exceptions follows, pursuant to section 120.57(1)(k), Florida Statutes:

Exception 1: Paragraph 17

Petitioner takes exception to Paragraph 17 on the grounds that the ALJ's finding that Respondent told another player that she decided to cash out chips is improperly based on hearsay. Having reviewed the record, this finding is based on competent, substantial evidence. The exception is denied.

Exception 2: Paragraph 18

Petitioner takes exception to Paragraph 18 on the grounds that the ALJ's finding that the Respondent told the dealer several things is improperly based on hearsay. Having reviewed the record, this finding is based on competent, substantial evidence. The exception is denied.

Exception 3: Paragraph 19

Petitioner takes exception to Paragraph 19 on the grounds that the ALJ's finding about what the dealer told Respondent is hearsay. Having reviewed the record, this finding is based on competent, substantial evidence. The exception is denied.

Exception 4: Paragraph 28

Petitioner takes exception to Paragraph 28 without sufficiently explaining the grounds. Having reviewed the record, this finding is based on competent, substantial evidence. The exception is denied.

Exception 4: Paragraph 29

Petitioner takes exception to Paragraph 29 without sufficiently explaining the grounds. Having reviewed the record, this finding is based on competent, substantial evidence. The exception is denied.

Exception 5: Paragraph 30

Petitioner takes exception to Paragraph 30 without sufficiently explaining the grounds. Having reviewed the record, this finding is based on competent, substantial evidence. The exception is denied.

The Division rejects paragraphs 36, 40, and 42-49 of the Recommended Order as erroneous conclusions of law. An agency's interpretation of a statute the agency is charged with implementing is entitled to great deference, and will not be reversed unless it is clearly erroneous, i.e. unless there is a clear conflict with the intent of the statute. Lakeland Regional Medical Ctr. v. Agency for Health Care Admin., 917 So.2d 1024 (Fla. 1st DCA 2006).

"A statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts, and is not to be read in isolation, but in the context of the entire

section." Fla. Dep't of Envtl. Prot. v. Contractpoint Fla. Parks, LLC, 986 So. 2d 1260, 1265 (Fla. 2008). "The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent." Florida Department of State v. Martin, 916 So.2d 763, 768 (Fla. 2005). "If part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the same statute or others *in pari materia*, the Court will examine the entire act and those in *pari materia* in order to ascertain the overall legislative intent." Florida State Racing Commission v. McLaughlin, 102 So. 2d 574, 575-576 (Fla 1958). "All parts of a statute must be read together in order to achieve a consistent whole." Forsythe v. Longboat Key Beach Erosion Control District, 604 So.2d 452, 455 (Fla 1992).

Section 550.0251(6), Florida Statutes, reads in part:

> [T]he division may exclude from any pari-mutuel facility within this state any person who has been ejected from a pari-mutuel facility in this state . . . The division may authorize any person who has been ejected or excluded from pari-mutuel facilities in this state upon a finding that the attendance of such person at pari-mutuel facilities would not be adverse to the public interest or to the integrity of the sport or industry.

Petitioner has interpreted the provisions of section 550.0251(6), Florida Statutes, to mean that the Division may exclude any person who has been ejected from a pari-mutuel facility in this state from any or all other pari-mutuel facilities in the state.

Further, the Division *may* authorize any person who has been excluded from pari-mutuel facilities in this state to visit facilities within the state upon a finding that it would not be adverse to the public interest or to the integrity of the sport or industry. This authorization is at the discretion of the agency. This authorization, however, can only occur once an individual has

been ejected from pari-mutuel facilities. Petitioner has only alleged Respondent has been ejected from a single facility and Respondent even contested whether that ejection occurred. The Division could not authorize Respondent to visit pari-mutuel facilities within Florida under the statute until it has a final order excluding Respondent. The processes do not happen at the same time.

Therefore, the Division rejects paragraphs 36, 40, and 42-49 as erroneous conclusions of law. The Division finds that its substituted conclusions are as or more reasonable than the conclusions that it rejects. § 120.57(1)(l), Fla. Stat.

## RULING ON RECOMMENDATION

The Division "may accept the recommended penalty in a recommended order" but "may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action." § 120.57(1)(l), Fla. Stat.

The recommended penalty does not exclude Respondent from any pari-mutuel facility in the state of Florida. The recommended penalty occurs due to an erroneous combination of two different processes found within section 550.0251(6), Florida Statutes, into a single proceeding not contemplated by the law. The record indicates that the Respondent was ejected or excluded from one pari-mutuel facility. That is sufficient for the Division to bar Respondent from any pari-mutuel facility in the state.

Applying the recommended penalty would violate the plain language of the statute. The Legislature created a process by which excluded individuals could reobtain access to pari-mutuel facilities with the "public interest" finding. But it created no such "public interest" test for the actual process of the initial exclusion. The recommend penalty is rejected.

## FINDINGS OF FACT

The Division adopts the Findings of Fact in the Recommended Order and incorporates them by reference.

## CONCLUSIONS OF LAW

Except as stated above, the Division adopts the Conclusions of Law in the Recommended Order and incorporates them by reference.

*Order to follow on next page.*

<u>ORDER</u>

Based upon a complete review of the record in this case, the Division determines that Respondent violated sections 550.0251(6), and 551.112, Florida Statutes, and it is hereby ORDERED that:

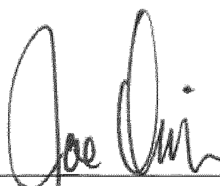
1. The Recommended Order (Exhibit "A") is adopted, except as modified by the above Rulings on Exceptions, and Ruling on Recommendation, and is incorporated by reference herein, finding that its Conclusions of Law are as or more reasonable than those that were rejected.

2. Respondent is hereby permanently EXCLUDED from all pari-mutuel facilities within the state of Florida.

3. Respondent is hereby permanently EXCLUDED from all slot machine facilities in the state of Florida.

4. This Final Order shall become effective on the date of filing with the Agency Clerk of the Department of Business and Professional Regulation.

This Final Order in DBPR Case Number 2021-045686 is DONE AND ORDERED this 29 day of June, 2022, in Tallahassee, Florida.



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

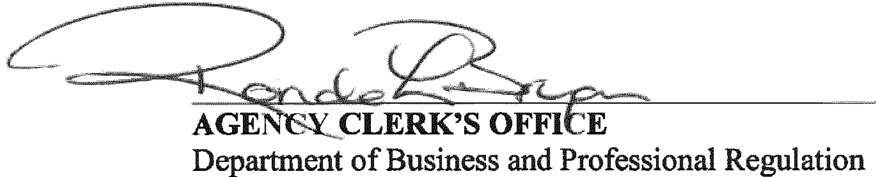
## NOTICE OF RIGHT TO APPEAL UNLESS WAIVED

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 30th day of June 2022, that a true and correct copy of the foregoing Final Order has been sent via electronic and U.S. Mail to:

**Bibi Amelia Downlat-Haniff**
c/o Derrick C. Morales, Esq.
13499 Biscayne Blvd., Ste. 107
Miami, Florida 33181
DCM@DCMoraleslaw.com



**AGENCY CLERK'S OFFICE**
Department of Business and Professional Regulation

cc: Ebonie Lanier

# STATE OF FLORIDA
# DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs. Case No. 21-3600

BIBI AMELIA DOWNLAT-HANIFF,

Respondent.
_______________________________/

## RECOMMENDED ORDER

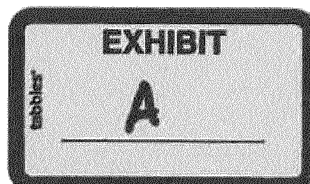
Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2021),[1] before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on April 18, 2022, by Zoom Conference.

## APPEARANCES

For Petitioner: Emily Ann Leiva, Esquire
Marc Daniel Taupier, Esquire
Department of Business and Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399

For Respondent: Derrick Christian Morales, Esquire
Derrick C. Morales, P.A.
13499 Biscayne Boulevard, Suite 107
Miami, Florida 33181

[1] All references to Florida Statutes are to the 2021 codification, which was in effect at the time of the incident giving rise to this proceeding.



