IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

BREWER ADAMS,	:	
	:	**C.A. NO: 09A-07-001 (RBY)**
Appellant,	:	
	:	
v.	:	
	:	
DELAWARE HARNESS RACING COMMISSION,	:	
	:	
	:	
Appellee.	:	

Submitted: October 22, 2009
Decided: January 15, 2010

Upon Consideration of Appellant's Appeal
from the Decision of the
Delaware Harness Racing Commission
AFFIRMED

OPINION AND ORDER

Ronald G. Poliquin, Esq., Young, Malmberg & Howard, Dover, Delaware for Appellant.

Robert W. Willard, Esq., Department of Justice, Wilmington, Delaware for Appellee.

Young, J.

SUMMARY

Appellant, Brewer Adams ("Appellant"), appeals the decision of the Delaware Harness Racing Commission (the "Commission"), affirming the decision of the Board of Judges at Harrington Raceway to suspend Appellant from racing for nine months, and impose a $3,000 fine for violating Harness Racing Regulations. Because the record demonstrates that there is substantial evidence to support a finding that Appellant violated Harness Racing Rules and Regulations, the decision of the Commission is **AFFIRMED**.

BACKGROUND

Under the rules of the Commission, a trainer of a race horse is prohibited from administering certain drugs and substances.[1] "Random or for[-]cause testing may be required by the Commission, at any time[,] on any horse that has been entered to race at a Commission[-]licensed Association."[2] "At least one horse in each race, selected by the judges from among the horses finishing in the first four positions in each race, shall be tested."[3] The winning horse of every race is routinely tested for foreign substances.[4]

Selected horses are taken to a detention area, where the Commission Veterinarian or his assistant collects two blood or urine samples, which are

[1] Del. Harness Racing Comm'n R. 8.5.2.

[2] Del. Harness Racing Comm'n R. 8.4.1.2.

[3] Del. Harness Racing Comm'n R. 8.4.1.1.1.

[4] Del. Harness Racing Comm'n R. 8.8.2.

designated as the "primary" and "secondary" samples.[5] The primary sample is then tested for prohibited substances. If the primary sample tests positive for a prohibited substance, it is sent to Dalare Associates ("Dalare"), a Commission-approved laboratory, for confirmatory testing.[6] If the primary sample is confirmed by Dalare, the test results are *prima facie* evidence that the horse was given a prohibited substance.[7]

The trainer of any horse that tests positive for a prohibited substance has the right to request testing of the secondary sample.[8] The trainer also has the right to select the laboratory where the secondary sample is tested, so long as the laboratory is approved by the Association of Racing Commissioners International.[9] The Commission is responsible for preparing and shipping the secondary sample.[10]

Although the Commission retains responsibility for any samples in its possession, it does not assume responsibility for any acts or incidents beyond its control. Rule 8.4.3.5.12 of the Delaware Harness Racing Rules and Regulations specifically provides that "[i]f an Act of God, power failure, accident, strike[,] or other action beyond the control of the Commission occurs, the results of the primary official test shall be accepted as *prima facie* evidence."

FACTS

[5] Del. Harness Racing Comm'n R. 8.4.3.1, 8.4.3.5., 8.4..3.5.8.

[6] Del. Harness Racing Comm'n R.8.7.2.3.

[7] Del. Harness Racing Comm'n R. 8.5.1.

[8] Del. Harness Racing Comm'n R.8.4.3.5.9.1, 8.7.2.4.

[9] Del. Harness Racing Comm'n R. 8.4.3.5.9.2.

[10] Del. Harness Racing Comm'n R. 8.4.3.5.10.

In November 2008, Appellant was the trainer of the harness race horses *None Can Compare* and *Aloha Reggie*. On three separate occasions, post-race urine samples of these horses tested positive for the Class 2 drug Buprenorphine. These samples were taken: (1) from *None Can Compare* following the thirteenth race on November 16, 2008; (2) from *Aloha Reggie* following the eleventh race on November 19, 2008; and (3) from *Aloha Reggie* following the sixth race on November 26, 2008. All three races occurred at Dover Downs Raceway in Dover, Delaware.

Under the Delaware Harness Racing Rules and Regulations, Class 2 drugs are prohibited due to their "high potential for affecting the outcome of a race."[11] In the absence of extraordinary circumstances, a Class 2 drug violation warrants "a minimum license revocation of nine months and a minimum fine of $3,000, and a maximum fine of up to the amount of the purse money for the race in which the violation occurred, forfeiture of the purse money, and assessment for cost of the drug testing."[12] In addition, the Harness Racing Rules and Regulations provide for the imposition of greater penalties, if certain aggravating circumstances are present.[13] One such circumstance is "repeated violations of [the] medication and prohibited substances rules by the same trainer or with respect to the same horse."[14]

As was his right, Appellant requested that the secondary samples of the horses' urine samples be sent to Louisiana State University ("LSU") for confirmatory testing. Appellant was present for the packaging of the secondary samples for transfer to

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[11] Del. Harness Racing Comm'n R. 8.3.1.2.

