

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES F. MCCLELLAN, and
NATASHA NEMETH,

Petitioners,

v.

DOAH CASE NO: 2017-5238RU

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

Respondent.

**MOTION TO DETERMINE SUFFICIENCY OF RESPONDENT'S RESPONSES TO
PETITIONERS' FIRST REQUEST FOR ADMISSIONS AND FOR SANCTIONS**

Petitioners, CHARLES F. MCCLELLAN ("Mr. McClellan") and NATASHA NEMETH ("Ms. Nemeth"), pursuant to Rule 28-106.206, F.A.C., Florida Rule of Civil Procedure 1.370 and all other applicable law, hereby move this Court for the entry of an Order finding Respondent's, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING (the "Division"), Responses to Petitioners' First Requests for Admissions insufficient and, therefore, deeming same admitted. In support of this Motion, Petitioners state:

Introduction

1. Petitioners commenced this action on September 21, 2017 by filing their Petition for Administrative Determination of the Invalidity of (1) Agency Policies and Statements as Unpromulgated Rules; and (2) Rules 61D-6.007, 61D-6.012, F.A.C.

2. Count I of the Petition requests that the Court determine that the Division's statements regarding the collection, handling and testing of racing greyhounds' urine samples constitute invalid unadopted rules. Count II of the Petition requests that the Court determine that the Division's Rules 61D-6.007, 61D-6.012, F.A.C. constitute an invalid exercise of delegated

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legislative authority because they do not contain limits of detection (i.e. threshold concentration levels) for environmental substances, specifically, benzoylecgonine ("BZE"), a cocaine metabolite, in racing greyhounds' urine samples.

3. On October 3, 2017, Petitioners served their First Requests for Admissions on the Division.

4. On October 10, 2017, the Division served its Responses to Petitioners' First Requests for Admissions (the "Responses").

5. The Division's Responses fail to properly respond to Petitioners' requests.

Standard

6. Any matter within the scope of Florida Rules of Civil Procedure 1.280(b) may be addressed through a request for admission. Florida Rules of Civil Procedure 1.370(a).

7. Pursuant to Florida Rules of Civil Procedure 1.370(a), a request is "deemed admitted unless the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter."

8. The party requesting the admissions can then "move to determine the sufficiency of the answers or objections." *Id.*

Requests No. 1 – 9

9. In request no. 1 of its Requests for Admissions, Petitioners requested the Division admit that, "Rule 61D-6.005, F.A.C., does not contain the entire protocol and/or procedure specifying how to collect racing greyhounds' urine." Requests no. 2 – 4 are worded similarly, except that the words "seal," "store," and "ship," respectively, replace "collect."

10. The Division responded to request no. 1: "the Division objects to the phrase '**entire protocol**' as used in this admission because that term is vague. Without waiving the objection,

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the Division admits that the rules and statute **provide guidance** as to drug collection and testing procedures.” (Emphasis added).

11. In request no. 5 of its Requests for Admissions, Petitioners requested the Division to admit that, “the Guidelines do not contain the entire protocol and/or procedure specifying how to collect racing greyhounds’ urine.” Requests no. 6 – 8 are worded similarly, except that the words “seal,” “store,” and “ship,” respectively, replace “collect.”

12. Again, the Division responded to requests no. 2 – 8: “the Division objects to the phrase ‘**entire protocol**’ as used in this admission as the term is vague. Without waiving the objection, the Division admits that both Rule 61D-6.005 and Section 550.2415 **refer to** preserving the integrity of the sample.” (emphasis added).

13. In request no. 9 of its Requests for Admissions, Petitioners requested the Division to admit that, “the Division and its representatives are still following the protocols and procedures outlined in Section 3 of the Manual as its protocol for sampling racing greyhounds’ urine.”

14. The Division responded to request no. 9: “[t]he Division objects to the term **protocol** as used in this admission as the term is phrased, otherwise denied¹.”

15. Pursuant to Florida Rules of Civil Procedure 1.370(a), “if an objection is made, the reasons shall be stated.”

16. The Division failed to properly object to Petitioners’ requests no. 1 – 9 because the terms “protocol” and “entire protocol” are commonly understood and not vague. *See Carson v. Ft. Lauderdale*, 173 So.2d 743, 744 (Fla. 2d DCA 1965) (“[i]t is well recognized that in matters of discovery, trial courts are vested with wide discretion, and their treatment of problems arising

¹ Based on the Division’s responses to requests no. 1 – 8, this appears to be an objection for vagueness. Otherwise, “as the term is phrased” is not an objection.