## STATEMENT OF THE ISSUES

The issues in this case are: (1) whether Petitioner may exclude Respondent, on a permanent basis, from licensed pari-mutuel wagering facilities in this state; (2) whether Respondent should be authorized to attend licensed pari-mutuel facilities in this state other than Magic City Casino; and (3) whether Petitioner may exclude Respondent, on a permanent basis, from any licensed slot machine facilities in this state.

## PRELIMINARY STATEMENT

On or about October 26, 2021, Petitioner, Department of Business and Professional Regulation, issued an Administrative Complaint determining that Respondent, Bibi Amelia Downlat-Haniff, had violated sections 550.0251(6) and 551.251, Florida Statutes, by having been excluded from the Magic City Casino (hereafter, "Casino") and proposing to permanently exclude her from any licensed pari-mutuel wagering facility and any facility of a slot machine licensee in the state of Florida. Respondent timely filed an Election of Rights form disputing certain allegations in the Administrative Complaint and requesting a hearing pursuant to sections 120.569 and 120.57(1).

On November 29, 2021, this matter was referred to DOAH for assignment of an ALJ to conduct an evidentiary hearing pursuant to sections 120.569 and 120.57(1). The final hearing initially was scheduled for February 8, 2022, but was continued and rescheduled for April 18, 2022.

On January 11, 2022, Respondent filed Respondent's Motion to Compel Better Responses to the Request for Production ("Motion to Compel"), seeking to compel production of an entire video created by the Casino, purportedly depicting the entirety of the incident that resulted in Respondent being excluded from the Casino. On January 12, 2022, Petitioner filed Petitioner's

Response to Motion to Compel Better Responses to the Request for Production and Motion for Attorney's Fees ("Response and Fees Motion"), in which Petitioner contended that it did not have the entire video for which Respondent sought production. Petitioner further requested an award of attorney's fees, pursuant to Florida Rule of Civil Procedure 1.380(a)(4). The undersigned conducted a hearing on the motion and response on January 19, 2022, and issued an Order Denying Motion to Compel on January 20, 2022, in which she reserved ruling on Petitioner's request for attorney's fees. As further discussed below, the undersigned has determined that, pursuant to rule 1.380(4), Petitioner is entitled to an award of reasonable expenses, including attorney's fees, incurred in opposing the motion.

The final hearing was held on April 18, 2022. Petitioner presented the testimony of Manuel Andreu, and Petitioner's Exhibit Nos. 1 and 2 were admitted into evidence without objection. Respondent testified on her own behalf, and Respondent's Exhibit Nos. 1 and 2 were admitted without objection.

The Transcript of the final hearing was filed at DOAH on May 2, 2022, and the parties were given ten days, until May 12, 2022, to file their proposed recommended orders. Petitioner timely filed its Proposed Recommended Order on May 12, 2022, and Respondent filed her Proposed Recommended Order at 8:00 a.m. on May 13, 2022. Both proposed recommended orders were given due consideration in preparing this Recommended Order.

## FINDINGS OF FACT

The Parties

1. Petitioner is the state agency charged with administering and enforcing the statutes and rules regarding licensed pari-mutuel wagering facilities,

licensed cardrooms, and licensed slot machine facilities in the state of Florida.

2. Respondent is a female who is a frequent patron at licensed pari-mutuel wagering, including those having licensed cardrooms, and at licensed slot machine facilities in Florida.

<u>Evidence Adduced at the Final Hearing</u>

3. Respondent was a patron at the Casino on August 25, 2021. The Casino is a licensed pari-mutuel facility that also is the holder of a cardroom license and a slot machine license.

4. Andreu, the supervisor of security at the Casino, testified on behalf of Petitioner regarding the events that led to Respondent being excluded from the Casino on August 25, 2021.

5. According to Andreu, and confirmed by Respondent, Respondent was playing cards at a poker table on that date.

6. At some point, Andreu was summoned to the poker room regarding Respondent's alleged actions that were claimed to have occurred at the poker table.

7. Andreu's testimony regarding Respondent's alleged conduct regarding placing an "all-in" bet at the poker table was based solely on what the poker supervisor, Elio Molina, told him had occurred. Molina did not testify at the final hearing.

8. Specifically, Andreu testified:

> From what I remember from the supervisor [Molina] told me[,] she had put in an all-in bet and she was trying to take back the all-in bet. And from what was explained to me, that was a violation of the poker rule. And he gave her another one or two opportunities to put the bet in, but she didn't do it, and he told me that she needed to be excluded.

9. Andreu did not witness Respondent's alleged conduct regarding placing an all-in bet, and no evidence was presented demonstrating that he had

personal knowledge regarding whether—or not—Respondent had placed an all-in bet. Therefore, his testimony regarding Respondent's alleged actions at the poker table regarding the bet is hearsay.

10. Petitioner did not present any video footage, audio recording, or any other competent, non-hearsay evidence to substantiate Andreu's hearsay testimony that Respondent placed an "all-in" bet at the poker table. Thus, Andreu's testimony that Respondent violated the Casino's rules by placing an all-in bet and then attempting to take it back does not constitute competent substantial evidence regarding Respondent's conduct at the poker table on August 25, 2021.

11. Andreu testified to the effect that he arrived at the poker table in time to witness Respondent being told to put an "all-in" bet "back in," and Respondent refusing to do so, at which point Molina told him that Respondent needed to be excluded from the Casino.

12. However, as discussed below, Andreu's testimony appears inconsistent with Respondent's Exhibit No. 1, which consists of a video from a camera directly above the poker table, showing Respondent gathering her numerous chips off of the table and placing them in trays to cash out *before* Andreu arrived at the poker table.

13. Petitioner presented video footage showing Respondent being escorted from the Casino by Andreu and three police officers. The video shows Respondent handing her driver's license to one of the police officers, who handed it to Andreu. Andreu testified that he obtained Respondent's name and personal information from her driver's license, and that he added her name to the list of persons permanently excluded from the Casino.

14. Andreu testified, and Petitioner presented an exclusion list showing, that Respondent has been permanently excluded from the Casino.

15. The competent, credible, and persuasive evidence establishes that Respondent is an experienced poker player who understands the rules of poker, including what placing an all-in bet entails.

16. In order to supplement her income, Respondent often plays poker at the Casino and other pari-mutuel facilities having licensed cardrooms.

17. Respondent credibly testified that she had been playing poker at the Casino on the morning of August 25, 2021, and that between 1:15 and 1:30 a.m., she decided to cash out her chips because the Casino closed at 2:00 a.m. She testified, credibly, that she mentioned that to one of the other players at the table.

18. Respondent testified, credibly, that thereafter, she noticed that two cards had been placed on the table in front of her, and she was told that she had placed an all-in bet. Respondent credibly testified that she did not turn over the cards. She told the dealer that she had not placed an all-in bet, had not turned over the cards in front of her, and no longer was playing because she was leaving the Casino.

19. She also testified, credibly, that she asked a supervisor to review the surveillance camera video footage of the poker table in order to verify that she had not placed the bet; however, the supervisor refused, and informed her that she had placed the all-in bet and had to play the game.

20. The competent, credible evidence establishes that at that point, Respondent stood and began to gather her chips to cash in before leaving the Casino.

21. As discussed above, Respondent's Exhibit No. 1, consisting of video footage from the surveillance camera located directly above the poker table, does not show Andreu present at the poker table at the time Respondent ostensibly was told that she had to put an all-in bet back into the game, and Respondent refusing to do. Rather, the video shows Andreu walking up to the table *after* Respondent was standing and gathering her chips. The video also does not show anyone identified as Molina at or near the table. Therefore, the accuracy, and, thus, the credibility, of Andreu's testimony that he was present when Molina told Respondent that she needed to put her "all-in" bet "back in," and Respondent refused to do so, is undercut by the video evidence.

22. The video footage shows that Andreu walked past, and then subsequently walked up to, the poker table, as Respondent finished placing her chips in the trays and gathered her personal belongings to leave the table.