[12] Del. Harness Racing Comm'n R. 8.3.2.2.

[13] Del. Harness Racing Comm'n R. 8.3.2.6.

[14] Del. Harness Racing Comm'n R. 8.3.2.6.1.

LSU. The state investigator then completed the necessary forms for the transfer, and placed the samples in a state-owned vehicle. Using that vehicle, another state agent delivered the samples to the United Parcel Service ("UPS") site in Harrington, Delaware. UPS scanned each package, and provided the agent with a receipt.

When it was discovered that LSU never received the samples, they were traced through UPS's tracking system. It was confirmed that the packages had been received by UPS at the Harrington site, but there was no record of them leaving the premises. The secondary samples were never located. Consequently, they could not undergo confirmatory testing. The original test results from the primary sample were ultimately used as evidence against Appellant.

Although Appellant's horses tested positive three times following three separate harness horse races licensed by the Commission, each positive drug test was treated as a first offense by the judges because all three test results became known close in time. The minimum fine for each of the three offenses was imposed, rather than treating them as first, second, and third offenses with escalating penalties.

PROCEDURAL HISTORY

Prior to Appellant's March 18, 2009 appeal hearing before the Commission's hearing officer, Administrator of Racing Hugh Gallagher ("Gallagher"), Appellant requested a pre-determination hearing on two issues: the loss of the secondary samples and Gallagher's objectivity. Appellant claimed that Gallagher was involved in the denial of Appellant's stay. Appellant's request for a pre-determination hearing was denied. Appellant was informed, however, that all requests could be re-submitted, by motion, at the appeal hearing, and that any evidence relating to Gallagher's alleged lack of objectivity could be addressed at the appeal hearing as

well.

At the March 18, 2009 appeal hearing before Gallagher, Appellant moved for a pre-determination hearing. That application was denied. Gallagher then heard testimony from Appellant and the following Commission officials: Scott Egger, Presiding Judge ("Egger"); Joseph Strug, Jr., chemist and laboratory director of Dalare ("Strug"); Brian Manges, state investigator for the Commission ("Manges"); Betty Ann Davis, office manager for licensing for the Commission ("Davis"); and George Teague, a Delaware horse trainer.

Near the end of the hearing, Appellant raised an issue concerning notice. Appellant claimed that he did not receive proper notice of his appeal hearing, and that the Commission was violating its own rules. After being informed that, pursuant to Delaware Harness Racing Commission Rule 10.3.8.10, the record could be supplemented with additional evidence, Gallagher commented that "we'll keep that option open." Gallagher then permitted the parties, including Appellant himself, to present any final statements.

Less than thirty days after that hearing, in a letter dated April 9, 2009, Gallagher notified both parties that he was considering allowing additional evidence into the record. This additional evidence consisted of a Certification of Service confirming Appellant had been personally served with notice of the hearing. Gallagher's letter further explained that each party had five days to inspect and to rebut the evidence, after which he would render a decision. Appellant's counsel responded to Gallagher's letter on April 16, 2009. This response questioned the validity of the new evidence, and reiterated prior arguments.

On May 5, 2009, forty-eight days after the March hearing, Appellant filed a Motion to Dismiss, arguing that the Commission's Rules required a decision to be

made within thirty days of the original hearing date. On May 11, 2009, Gallagher issued an Interim Order referring Appellant's appeals directly to the full Commission for a *de novo* hearing. Because of that referral, the Interim Order declared the Motion to Dismiss tobe moot.

On June 9, 2009, the full Commission convened a *de novo* hearing to reconsider Appellant's original appeal. Appellant appeared *pro se.*[15] Appellant argued his due process rights had been violated due to the loss of the secondary samples. He further complained that the Commission failed to follow the precedent it had established in the George Teague case.[16] Finally, Appellant maintained that, since the Commission failed to render a decision within thirty days of the March hearing, the charges against him should be dropped. After considering Appellant's arguments and listening to the live testimony of Egger, Strug, Manges, and Davis, the Commission held that Appellant had failed to rebut the *prima facie* findings of the original test results. The Commission was satisfied that the evidence showed that the urine samples had been properly safeguarded by Commission personnel, and delivered to UPS for shipment to LSU. The Commission disagreed with Appellant's interpretation of Rule 8.4.3.5.12, and held that the loss of the samples by UPS was "an [act] beyond the control of the Commission." Therefore, the Commission's reliance on the original test results was not misplaced.