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thereunder ordinarily will not be disturbed. Equally well recognized, however, is that the burden of proving the validity of objections is upon the objecting party”).

17. Stated simply, if the Division believes the Rule and/or the Guidelines contain some of the protocol, but not the “entire protocol,” it could have simply denied the requests. Apparently, the Division is concerned about giving a truthful response in this instance and, therefore, has attempted to obfuscate discovery by raising these baseless objections.

18. Furthermore, the Division contradicts its own objection by responding, without objection, to Petitioners’ interrogatory no. 11, which requests the Division to “[i]dentify the person or persons in charge of implementing the **protocols and procedures** for the testing of urine of racing greyhounds pursuant to Florida Statutes Section 550.2415 from October 27, 2016 to the present date.” (Emphasis added). Apparently, the Division understood the word “protocol” at the time it was formulating its response to Petitioners’ interrogatories, but not at the time it was formulating its response to Petitioners’ Requests for Admissions. This strains credulity.

19. Notwithstanding the objections, the Division failed to appropriately admit or deny the truth of the matters set forth in requests no. 1 – 8. *See* Florida Rules of Civil Procedure 1.370(a) (“[a] denial shall fairly meet the substance of the requested admission”).

20. The Division’s response to request no. 1 does not fairly meet the substance of the requested admission. Stating that the rules and statute “**provide guidance**” for drug collection and testing does not respond to the questions posed of whether the Division’s rules contain the entire protocol and/or procedure as to the collection, sealing, storage, and shipment of racing greyhounds’ urine.

21. The Division’s responses to requests no. 2 – 8 also do not fairly meet the substance of the requested admission. Stating that Rule 61D-6.005, F.A.C., and Section 550.2415 “**refer** to

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preserving the integrity of the sample” is not responsive to whether the Division’s rules contain the entire protocol and/or procedure as to the collection, sealing, storage, and shipment of racing greyhounds’ urine.

22. Furthermore, with respect to requests no. 5 – 8, the Division’s responses completely ignore the fact that these requests are in reference to the Guidelines, not the Division’s rules.

23. Simply put, the responses to requests no. 1 – 8 do not include an admission or denial and should therefore be deemed admitted.

Request No. 11

24. In request no. 11 of its Requests for Admissions, Petitioners requested the Division to admit that, “the Division has not adopted rules specifying the Division’s chain of custody procedures for racing greyhounds’ urine samples.”

25. The Division responded to request no. 11: “[t]he Division objects to this admission **as phrased**. Without waiving the objection, denied, because the relevant rules discuss chain of custody.” (emphasis added).

26. “As phrased,” which is not an objection, is in violation of Florida Rules of Civil Procedure 1.370(a). *See Carson v. Ft. Lauderdale*, 173 So.2d at 745 (“...the objections must be specific and supported by a detailed explanation why...”) (quoting *United States v. Nysco Laboratories, Inc.*, 26 F.R.D. 159, 161 (E.D. N.Y. 1960).

27. To the extent the Division purported to respond to this request notwithstanding the objection, their response does not address the request that was served. Petitioners asked the Division to admit that it has not adopted rules *specifying* the Division’s chain of custody procedures. Petitioners did not ask the Division whether it had adopted rules *discussing* chain of custody procedures.

Requests 12 – 16, 20

28. In addition, Petitioners requested the Division admit the following, to which the Division gave the following responses:

12. Admit that the Division **cannot confirm** that its personnel handling greyhounds pre-race always wear protective gloves. (emphasis added).

Response: The Division objects to the extent this admission **asks the Division to speculate** and it is **based on a lack of predicate**. Without waiving the objection, the Division is unaware of any instance that an employee was not wearing gloves. Additionally, the Division employs supervisors that oversee and supervise the collection and handling of urine samples to ensure the integrity of the samples. (emphasis added).

13. Admit that the Division cannot confirm that Lab personnel handling racing greyhounds' urine samples always wear protective gloves.

Response: The Division objects to the extent this admission asks the Division to speculate and is based on a lack of predicate. However, the Division is unaware of any instance in which laboratory personnel did not handle a sample properly. Section 550.2415, Florida Statutes, requires the Division to have a [sic] laboratory test samples. The laboratory is required to participate in an externally administered quality assurance program designed to assess testing proficiencies. The Division is unaware of any finding or evidence of a lack of quality in the UF Racing Laboratory.