23. The video then depicts Respondent walking away from the poker table, followed by Andreu and a police officer who had been standing near the poker table.[2] Respondent testified, credibly, that she went to the cashier window and cashed out her chips.

24. As found above, video footage shows Respondent being escorted out of the Casino by Andreu and three police officers. Respondent confirmed that she was told not to return to the Casino.

25. Respondent credibly testified, and the video evidence presented at the final hearing confirms, that at no point did Respondent become unruly or confrontational with Andreu, the police officers, or anyone else.

Findings of Ultimate Fact on the Merits of this Proceeding

26. The competent, substantial, and persuasive evidence adduced at the final hearing establishes that Respondent was excluded from the Casino on August 25, 2021.

27. The competent, substantial, and persuasive evidence also establishes that allowing Respondent to attend licensed pari-mutuel facilities in this state *other* than the Casino[3] would not be adverse to the public interest or to the integrity of the sport or industry.

28. Specifically, as discussed above, the competent, substantial, credible, and persuasive evidence establishes that Respondent did not place an all-in

---

[2] The competent, credible evidence established that law enforcement officers are present in the Casino, including in the poker room, at all times.

[3] Section 550.0251(6) recognizes the absolute right of a licensed pari-mutuel facility to permanently exclude patrons from attendance at its facility. Thus, under any circumstances, the Casino is legally entitled to permanently exclude Respondent from its facilities.

bet and then attempt to take it back, as Andreu claimed—again, based solely on what he had been told, rather than on his personal knowledge.

29. Nor does the competent substantial evidence otherwise establish that Respondent violated the rules of poker, or engaged in unruly or confrontational conduct, either at the poker table or as she was escorted out of the Casino.

30. Accordingly, it is determined, as a matter of ultimate fact, that while Petitioner has established that Respondent has been permanently excluded from the Casino, Respondent has established that she should be authorized to attend *other* licensed pari-mutuel facilities in this state on the basis that her attendance at these facilities would be not be adverse to the public interest or to the integrity of the sport or industry.

Attorney's Fees and Costs Incurred in Responding to Motion to Compel

31. As discussed above, on January 11, 2022, Respondent filed Respondent's Motion to Compel, seeking to compel production of the entire video created by the Casino purportedly depicting the entire incident that resulted in Respondent being excluded from the casino.

32. On January 12, 2022, Petitioner filed its Response and Fees Motion, in which it requested an award of attorney's fees, pursuant to Florida Rule of Civil Procedure 1.380(a)(4), on the basis that Respondent failed to confer with Petitioner before filing the motion to compel. The undersigned conducted a hearing on the motion and response on January 19, 2022, and issued an Order Denying Motion to Compel on January 20, 2022.

33. Pursuant to rule 1.380(4), Respondent is liable to Petitioner for reasonable expenses, including attorney's fees, incurred by Petitioner in opposing the motion.

## CONCLUSIONS OF LAW

34. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding, pursuant to sections 120.569 and 120.57(1).

Burden and Standard of Proof

35. Because Petitioner is asserting the affirmative of the issue regarding whether Respondent should be excluded from pari-mutuel facilities because she was excluded from the Casino, Petitioner bears the burden of proof with respect to that issue. *Balino v. Dep't of Health and Rehab. Servs.*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977). Although Petitioner proposes to take penal action against Respondent, because Petitioner's proposed agency action does not sanction a professional license, the applicable standard of proof is the preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

36. Because Respondent affirmatively asserts that she should be authorized to attend pari-mutuel facilities in the state because her attendance will not be adverse to the public interest or to the integrity of the sport or industry, she bears the burden of proof with respect to that issue. *Balino,* 348 So. 2d at 350. The standard of proof with respect to this issue is the preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

Applicable Statutory Provisions

37. Section 550.0251(6), Florida Statutes, states:

> (6) In addition to the power to exclude certain persons from any pari-mutuel facility in this state, the division may exclude any person from any and all pari-mutuel facilities in this state for conduct that would constitute, if the person were a licensee, a violation of this chapter or the rules of the division. The division may exclude from any pari-mutuel facility within this state any person who has been ejected from a pari-mutuel facility in this state or who has been excluded from any pari-mutuel facility in another state by the governmental department, agency, commission, or authority exercising regulatory jurisdiction over pari-mutuel facilities in such other state. The

> division may authorize any person who has been ejected or excluded from pari-mutuel facilities in this state or another state to attend the pari-mutuel facilities in this state upon a finding that the attendance of such person at pari-mutuel facilities would not be adverse to the public interest or to the integrity of the sport or industry; however, this subsection shall not be construed to abrogate the common-law right of a pari-mutuel permitholder to exclude absolutely a patron in this state.

38. Section 551.112, Florida Statutes, states:

> In addition to the power to exclude certain persons from any facility of a slot machine licensee in this state, the division may exclude any person from any facility of a slot machine licensee in this state for conduct that would constitute, if the person were a licensee, a violation of this chapter or the rules of the division. The division may exclude from any facility of a slot machine licensee any person who has been ejected from a facility of a slot machine licensee in this state or who has been excluded from any facility of a slot machine licensee or gaming facility in another state by the governmental department, agency, commission, or authority exercising regulatory jurisdiction over the gaming in such other state. This section does not abrogate the common law right of a slot machine licensee to exclude a patron absolutely in this state.

<u>Conclusions Regarding the Merits of this Proceeding</u>

39. Based on the foregoing Findings of Fact, and pursuant to section 550.0251(6), it is concluded that because Respondent was excluded from the Casino, Petitioner is authorized to exclude her from licensed pari-mutuel facilities in the state.

40. However, based on the foregoing Findings of Fact, and pursuant to section 550.0251(6), because Respondent demonstrated, by a preponderance of the evidence, that her attendance at pari-mutuel facilities in the state

would not be adverse to the public interest or the integrity of the sport or industry, it is concluded that Petitioner is authorized to allow, and must allow, her attendance at licensed pari-mutuel facilities in the state *other* than the Casino, which, as noted above, is legally entitled to exclude Respondent.

41. Based on the foregoing Findings of Fact, and pursuant to section 551.112, it is concluded that because Respondent was excluded from the Casino—which, in addition to being a licensed pari-mutuel facility that holds a cardroom license, is also a slot machine facility licensee—Petitioner is authorized to exclude Respondent from the facilities of slot machine licensees in the state.[4]

<u>Process for Demonstrating Lack of Adverse Effect to the Public Interest or to the Integrity of the Sport or Industry</u>

42. Petitioner, through counsel, took the position at the final hearing that because the Administrative Complaint only cited a portion of section 550.0251(6), and did not mention the last sentence in section 550.0251(6)—which expressly authorizes Petitioner to allow a person who has been excluded from a pari-mutuel facility to attend other pari-mutuel facilities upon findings that the person's attendance would not adversely affect the public interest or the integrity of the sport or industry—the question whether Respondent should be authorized to attend other pari-mutuel facilities in the state is not at issue in this proceeding.

43. Petitioner, through counsel, also posited that to the extent findings on this issue must be made, it is solely the agency's place to make such findings, pursuant to a separate process.[5]

44. These positions are incorrect for the following reasons.

---

[4] Section 551.112 does not contain a provision authorizing a person who was excluded from the facility of a slot machine licensee to demonstrate that his or her attendance at licensed slot machine facilities will not be adverse to the public interest or to the integrity of the sport or industry.

[5] Section 550.0251 does not mention such a separate application process, nor, as further discussed below, has the agency adopted rules implementing such an application process.

45. First, Petitioner's position is contrary to the plain language of section 550.0251(6), which expressly and specifically contemplates that an excluded patron may be authorized to attend pari-mutuel facilities in the state "upon a finding" that certain circumstances in the statute exist. This provision is part of section 550.0251(6), and it is axiomatic that an agency is not free to simply ignore statutory language, or treat such language as mere surplusage. *See Edwards v. Thomas*, 229 So. 3d 277, 284 (Fla. 2017)(a basic rule of statutory construction provides that the legislature does not intend to enact useless provisions, and related statutory provisions must be read together to achieve a consistent whole).