The Commission upheld Appellant's suspension and fine. Appellant subsequently brought the present appeal.

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[15] Appellant apparently could no longer afford an attorney.

[16] At the March 18, 2009 hearing, George Teague, a Delaware trainer, testified that, when his secondary samples were lost, the Judges dismissed the drug violations against him.

STANDARD OF REVIEW

On appeal, this Court reviews a decision of the Delaware Harness Racing Commission to determine whether the Commission's factual findings are supported by substantial evidence, and are free from legal error.[17] On appeal, this Court does not have the "authority to weigh evidence, determine the credibility of witnesses[,] or make independent factual findings."[18] Generally, a decision of the Commission will be affirmed absent an abuse of discretion.[19] "When reviewing an administrative agency's interpretation of regulatory provisions, this Court will defer to the construction placed by the administrative agency on regulations promulgated and enforced by it, unless shown to be clearly erroneous."[20]

DISCUSSION

Appellant complains that the Commission committed legal error on seven grounds. First, Appellant contends that the Commission's failure to render a decision thirty days after the March hearing demands reversal of the violations. Second, Appellant avers that he was denied a fair and impartial hearing before the Commission on June 9, 2009 due to the usurpation of the hearing by the State's attorney and the

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[17] *Hochstetler v. Delaware Harness Racing Comm'n*, 2003 WL 549181, at *2 (Del. Super. Ct. Feb. 26, 2003) (citing *Baxter v. Delaware Harness Racing Comm'n*, 2001 WL 167849, at *1 (Del. Super. Ct. Jan. 19, 2001)).

[18] *Richards v. Delaware State Harness Racing Comm'n*, 1998 WL 960717, at *2 (Del. Super. Ct. Oct. 20, 1998) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

[19] *Eastburn v. Delaware Harness Racing Comm'n*, 2006 WL 2900768, at *2 (Del. Super. Ct. Aug. 22, 2006) (citing *Hochstetler*, 2003 WL 549181, at *2).

[20] *Hochstetler*, 2003 WL 549181, at *2 (citing *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 (Del. 1999).

Commission's attorney. Third, Appellant questions Gallagher's decision to refer Appellant's appeal to the full Commission, rather than deciding it himself. Fourth, Appellant posits that, by conducting a second hearing after no decision was finalized on the first hearing, the State was improperly permitted to take "a second bite at the apple." Fifth, Appellant maintains that he was not properly notified of the violations against him. Sixth, Appellant charges that the Commission did not consider any mitigating factors when deciding Appellant's penalties. Finally, Appellant claims the Commission failed to follow its own precedent.

As previously indicated, this Court's function is to determine whether the Commission's decision is supported by substantial evidence, and is free from legal error. It is a low standard to affirm and a high standard to overturn. Therefore, "if there is substantial evidence for the Commission's decision and there is no mistake of law, the decision will be affirmed."[21] It is the Court's finding that there is substantial evidence to support the Commission's decision, and that no legal error has been committed.

As to Appellant's first contention, "the failure of the Commission to issue an opinion within the thirty-day time limit prescribed by its rules does not require a reversal."[22] When presented with precisely this issue in *Richards v. Delaware State Harness Racing Commission*, the court held that:

> [i]n general, an agency will be required to follow its own rules and regulations. However, exceptions to this general requirement include rules which are adopted merely to effectuate the transaction of agency business or violations in which there is no harm because no substantial rights are

[21] *Id.*

[22] *Id.*

> involved. In the present matter, the rule at issue [then Rule 10(M), now Rule 10.3.13.1] is intended to expedite the issuance of opinions. However, the rule does not enlarge or diminish any substantial rights of appeal and [Appellant's] Due Process Rights have not been diminished.[23]

The court further elaborated that, although the Commission could have acted more expeditiously, Appellant suffered no measurable prejudice as a result.[24] In the case *sub judice*, the Court finds no prejudice to Appellant. If anything, the delay in the issuance of the written decision was favorable to Appellant. The end result was a *de novo* hearing before the full Commission, rather than a decision from a hearing officer he claimed was biased against him.

The balance of Appellant's contentions, although framed as legal arguments, is actually *ad hominem* attacks against the State's attorney, the Commission's attorney, Gallagher, and members of the Commission. Many of Appellant's remaining contentions are simply without legal merit.