14. Admit that the Division cannot confirm that track personnel handling racing greyhounds pre-race always wear protective gloves.

Response: The Division objection [sic] to this admission because the term "track personnel" as used in this admission is vague. There are numerous kinds of employees working at the track, some of whom work for the Division and some of whom work for the facility or other entities. The Division cannot answer this question appropriately as phrased. Without waiving the objection, the Division employs supervisors that oversee and supervise the collection of urine samples to ensure the integrity of the samples.

15. Admit that the presence of cocaine metabolites in racing animals' test samples **could be** based on inadvertent environmental exposure. (emphasis added).

Response: The Division objects to this admission as it calls for the Division to speculate about a scenario that is one of a potentially infinite amount. **The Division finds it is much more likely that a prohibited substance is provided to a racing**

animal purposely by the animal's trainer. However, in either scenario, Section 550.2415, Florida Statutes, says "the finding of a prohibited substance in a race-day specimen constitutes prima facie evidence that the substances [sic] was administered and was carried into the body of the animal while participating in the race" and administrative action can be taken against the trainer of the animal. (emphasis added).

16. Admit that the presence of cocaine metabolites in racing animals' test samples could have resulted from contamination of the test sample after it was collected.

Response: See Answer to Admission 15.

20. Admit that concentration levels of 100 ng/ml or less of BZE and/or EME in racing animals' pre-race urine samples **may be** the result of normal physiological conditions unrelated to the dispensing of any illegal substances to a racing greyhound. (emphasis added).

Response: Denied. The Division is unaware of any normal physiological condition that would result in positive findings of BZE or EME, in the body of a racing greyhound. To the extent this admission asks the Division to speculate, please see the answer to admission 15.

29. Each response to requests no. 12 – 16, 20 objects to the request as speculative (response to request no. 14 does not do so explicitly, but it appears to be the crux of its objection²), which is an improper objection in this instance.

30. Requests no. 12 – 14 ask the Division to admit that it "cannot confirm" that personnel always use protective gloves. In other words, these requests ask the Division to admit that it **cannot speculate**³.

² The other objections contained in the response to request no. 14 are also improper and in violation of Florida Rules of Civil Procedure 1.370(a). As stated before, "as phrased" is not a proper objection. Furthermore, the use of "track personnel" is not vague when considering that requests no. 12 – 13 refer to substantively the same admission, except that they are directed to the Division and the Lab, respectively. These requests were drafted this way to avoid confusion as to whom they are referring. Therefore, it is illogical to argue that "track personnel" could refer to anybody other than those who work for the track (i.e. not the Division).

³ Furthermore, "lack of predicate" is not an objection.

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31. Requests no. 15 – 16, 20 are written in conditional language, using words such as “could” and “may.” Petitioners are not asking the Division to admit an absolute conclusion of fact based on speculation.

32. As to the responses to these requests, they are in fact non-responsive. *See Wider v. Carraway*, 101 So.2d 13, 15 (Fla. 2d DCA 1958) (“...affirmative action is required to avoid the admission. There must be, therefore, a sworn statement specifically denying the facts which the other party requests should be admitted or the admissions will be deemed to have taken place”).

33. The responses to requests no. 12 – 14 fail to admit or deny that the Division cannot confirm personnel always wears protective gloves. Instead of specifically denying the admissions, each response states that the Division and Lab have personnel overseeing the sample collection and testing process and that it is unaware of anybody failing to wear gloves. Petitioners did not ask whether the Division is aware of anybody failing to wear gloves; the fact that it possibly happened and the Division does not know about it is the point.

34. As to the responses to requests no. 15 – 16, the Division fails to admit or deny that the presence of cocaine metabolites in a test sample could have resulted from contamination. Interestingly, after objecting to these requests as speculative, the Division then speculates that “it is much more likely that a prohibited substance is provided to a racing animal purposely by the animal’s trainer.” This is not a proper admission or denial, nor does it comport with prior testimony proffered by the Division’s expert and other hearings.

Requests No. 17 – 19

35. Petitioners also requested the Division admit the following, to which the Division gave the following responses:

17. Admit that the Division, or anyone acting on its behalf, once followed an

unpublished BZE threshold for racing animals.