46. Second, the question of whether Respondent should be allowed to attend other pari-mutuel facilities in the state was raised and made an issue in this specific proceeding *by Respondent*, who challenged the agency's proposed action and alleged factual bases for that agency action. Respondent requested a hearing under section 120.57(1)—which, by definition, is a proceeding involving disputed issues of material fact. In such proceedings, the administrative law judge—not the agency—functions as the trier of fact, to make findings of fact based on the competent substantial evidence in the record.[6] § 120.57(1)(*l*), Fla. Stat. *See Demichael v. Dep't of Mgmt. Servs.*, 344 So. 3d 691, 695 (Fla. 1st DCA 2022)(recognizing administrative law judge's exclusive fact-finding function in administrative proceedings involving disputed issues of material fact).

47. Third, to the extent Petitioner reads the language "may authorize" in the last sentence of section 550.0251(6) as granting it absolute discretion to decide whether (or not) to authorize an excluded person to attend pari-mutuel facilities in the state, this reading is contrary to established case law holding that even when statutes grant administrative agencies substantial discretion,

[6] In a proceeding involving disputed issues of material fact conducted under section 120.57(1), it is not the agency's role to make factual findings; that role is exclusively reserved for the administrative law judge.

the exercise of that discretion must be supported by competent substantial evidence in the record of the administrative proceeding. *Fla. Power & Light Co. v. Siting Bd.*, 693 So. 2d 1025, 1027-28 (Fla. 1st DCA 1997). Here, Respondent presented competent, substantial, and persuasive evidence showing that her attendance at pari-mutuel facilities in Florida would not have an adverse effect on the public interest or the integrity of the sport or industry, and Petitioner failed to present sufficient countervailing evidence to overcome this showing. Accordingly, Respondent has demonstrated her entitlement, pursuant to the last sentence in section 550.0251(6), to attend pari-mutuel facilities in the state *other* than the Casino.

48. Fourth, Petitioner, through counsel, asserted that any determination regarding whether an excluded person may be authorized to attend other pari-mutuel facilities pursuant to the last sentence of section 550.0251(6) would involve a process that is separate and apart from a proceeding such as this one, regarding whether a person should be excluded from all pari-mutuel facilities in the state by virtue of having been excluded from one such facility. When pressed regarding the specific details of such a separate process, Petitioner took the position that a person would file a petition, conforming to Florida Administrative Code Chapter 28-106, requesting to be allowed to attend pari-mutuel facilities in the state. Petitioner's position misapprehends that in order for the right to file a petition conforming to chapter 28-106 (specifically, rule 28-106.201) to be triggered, the agency must *first* take proposed agency action and provide the person whose substantial interests are being determined a clear point of entry to challenge that agency action. That is precisely the process that has been invoked in *this* proceeding, where Petitioner has proposed to permanently exclude Respondent from all pari-mutuel facilities in the state, and Respondent has raised the disputed issue of material fact regarding whether she should be authorized to attend other pari-mutuel facilities in the state on the basis that her attendance would not be adverse to the public interest or to the integrity of the sport or industry.

Succinctly stated, the "separate process" that Petitioner has described for enabling an excluded person to demonstrate that he or she should not be excluded, pursuant to the last sentence of section 550.0251(6), simply is not contemplated under that statute, under sections 120.569 and 120.57(1), or under rule 28-106.201.

49. Finally, as discussed above, the "separate application process" that Petitioner described for determining whether a person excluded from pari-mutuel facilities should be allowed to attend such facilities is not contemplated in the plain language of section 550.0251(6). To the extent the agency does, or would, uniformly invoke such a "separate application process" to implement the last sentence of section 550.0251(6), that process constitutes a rule,[7] which, pursuant to section 120.54(1), must be adopted pursuant to the rulemaking process in section 120.54 in order for Petitioner to apply it in determining a party's substantial interests. Notably, Petitioner has not adopted any rules to establish such a separate application process for implementing the last sentence of section 550.0251(6). Thus, to the extent Petitioner attempts to impose such a process on Respondent, that process constitutes an unadopted rule, which cannot be applied to determine whether she may be allowed to attend pari-mutuel facilities in the state.[8]

50. The undersigned retains jurisdiction over this proceeding for the sole purpose of determining the amount of reasonable expenses, including attorney's fees, to which Petitioner may be entitled under rule 1.380(4). Should Petitioner wish to pursue its claim for an award of reasonable expenses, including attorney's fees, associated with preparing and filing the response in opposition to Respondent's Motion to Compel, Petitioner shall file with the undersigned, and serve on Respondent, an affidavit, with supporting

---

[7] A "rule" is a statement of general applicability that implements, interprets, or prescribes law or policy or describes *the procedure* or practice requirements of an agency. §120.52(16), Fla. Stat.

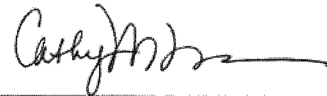
[8] "An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule." § 120.57(1)(e)1., Fla. Stat.

documents, establishing the amount of reasonable expenses, including attorney's fees, to which Petitioner claims it is entitled. Upon such filing, a separate proceeding, pursuant to section 120.57(1), shall be opened for the purpose of determining the amount of expenses, including attorney's fees, to which Petitioner may be entitled.

## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation issue a final order: (1) determining that although Respondent violated section 550.0251(6), she is authorized to attend pari-mutuel facilities in the state other than the Casino; and (2) determining that Respondent violated section 551.112, and, therefore, is excluded from licensed slot machine facilities in the state of Florida.

DONE AND ENTERED this 1st day of June, 2022, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of June, 2022.

COPIES FURNISHED:

Emily Ann Leiva, Esquire
Department of Business
and Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399

Marc Daniel Taupier, Esquire
Department of Business
and Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399

Louis Trombetta, Director
Division of Pari-Mutuel Wagering
Department of Business
and Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399

Melanie S. Griffin, Secretary
Department of Business
and Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399-2202

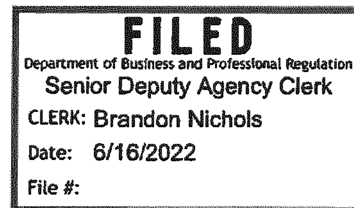
Derrick Christian Morales, Esquire
Derrick C. Morales, P.A.
Suite 107
13499 Biscayne Boulevard
Miami, Florida 33181

Eric Anthony Saccomanno, Esquire
Department of Business
and Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399

David Axelman, General Counsel
Office of the General Counsel
Department of Business
and Professional Regulation
Suite B-6
2601 Blair Stone Road
Tallahassee, Florida 32399-2202

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.




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.

DOAH Case No.:21-003600
DBPR Case No.: 2021-045686

BIBI AMELIA DOWNLAT-HANIFF,

Respondent.
_______________________________________/

## PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Pursuant to section 120.57(1)(k), Florida Statutes, and rule 28-106.217, Florida Administrative Code, Petitioner, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Department"), submits its exceptions to the recommended order issued on June 1, 2022 ("Recommended Order"), and states as follows:

### The Department's Role

1. The Department is charged with regulating and safeguarding the integrity of all authorized pari-mutuel wagering activities, slot machine games, and cardroom in this state. *See* §§ 550.0251, 551.103, 849.086(4), Fla. Stat. Stated another way, the Department executes, enforces, and has substantive jurisdiction over chapters 550, 551, and section 849.086, Florida Statutes.

### Procedural Background

2. On June 1, 2022, the administrative law judge ("ALJ") issued her recommended order in this matter. Ultimately, the ALJ recommended that even though the Department proved the Respondent was excluded from Magic City Casino and was therefore subject to statewide

exclusion from all pari-mutuel and slot machine facilities in this state pursuant to sections 550.0251(6), and 551.112, Florida Statutes, the Department should enter a final order: 1) authorizing the Respondent to attend pari-mutuel facilities in the state other than Magic City Casino; and 2) excluding the Respondent from all licensed slot machine facilities in this state.

3. For the reasons that follow, the Department should adopt the following exceptions to the ALJ's recommended order and incorporate them into the final order.