First, a review of the June 9, 2009 hearing transcript indicates that the hearing was conducted fairly and impartially. Not only did the attorneys involved act appropriately and professionally, they afforded great latitude to Appellant, who was representing himself. They did not usurp the Commission's proceeding, and even offered Appellant procedural advice. The Commission fully and impartially considered each side, and rendered its decision accordingly. The Court finds no reversible error in the Commission's actions.

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[23] *Id.* (referencing *Regional Care Facilities, Inc. v. Rose Care, Inc.*, 912 S.W.2d 409, 411 (Ark. 1995) (reversal required where substantial rights are prejudiced); *Hopkins v. Maryland Inmate Grievance Comm'n*, 391 A.2d 1213, 1217 (Md. Ct. Spec. App. 1978) (where a rule is adopted merely for the orderly transaction of business, reversal is not required)).

[24] *Id.*

Second, the Court is unclear as to why Appellant raises Gallagher's alleged lack of objectivity as an issue in his appeal. Gallagher ultimately recused himself from this matter. Gallagher's Interim Order of May 11, 2009 ruled that, due to questions about his impartiality, the "interest[s] of justice" required him to refer the appeal to the full Commission. From that point forward, Gallagher was not involved in the case at all. The Court finds this argument extraneous.

Next, the Court summarily dismisses Appellant's argument that the State was permitted a "second bite at the apple." The expression "second bite at the apple" necessarily implies that the first bite was not successful, yet, through some windfall, a new opportunity is awarded. The record clearly demonstrates that this term is inapplicable to the instant situation. Nothing was decided by the first hearing. After Gallagher recused himself, a *de novo* hearing before the full Commission was granted. Appellant's argument that the State was somehow advantaged by a decision rendered for his benefit is untenable.

Appellant's contention concerning lack of notice fails as well. The record reflects that Appellant was served personally. A signed Certificate of Service documents that service was accomplished. Moreover, Appellant did not fail to appear for any hearings. He was personally present for all proceedings. Therefore, Appellant suffered no prejudice. The Court finds no reversible error on Appellant's notice claim.

Appellant's final two arguments coincide with one another. Appellant asserts that, not only did the Commission fail to consider the extraordinary mitigating factors in deciding his penalties, it failed to follow its own established precedent. According to Appellant, since the secondary samples never arrived at LSU due to the Commission's error, all violations should be dropped. Appellant contends this was

the procedure followed in the George Teague case. The Court is unpersuaded.

The record contains little information about the specific facts underlying the Teague case. George Teague himself testified that he could not recall the exact transpiration of events. All he remembered was that the charges against him were ultimately dropped due to "mishandl[ing] or something."

The record does, however, contain evidence about the handling of Appellant's secondary samples. It is undisputed that the samples arrived at UPS. It was the Commission's responsibility to deliver them, and they properly did so. At some point following this delivery, the samples were obviously lost or misplaced. Rule 8.4.3.5.12 contemplates precisely this circumstance. If an action beyond the control of the Commission occurs – i.e., UPS's loss of the samples – which prevents a confirmatory test, then the results of the primary test are accepted as *prima facie* evidence. The Commission found that Appellant could not support any of the above arguments with evidence to overcome this *prima facie* finding that the horses had been administered prohibited substances. This Court is satisfied with the Commission's factual findings, and will not disturb them.

Moreover, when imposing Appellant's penalties, the Commission did consider mitigating factors. All three of Appellant's drug violations occurred during a ten-day period. Rather than imposing more stringent penalties for the second and third offenses, which was well within its authority, the Commission treated each violation as a first offense, and imposed the minimum penalty in each case.

Although Appellant goes to great lengths to hurl unsubstantiated allegations and advance formulated legal arguments, he cursorily addresses the ultimate issue – whether substantial evidence supports the Commission's finding that Appellant violated the Commission's rule against prohibited substances. Appellant had

numerous opportunities to discuss his version of the circumstances that led to his horses testing positive for prohibited substances. He failed to do so, and alternatively decided to focus his appeal on other grounds. Nonetheless, the record demonstrates that there is substantial evidence to support a finding that Appellant violated Delaware Harness Racing Rules, when *Aloha Reggie* and *None Can Compare* tested positive for the Class 2 drug Buprenorphine.

CONCLUSION

After reviewing the record, this Court is satisfied that the Delaware Harness Racing Commission did not err in its decision that Appellant, Brewer Adams, violated the Harness Racing Regulations. Accordingly, the Commission's decision is **AFFIRMED**.

SO ORDERED this 15th day of January, 2010.

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J.

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