Response: The Division objects to this admission **because it is irrelevant.** Without waiving the objection, **the Division would admit to the extent this may have occurred in years past** and deny that the Division (or anyone acting on its behalf) currently operates with any unpublished threshold for BZE. The most recent amendment to Section 550.2415, Florida Statutes, required the Division to refer to the ARCI in determining threshold levels. The version of ARCI's model rules referenced by the statute did not have any threshold levels for cocaine, BZE, or EME, and the Division was and is not required to have threshold levels for those substances. (emphasis added).

18. Admit that prior to September 21, 2017, neither the Division, nor anyone acting on its behalf, had solicited input from the Department of Agriculture and Consumer Services with respect to the communications referenced in Florida Statutes § 550.2415(1)(b).

Response: The Division objects to this admission because it is irrelevant to the issue in this rule challenge. According to Section 550.2415(1)(b), Florida Statutes, "The Division **may** solicit input from the Department of Agriculture and Consumer Services and adopt rules that specify normal physiological concentrations of naturally occurring substances in the natural untreated animal and rules that specify acceptable levels of environmental contaminants and trace levels of substances in test samples.

19. Admit that concentration levels of 100 ng/ml or less of BZE and/or EME in racing greyhounds' pre-race urine samples are inconsistent with performance enhancement.

Response: The Division objects to this admission as phrased and because it is irrelevant, otherwise denied. According to the ARCI, Class 1 substances, such as cocaine, have the highest potential to affect performance.

36. "Irrelevant" is not an appropriate objection to a discovery request. Instead, the scope of discovery includes information sought that "appears reasonably calculated to lead to the discovery of admissible evidence." *See* Florida Rules of Civil Procedure 1.280(b)(1).

37. Furthermore, these requests are entirely relevant to Count II of the underlying Petition.

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38. An admission to request no. 17 is tantamount to an admission that there should be a limit of detection of BZE in racing greyhounds' urine samples, which is the primary argument of Count II.

39. Request no. 18 is relevant to whether the Division contravened or exceeded the legislative authority delegated to it by statute and in fact explicitly refers to that statute.

40. Request no. 19 is relevant to whether it is arbitrary and capricious to not have a limit of detection of BZE in racing greyhounds' urine samples.

41. As to the responses, the response to request no. 17 is evasive and in violation of Florida Rules of Civil Procedure 1.370(a) (“[t]he answer shall specifically deny the matter or set forth the reasons why the answering party cannot truthfully admit or deny the matter”).

42. Answering that “the Division would admit to the extent that this may have occurred in years past” is a clear attempt to avoid admitting that the Division once had an unpublished limit of detection of BZE in racing greyhounds' urine samples. Responses such as these are exactly why Florida Rules of Civil Procedure 1.370(a) gives the court the authority to deem insufficient answers as admitted. *See Winn Dixie Stores, Inc. v. Gerringer*, 563 So.2d 814, 816 (Fla. 3d DCA 1990) (“[t]he purpose of requests for admissions is to define and limit the issues in controversy between the parties, thus reducing the expense and delay that might otherwise be unnecessarily involved in the trial, and thereby facilitating proof at trial. This is accomplished by compelling admissions to those matters over which there is no good faith controversy. The Rule provides for sanctions against improper denials in order to foster admissions of issues, thereby narrowing the issues needed to be proved at trial”).

43. Finally, the Division did not respond to request no. 18.

Request for Sanctions

44. Florida Rules of Civil Procedure 1.370 states, "[i]f the court determines that an answer does not comply with the requirements of this rule, it may order either the matter is admitted or that an amended answer be served... The provisions of Rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.

45. Accordingly, the undersigned hereby requests the Court deem the requests set forth above admitted and require the Division to reimburse Petitioners' expenses in bringing this Motion, including their costs and attorneys' fees.

WHEREFORE, Petitioners respectfully request this Court enter an order deeming the Division's responses to the requests for admissions cited herein insufficient and therefore deeming the requests admitted, awarding Petitioners their expenses incurred in bringing this Motion and granting such further relief as is just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served this 16th day of October, 2017 via electronic mail on: **Jason L. Maine, Esq., Louis Trombetta, Esq., Charles Dewrell, Esq., Joseph Yauger Whealdon III, Esq. and Kate Marshman, Esq.,** Division of Pari-Mutuel Wagering, FL Dept. of Business & Professional Regulation, 2601 Blair Stone Rd., Tallahassee, FL 32399 at jason.maine@myfloridalicense.com; louis.trombetta@myfloridalicense.com; charles.dewrell@myfloridalicense.com; joseph.whealdon@myfloridalicense.com; kate.marshman@myfloridalicense.com.

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