Exception One

4. The Department takes exception to the ALJ's findings of fact on page 6, paragraphs 17-19 and pages 7-8, paragraphs 28-30 based solely on uncorroborated hearsay without any applicable exception as such evidence does not constitute competent substantial evidence.

*Specific Challenged Findings of Fact*

5. The ALJ found that Respondent credibly testified that she was at the poker room on August 25, 2021 and decided to cash out her chips sometime between 1:15 to 1:30 AM. RO at ¶ 17. The ALJ concluded Respondent communicated this decision to one of the other players at table. *Id.*

6. The ALJ also found that Respondent credibly testified that she told the dealer that she had not placed an all-in bet, had not turned over the cards in front of her, and was no longer playing because she was leaving the casino. RO at ¶18.

7. The ALJ concluded that Respondent credibly testified that she asked the poker supervisor to review the surveillance camera video footage of the poker table in order to verify that she did not place the all-in bet, that the supervisor refused to allow her to see the footage, and informed her that she did place the bet and had to play the game. RO at ¶19.

8. Relying on these statements, the ALJ ultimately concluded as a matter of fact that Respondent did not place an all-in bet, did not violate the rules of poker or engage in unruly or confrontational conduct at the poker room or when escorted out, and should be authorized to attend other pari-mutuel facilities in the state. RO at ¶ 28-30.

*Argument*

9. The Department may reject findings of fact made that are not supported by competent substantial evidence in the record. *See* § 120.57(1)(*l*), Fla. Stat. Competent substantial evidence is such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred or such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *Eady v. State*, 279 So. 3d 1249 (Fla. 1st DCA 2019); *Mobley v. State*, 181 So. 3d 1233 (Fla. 1st DCA 2015); *Bill Salter Advertising, Inc. v. Dept. of Transp.*, 974 So. 2d 548 (Fla. 1st DCA 2008); *T.H. v. Fla. Dept. of Children and Families*, 308 So. 3d 678 (Fla. 1st DCA 2020).

10. Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. § 90.801(c), Fla. Stat. Although hearsay evidence is admissible in administrative proceedings and may be used to supplement other evidence, "it is not sufficient, standing alone, to prove a material fact at issue unless it would be admissible over objection in a civil proceeding." *Yost v. Unemployment Appeals Comm'n*, 848 So. 2d 1235, 1237 (Fla. 2d DCA 2003); § 120.57(1)(c), Fla. Stat.; *Doyle v. Fla. Unemployment Appeals Comm'n*, 635 So.2d 1028, 1032 (Fla. 2d DCA 1994); *see also Brown v. Int'l Paper Co.*, 710 So.2d 666, 668 (Fla. 2d DCA 1998).

11. The Respondent's testimony that she told another player that she decided to cash out her chips is hearsay without any applicable exception. Likewise, the Respondent's testimony

that she told the dealer she had not placed an all-in bet, had not turned over the cards in front of her, and was no longer playing because she was leaving the casino is hearsay without any applicable exception. Finally, the Respondent's testimony that the poker supervisor told her she was not permitted to view video footage is hearsay without any applicable exception.

12. Additionally, the Respondent's out-of-court statements, as well as the poker supervisor's out-of-court statement, were not corroborated by any other non-hearsay evidence. Accordingly these hearsay statements are not admissible, do not constitute competent and substantial evidence, cannot be used to support any finding of fact that any of these statements were actually made, and are an insufficient basis for any finding that the Respondent is credible or should ultimately be allowed to attend other pari-mutuel facilities.

13. Therefore, the Department respectfully requests a Final Order be entered granting the Department's Exception to the findings of fact set forth on page 6 paragraphs 17-19 and pages 7-8 paragraphs 28-30 of the Recommended Order.

Exception Two

14. The Department takes exception to the ALJ's conclusions of law regarding how section 550.0251(6), Florida Statutes, operates. RO at ¶ 45-49.

*Background*

15. During the final hearing, the ALJ asked the Department's counsel whether the Department had any rules or policies for determining whether an excluded person's attendance at a pari-mutuel facility would be adverse to the public interest or to the integrity of the sport or industry. Tr. p. 73.

16. Counsel confirmed that while there were no rules, the plain language of section 550.0251(6), Florida Statutes, was sufficient. Tr. p. 74. Counsel explained that Section

550.0251(6) contemplates an initial finding that someone was excluded has been made. *Id.* The hearing in this case, then, was to determine if the Respondent had been excluded. *Id.* Upon a finding of exclusion, the excluded individual could petition the Department to not be excluded from pari-mutuel facilities in this state. *Id.* The Department would treat such a petition like any other petition in accordance with sections 120.569 and 120.57, Florida Statutes, and chapter 28-106, Florida Administrative Code. *Id.*

*Specific Challenged Conclusions of Law*

17. The ALJ concluded as a matter of law that the Department's reading of the plain language of section 550.0251(6), Florida Statutes, regarding the time and place for a finding that the attendance of an excluded person was adverse to the public interest or to the integrity of the sport or industry was incorrect. RO at ¶ 45. Instead of adopting the Department's position, the ALJ concluded that the issue of whether Respondent should be permitted to attend other pari-mutuel facilities in this state was made as part of the underlying proceeding by the Respondent. RO at ¶ 46.

18. The ALJ concluded that the Department's interpretation of Section 550.0251 for when and how an excluded person could petition the Department to return to other pari-mutuel facilities in this state is not supported by the plain language of the statute. RO at ¶ 48. Relatedly, the ALJ also concluded this interpretation of Section 550.0251 constituted an unadopted rule. RO at ¶ 49.

*Argument*

19. The Department is not required to defer to the legal conclusions of an ALJ regarding the laws over which it has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. ("The agency in its final order may reject or modify the conclusions of law over which it has

substantive jurisdiction[.]"); *J.D. v. Dept. of Children and Families*, 114 So. 3d 1127, 1133 (Fla. 1st DCA 2013); *see also* Art. V, § 21, Fla. Const. ("In interpreting a state statute or rule, a state court or *an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute* or rule, and must instead interpret such statute or rule de novo.") (emphasis added). It is undisputed that the Department has substantive jurisdiction over section 550.0251(6), Florida Statutes. *See* ¶ 1, supra. Therefore, the ALJ's conclusions of law regarding Section 550.0251(6) are entitled to no deference whatsoever by the Department.

20. One of the Department's enumerated powers is to exclude persons from pari-mutuel facilities in this state. Specifically, the Department "may exclude from any pari-mutuel facility within this state any person who has been ejected from a pari-mutuel facility in this state." § 550.0251(6), Fla. Stat.

21. Exclusion safeguards the public interest and the integrity of the sport or industry, which is a policy goal of the legislature. § 550.0251(6), Fla. Stat.

22. Section 550.0251 is clear and unambiguous: the Department may permit an excluded person to return to pari-mutuel facilities in this state only "upon a finding that the attendance of such person at pari-mutuel facilities would not be adverse to the public interest or to the integrity of the sport or industry[.]"[1] *Id.*

23. The Department's position at the final hearing is supported by the plain language of Section 550.0251(6) and the due process protections enshrined in the Administrative Procedures Act. "Legislative intent is the polestar that guides statutory interpretation." *Bautista*

---

[1] As noted by the ALJ, chapter 550, Florida Statutes, does not limit the common-law right of a pari-mutuel permitholder or slot machine licensee to exclude any patron in this state. *See* § 550.0251(6), Fla. Stat.

*v. State*, 863 So. 2d 1180, 1185 (Fla. 2003). Legislative intent is determined primarily from the statute's text. *Anderson v. State*, 87 So. 3d 774, 777 (Fla. 2012). If the meaning of the statute "is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *State v. Sampaio*, 291 So. 3d 120, 123 (Fla. 4th DCA 2020); *Lee Cty. Elec. Coop., Inc. v. Jacobs*, 820 So. 2d 297, 303 (Fla. 2002).

24. Section 550.0251(6) describes two different agency actions affecting a person's substantial interests. The first agency action involves the Department's determination whether a person has been excluded from a pari-mutuel facility in this state making that person subject to exclusion from any other pari-mutuel facility in this state. The second agency action is determining whether the attendance of a person excluded from pari-mutuel facilities in this state would have an adverse effect on the public interest or to the integrity of the sport or industry. Section 550.0251(6) plainly states that the Department has the authority to make this determination. Either action affects the person's substantial interests meaning that person has the ability to challenge it pursuant to chapter 120, Florida Statutes.

25. Chapter 120 is Florida's Administrative Procedure Act ("APA"). § 120.51, Fla. Stat. The purpose of the APA is to ensure due process and fair treatment of those affected by administrative actions. *Pro Tech Monitoring v. State, Dept. of Corrections*, 72 So. 3d 277, 279 (Fla. 1st DCA 2011). The APA is also designed to simplify the administrative process and provide the public with more certain administrative procedures. *School Bd. of Palm Beach County v. Survivors of Charter Schools, Inc.*, 3 So. 3d 1220, 1231 (Fla. 2009). Furthermore, chapter 28-106, Florida Administrative Code, was created to establish procedures that comply with the requirements of the APA. *See* § 120.54(5), Fla. Stat.

26. As the Department pointed out during the final hearing, the excluded person could petition the Department to not be excluded from pari-mutuel facilities in this state. *See* §120.569 and 120.57, Fla. Stat. The Department would treat such a petition in accordance with sections 120.569 and 120.57, Florida Statutes, and chapter 28-106, Florida Administrative Code, just like it would any other petition challenging agency action. Section 550.0251(6) requires nothing more.

27. Consequently, the ALJ's accounting of the Department's argument involving the proper interpretation of Section 550.0251(6) is as flawed as her reading of statute's plain language. The Department does not dispute, as the ALJ argues it does (*see* RO at ¶ 45), that Section 550.0251(6) requires a finding about an excluded person's adverse effect. That part of Section 550.0251(6) is clear and unambiguous. The Department is simply pointing out that Section 550.0251(6) contemplates at least two different agency actions and that only one agency action was at issue in this proceeding. Thus, the Department is not ignoring any portion of Section 550.0251(6). Accordingly, the ALJ's conclusion of law regarding this issue is incorrect, and the Department should enter a final order adopting the Department's exceptions to this flawed conclusion instead.

28. The ALJ's conclusion of law (*see* RO at ¶ 46) regarding the issues to be decided at the final hearing is similarly incorrect.[2] At administrative hearings, an ALJ may not consider matters not formally charged in an administrative complaint. *Marcelin v. State, Dep't of Bus. & Pro. Regul., Const. Indus. Licensing Bd.*, 753 So. 2d 745, 747 (Fla. 3d DCA 2000) (reversing three findings of an ALJ because they were not charged in the administrative complaint).

[2] The Department does not have substantive jurisdiction over chapter 120, Florida Statutes. However, exceptions such as these must be raised to preserve the issue for appellate review. *See, e.g. Couch v. Comm. on Ethics*, 617 So. 2d 1119 (Fla. 5th DCA 1993) ("Couch cannot argue on appeal matters which were not properly excepted to or challenged before the Commission and thus were not preserved for appellate review.")

Logically, then, the Department's final order will be also limited only to the charges in the administrative complaint, regardless of how far the questions strayed during the hearing. *See Chrysler v. Dep't of Prof'l Regulation*, 627 So. 2d 31, 34–35 (Fla. 1st DCA 1993). The underlying administrative complaint alleged that the Respondent had been excluded from Magic City Casino and was therefore subject to exclusion from any other pari-mutuel or slot machine gaming facility in this state. *See* Admin. Compl. at 2, *Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, Petitioner v. Bibi Amelia Downlat-Haniff, Respondent*, DBPR case no. 2021-045686.

29. The administrative complaint did not allege that the Respondent had committed a violation of the casino's rules. *Id.* Importantly, the Department did not allege that, if it was proven that the Respondent had been excluded from Magic City Casino, the Respondent's presence at any other pari-mutuel facility would have any adverse impact on the public interest or to the integrity of the sport or industry. *Id.*

30. Respondent filed an election of rights disputing, in relevant part, the material fact that she had been excluded from Magic City Casino and whether she was subject to exclusion from other pari-mutuel and slot machine gaming facilities. *See* Resp't['s] Req. for Hrg, *Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, Petitioner v. Bibi Amelia Downlat-Haniff, Respondent*, DBPR case no. 2021-045686. Notably, the Respondent did not raise or contest, if she was in fact excluded, whether her presence at any other pari-mutuel facility would have any adverse impact on the public interest or to the integrity of the sport or industry. *Id.* The Respondent did not raise this issue until the pre-hearing stipulation 10 days before the final hearing. *See* Joint Pre-Hearing Stipulation, *Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, Petitioner v. Bibi*

*Amelia Downlat-Haniff, Respondent*, DOAH case no. 21-3600. The Department objected to the late interjection of this issue but to no avail. *Id.*

31. As explained above, Section 550.0251(6) prescribes two agency actions: (1) determining whether a person was excluded from a pari-mutuel facility making that person is subject to exclusion from any other pari-mutuel facility in this state; and (2) determining whether the attendance of a person excluded from pari-mutuel facilities in this state would have an adverse effect on the public interest or integrity of the sport or industry. Based on the four corners of the Department's administrative complaint and the plain the language of Section 550.0251(6), then, the Department was only on notice that the final hearing would entail first agency action.

32. The ALJ rightly concluded that the Respondent had been excluded from Magic City Casino. That should have been the end of the inquiry in this proceeding. Instead, the ALJ rewrote the plain language of Section 550.0251(6), impermissibly expanded the scope of the proceeding, and made findings regarding the Respondent's adverse effect on the public interest or integrity of the sport or industry. This was improper. The ALJ could not expand the hearing beyond the four corners of the administrative complaint and the plain language of Section 550.0251(6).

33. Even if she could expand the proceeding, the ALJ did not provide the Department with proper notice. Such a failure constitutes a material error in procedure that impaired the fairness of the proceeding. *See* § 120.68(7)(c), Fla. Stat.

34. For these reasons, the ALJ's conclusions of law on page 12 paragraph 46 of the Recommended Order should be reversed.

35. Only after the Department has determined that a person was excluded from a pari-mutuel facility in this state and is therefore subject to exclusion from any pari-mutuel facility in this state, may the Department determine whether the attendance of a person excluded from pari-mutuel facilities in this state would have an adverse effect on the public interest or integrity of the sport or industry.

36. This conclusion is apparent from the plain language of Section 550.0251(6): "The division may authorize any person *who has been ejected or excluded from pari-mutuel facilities in this state* ... to attend the pari-mutuel facilities in this state upon a finding that the attendance of such person at pari-mutuel facilities would not be adverse to the public interest or to the integrity of the sport or industry." (emphasis added). The ALJ's contrary reading of Section 550.0251(6) (*see* RO at ¶ 48) is unsupported by the plain language of the statute – the ALJ ignores the latter part of the statute describing a person *who has been ejected or excluded from a pari-mutuel facility in this state*. (emphasis added). In other words, the ALJ is ignoring a condition-precedent in the latter portion of Section 550.0251(6). Accordingly, the ALJ's conclusion of law regarding this issue is incorrect, and the Department should enter a final order adopting the Department's exceptions to this flawed conclusion instead.

37. Finally, the ALJ's conclusions of law (*see* RO at ¶ 49) regarding whether the Department's interpretation of Section 550.0251(6) constituted an unadopted rule are incorrect and reversible as a matter of procedure and law.

38. In order to challenge an agency action proposing to determine the substantial interests of a party based on an unadopted rule, a rule challenge petitioner must allege the unadopted rule in the petition. § 120.57(1)(e)2., Fla. Stat. If a hearing is held, the petitioner must then prove the allegations of the petition. *Id.*; § 120.56(4)(c), Fla. Stat. To sufficiently allege the

existence of an unadopted rule, the petition must include the text of the statement or a description of the statement and must state facts sufficient to show that the statement constitutes an unadopted rule. § 120.56(4)(a), Fla. Stat.

39. As an initial matter, there is no unadopted rule challenge petitioner in this case. The Department filed the underlying administrative complaint in this case. The Respondent has filed no petition in this case, let alone an unadopted rule challenge petition. In fact, the Respondent never raised the specter of an unadopted rule in this case.

40. Additionally, because the Department was not properly given notice, through compliance with the pleading requirements of the APA, of any unadopted rule component to this case, the ALJ's conclusion that the Department's interpretation of Section 550.0215(6) is somehow an unadopted rule should be reversed. *See* § 120.68(7)(c), Fla. Stat.

41. Even if the Department had received proper notice that this matter involved an unadopted rule, the evidence does not demonstrate that the Department would rely on an unadopted rule if presented with a petition challenging the Department's determination regarding an excluded person's adverse impact on the public interest or to the integrity of the sport or industry.

42. There is no agency statement in this case. Counsel advocating for the Department during a final hearing are not an "agency." *See* § 120.52(1)(a), Fla. Stat. (defining "agency" to mean, in relevant part, "a departmental unit described in section 20.04, Florida Statutes.")

43. But even if Counsel were somehow an "agency," Counsel's statements during a final hearing describing how existing law would work do not constitute a "rule." *See* § 120.52(16), Fla. Stat. (defining "rule" as "each agency statement of general applicability that

implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency.")

44. All the evidence shows in this case is that the Department would treat a petition challenging the Department's determination regarding an excluded person's adverse impact on the public interest or to the integrity of the sport or industry in accordance with sections 120.569 and 120.57, Florida Statutes, and chapter 28-106, Florida Administrative Code, just like it would any other petition challenging agency action. Such a statement, describing how a statute and existing rule would apply, cannot constitute a rule. *See St. Francis Hospital, Inc. v. Dept. of Health & Rehab. Servs.*, 553 So.2d 1351, 1354 (Fla. 1st 1989) ("[A]n agency interpretation of a statute which simply reiterates the legislature's statutory mandate and does not place upon the statute an interpretation that is not readily apparent from its literal reading, nor in and of itself purport to create certain rights, or require compliance, or to otherwise have the direct and consistent effect of the law, is not an unpromulgated rule, and actions based upon such an interpretation are permissible without requiring an agency to go through rulemaking."); *Envtl. Trust v. State, Dept. of Envtl. Prot.*, 714 So. 2d 493, 498-99 (Fla. 1st DCA 1998) (holding that an agency statement explaining "how an existing rule of general applicability will be applied in a particular set of facts" is not itself an unadopted rule and does not require agency rulemaking.)

45. As such, the ALJ's conclusions of law on page 13 paragraph 49 of the Recommended Order should be reversed.

Exception Three

46. The Department takes exception to ALJ's findings relating to the Respondent's adverse impact on the public interest or to the integrity of the sport or industry and conclusion that the Respondent not be excluded from any other pari-mutuel facility in this state.

*Specific Challenged Findings*

47. The ALJ found that Respondent credibly testified that she was an experienced poker player who understands the rules of poker. RO at ¶ 16.

48. The ALJ found that Respondent credibly testified that she was at the poker room on August 25, 2021 and decided to cash out her chips sometime between 1:15 to 1:30 AM. RO at ¶ 17.

49. The ALJ also found that Respondent credibly testified that she told the dealer that she had not placed an all-in bet, had not turned over the cards in front of her, and was no longer playing because she was leaving the casino was credible. RO at ¶18.

50. The ALJ concluded that Respondent credibly testified that she asked the poker supervisor to review the surveillance camera video footage of the poker table in order to verify that she did not place the all-in bet, that the supervisor refused to allow her to see the footage, and informed her that she did place the bet and had to play the game. RO at ¶19.

51. Relying on these statements, the ALJ ultimately concluded as a matter of fact that Respondent did not place an all-in bet, did not violate the rules of poker or engage in unruly or confrontational conduct at the poker room or when escorted out, and should be authorized to attend other pari-mutuel facilities in the state. RO at ¶ 28-30.

52. The ALJ further relied on these findings to conclude that while Respondent was excluded from a Magic City Casino, the Department must allow her attendance at other licensed pari-mutuel facilities, as she is not adverse to the public interest or integrity of the sport or industry. RO at ¶ 39-40.

53. Furthermore, the ALJ concluded as a matter of law that the issue as to whether Respondent is adverse to the public interest or integrity of the sport or industry is a decision that is at issue in this proceeding and is not solely in the agency's discretion. RO at ¶ 42-44.

54. The ALJ concluded as a matter of law that the Department's reading of the plain language of section 550.0251(6), Florida Statutes, regarding the time and place for a finding that the attendance of an excluded person was adverse to the public interest or to the integrity of the sport or industry was incorrect. RO at ¶ 45. Instead of adopting the Department's position, the ALJ concluded that the issue of whether Respondent should be permitted to attend other pari-mutuel facilities in this state was made as part of the underlying proceeding by the Respondent. RO at ¶ 46.

55. The ALJ concludes that the language in section 550.0251(6), Florida Statutes, which states the Division may authorize any person who has been ejected or excluded form pari-mutuel facilities to attend pari-mutuels upon a showing that that such person is not adverse to the public interest or integrity of the sport or industry does not give the Division absolute discretion to make such a finding. RO at ¶ 47.

56. Lastly, the ALJ concluded that the Department's interpretation of Section 550.0251 for when and how an excluded person could petition the Department to return to other pari-mutuel facilities in this state is not supported by the plain language of the statute. RO at ¶ 48. Relatedly, the ALJ also concluded this interpretation of Section 550.0251 constituted an unadopted rule. RO at ¶ 49.

*Argument*

57. This proceeding did not involve whether the attendance of the Respondent at pari-mutuel facilities would be adverse to the public interest or to the integrity of the sport or

industry. For the reasons explained above in paragraphs 28-34, this proceeding involved determining whether the respondent had been excluded from a pari-mutuel facility in this state thereby making the Respondent subject to exclusion from any other pari-mutuel facility in this state.

58. The ALJ correctly concluded that the Respondent was excluded from Magic City Casino. *See* RO at ¶ 39. This means that the Department may exclude the Respondent from any other pari-mutuel facility in this state. Any of the ALJ's contrary findings of fact, conclusions of law, or mixed findings of both, are in direct contradiction to the plain language of Section 550.0251(6) which authorizes the Department to "exclude from any pari-mutuel facility within this state any person who has been ejected from a pari-mutuel facility in this state."

59. The Department may modify a recommended penalty in a recommended order so long as it reviews the complete record, states with particularity its reasons, and cites to the record. *See* § 120.57(1)(*l*), Fla. Stat.; *see also Crim. Justice Standards & Training Com v. Bradley*, 596 So. 2d 661, 663-664 (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))

60. In this case, the recommended penalty is excluding the Respondent from Magic City Casino and any slot machine facility in this State. RO at pg. 15. The ALJ also recommends that the Respondent be permitted to attend any other pari-mutuel facility in this state. *Id.*

61. The penalty in this case should be increased, i.e., the Department should exclude the Respondent from all pari-mutuel facilities in this state, because the ALJ's findings of fact are unsupported by competent substantial evidence and because the ALJ's recommended penalty is based on findings that exceed the scope of the underlying administrative complaint.

62. The Department proved that Magic City Casino, a pari-mutuel facility licensed by the Department, permanently excluded Respondent from their facility. Ro at ¶ 39.

63. The Department has an interest in protecting the integrity and safety of gaming activities in this state  and must take action that would prevent harm to licensed facilities and other patrons at these facilities. Excluding persons who have already been excluded from one pari-mutuel facility from any other pari-mutuel facility prevents any harm the excluded person could cause to any other facility.

64. Therefore, the Department respectfully requests a Final Order be entered granting the Department's Exception findings set forth in page 6 paragraphs 17-19, pages 7-8 paragraphs 28-30, pages 10-11 paragraphs 39-40, and pages 11-14 42-49 of the Recommended Order and excluding the Respondent from all pari-mutuel facilities in this state.

65. Assuming, arguendo, that the underlying proceeding necessitated determining whether the attendance of the Respondent at pari-mutuel facilities would be adverse to the public interest or to the integrity of the sport or industry, this finding is infused with policy considerations. Accordingly, the Department may substitute its own findings for that of the ALJ's regarding this finding. *See Winters v. Fla. Bd. of Regents*, 834 So. 2d 243, 250 (Fla. 2d DCA 2002) ("Thus, where the matter under review is infused with overriding policy considerations, the issue should be left to the agency.") (citation omitted); *Latson v. School Bd. of Palm Beach County*, 328 So. 3d 1006, 1007 (Fla. 4th DCA 2021) (reaffirming the holding in *Winters*); *see also McDonald v. Dept. of Banking and Fin.*, 346 So. 2d 569, 570 (Fla. 1st DCA 1977) ("[W]here the ultimate facts are increasingly matters of opinion and opinions are increasingly infused by policy considerations for which the agency has special responsibility, a reviewing court will give correspondingly less weight to the hearing officer's findings in

determining the substantiality of evidence supporting the agency's substituted findings.") (emphasis added), *superseded on other grounds by statute*, § 120.54(1)(a), Fla. Stat., *as stated in Citizens of State v. Graham*, 346 So. 2d 569 (Fla. 2017).

66. The Department must faithfully execute the laws over which it has substantive jurisdiction. § 20.05(1)(a), Fla. Stat. This means the Department must always keep the policy of the legislature at the forefront of its decision making.

67. In this case, the Department must prioritize the legislative policy of safeguarding the public interest and the integrity of the sport or industry.

68. The Department, ensuring this legislative policy is dutifully carried out, must prevent persons excluded from pari-mutuel and slot machine facilities from attending any other such facilities in this state to minimize disruption and safeguard the integrity of the sport and industry.

69. Accordingly, the overriding policy considerations mean the Department should reject the ALJ's finding on page 6 paragraphs 17-19, pages 7-8 paragraphs 28-30, pages 10-11 paragraphs 39-40, and pages 11-14 42-49 of the Recommended Order and conclude that the Respondent's attendance at pari-mutuel facilities in this state is adverse to the public interest and integrity of the sport and industry.

## CONCLUSION

Based on the foregoing, a Final Order should be entered granting the Department's Exceptions to the Recommended Order as set forth above.

The Petitioner's Exceptions to the Recommended Order in DOAH Case Number 21-003600 is respectfully submitted this 16th day of June, 2022.

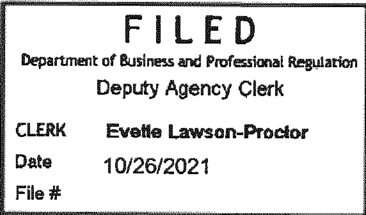
*/s/ Emily A. Alvarado*
**EMILY A. ALVARADO**
Deputy Chief Attorney
Florida Bar Number: 1025200
Department of Business and Professional Regulation
Office of the General Counsel
Division of Pari-Mutuel Wagering
2601 Blair Stone Road
Tallahassee, Florida 32399-2202
Telephone: (850) 717-1783
Emily.Leiva@MyFloridaLicense.com
Ebonie.Lanier@MyFloridaLicense.com

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 16th day of June, 2022, a true and correct copy of the foregoing has been furnished via electronic mail to each of the following:

**Bibi Amelia Downlat-Haniff**
c/o Derrick C. Morales, Esq.
DCM@DCMoraleslaw.com
13499 Biscayne Boulevard, Suite 107
Miami, Florida 33181
(786)-440-9383

*/s/ Emily A. Alvarado*
**EMILY A. ALVARADO**
Deputy Chief Attorney
Florida Bar Number: 1025200
Department of Business and Professional Regulation
Office of the General Counsel
Division of Pari-Mutuel Wagering
2601 Blair Stone Road
Tallahassee, Florida 32399-2202
Telephone: (850) 717-1783
Emily.Leiva@MyFloridaLicense.com
Ebonie.Lanier@MyFloridaLicense.com




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,

DBPR Case No.: 2021-045686

v.

BIBI AMELIA DOWNLAT-HANIFF,

Respondent.
______________________________/

## ADMINISTRATIVE COMPLAINT

The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Petitioner"), files this Administrative Complaint against Bibi Amelia Downlat-Haniff ("Respondent"), and alleges:

1. Petitioner is the state agency charged with regulating pari-mutuel wagering, slot machines, and cardroom operations pursuant to Chapters 550, 551, and 849, Florida Statutes.

2. At all times material hereto, Respondent's address was reported as 8270 North East 1st Place, Apt. 1 Miami, Florida 33138.

3. At all times material hereto, Magic City Casino was a facility operated by a permitholder authorized to conduct pari-mutuel wagering, slot machines, and cardroom operations in the State of Florida.

4. On or about August 25, 2021, Respondent was a patron of Magic City Casino.

5. On or about August 25, 2021, Respondent was ejected and permanently excluded from Magic City Casino.

6. Section 550.0251(6), Florida Statutes, provides in relevant part:

> In addition to the power to exclude certain persons from any pari-mutuel facility in the state, the division may exclude any person from any and all pari-mutuel facilities in this state for conduct that would constitute, if the person were a licensee, a violation of this chapter or the rules of the division. The division may exclude from any pari-mutuel facility within this state any person who has been ejected from a pari-mutuel facility in this state or who has been excluded from any pari-mutuel facility in another state by the governmental department, agency, commission, or authority exercising regulatory jurisdiction over pari-mutuel facilities in such other state.

(Emphasis supplied).

7. Section 551.112, Florida Statutes, provides:

> In addition to the power to exclude certain persons from any facility of a slot machine licensee in this state, the division may exclude any person from any facility of a slot machine licensee in this state for conduct that would constitute, if the person were a licensee, a violation of this chapter or the rules of the division. The division may exclude from any facility of a slot machine licensee any person who has been ejected from a facility of a slot machine licensee in this state or who has been excluded from any facility of a slot machine licensee or gaming facility in another state by the governmental department, agency, commission, or authority exercising regulatory jurisdiction over the gaming in such other state. This section does not abrogate the common law right of a slot machine licensee to exclude a patron absolutely in this state.

(Emphasis supplied).

8. Based on the foregoing, Respondent violated Sections 550.0251(6) and 551.112, Florida Statutes, and is subject to exclusion from all licensed pari-mutuel wagering facilities and any facility of a slot machine licensee in the State of Florida based on her ejection from Magic City Casino on or about August 25, 2021.

WHEREFORE, Petitioner respectfully requests the Division Director enter an Order excluding Respondent from all licensed pari-mutuel wagering facilities and any facility of a slot

machine licensee in the State of Florida, along with any other remedy provided by Chapters 550 and 551, Florida Statutes, and/or the rules promulgated thereunder.

This Administrative Complaint for DBPR Case Number 2021-045686 is signed this 26th day of October 2021.

/s/ *Emily A. Leiva*

Emily A. Leiva
Assistant General Counsel
Florida Bar Number: 1025200
Department of Business and Professional Regulation
Office of the General Counsel
Division of Pari-Mutuel Wagering
2601 Blair Stone Road
Tallahassee, Florida 32399-2202
Telephone: (850) 717-1783
Facsimile: (850) 921-1311
Primary: Emily.Leiva@MyFloridaLicense.com
Secondary: Ebonie.Lanier@MyFloridaLicense.com

<u>NOTICE OF RIGHTS TO REQUEST A HEARING</u>

Pursuant to Sections 120.569 and 120.57, Florida Statutes, you have the right to request a hearing to challenge the charges contained in this Administrative Complaint. If you choose to request a hearing, you will have the right to be represented by counsel, or other qualified representative, to present evidence and argument, to call and cross-examine witnesses, and to have subpoenas and subpoenas duces tecum issued on your behalf.

Any request for an administrative proceeding to challenge or contest the charges contained in this Administrative Complaint must conform to Rule 28-106.2015, Florida Administrative Code. Pursuant to Rule 28-106.111, Florida Administrative Code, you must request a hearing within 21 days from receipt of this Notice, or you will waive your right to request a hearing.

Mediation under Section 120.573, Florida Statutes, is not available to resolve this Administrative Complaint.