

COMMONWEALTH OF KENTUCKY  
PUBLIC PROTECTION CABINET  
KENTUCKY HORSE RACING COMMISSION  
ADMINISTRATIVE ACTION NO. KHRC-SB-12-014



JOHN D. CAMPBELL

COMPLAINANT

v.

KENTUCKY HORSE RACING COMMISSION

RESPONDENT

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**FINAL ORDER**

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The Hearing Officer in the above-styled case issued his Recommended Findings of Fact, Conclusions of Law and Recommended Order ("Recommendation") on April 1, 2013, wherein he recommended the issuance of a final order affirming Judges' Ruling No. J2012-037. Neither the Complainant nor the Respondent filed exceptions to the Recommendation. The Kentucky Horse Racing Commission considered the record and the Recommendation, as required by KRS 13B.120, at its June 5, 2013 meeting and hereby issues its Final Order fully adopting all findings of fact and conclusions of law set forth in the Recommendation, which is attached hereto and incorporated herein by reference.

Judges' Ruling No. J2012-037 is AFFIRMED, and John D. Campbell shall immediately pay the assessed fine of one hundred and fifty dollars (\$150.00).

SO ORDERED this 5<sup>th</sup> day of June, 2013.

A handwritten signature in cursive script that reads "Robert M. Beck, Jr." The signature is written in black ink and is positioned above a horizontal line.

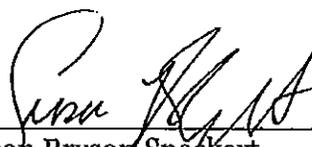
Robert M. Beck, Jr.  
Chairman  
Kentucky Horse Racing Commission

**NOTICE**

A final order of the Kentucky Horse Racing Commission may be appealed pursuant to KRS 13B140(1), which states:

All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

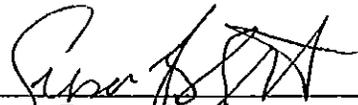
This is to certify that a true and correct copy of the foregoing Final Order was served via U.S. Mail and electronic mail on this the 5<sup>th</sup> day of June, 2013, upon the following:

William C. Hurt, Jr.  
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*Hearing Officer*

  
\_\_\_\_\_  
Susan Bryson Speckert

COMMONWEALTH OF KENTUCKY  
PUBLIC PROTECTION CABINET  
KENTUCKY HORSE RACING COMMISSION  
ADMINISTRATIVE ACTION NO. KHRC-SB-12-014



JAMES D. CAMPBELL

COMPLAINANT

**RECOMMENDED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
RECOMMENDED ORDER**

KENTUCKY HORSE RACING COMMISSION

RESPONDENT

This case involves appeal of a judges' ruling that, during the 4<sup>th</sup> race at Red Mile on September 28, 2012, that the horse Odds on Equuleus and Complainant, the driver of the horse, improperly slowed the pace of a race so as to cause confusion to the trailing horses, which, if true, is a racing violation under 811 KAR 1:1075. Based upon the judges' ruling that a foul had occurred, the judges disqualified the horse.

On October 4, 2013, an appeal to the judges was filed by James Campbell, the Complainant and driver, and Robin Schadt, the trainer, and Odds on Racing, LLC, the owner of the horse. The October 4 appeal appealed the decisions and rulings of the judges on September 29 regarding disqualification of the horse, claiming a right to a hearing before the judges. A judges' hearing took place on November 19, 2012, and the judges issued Ruling No. J2012-037 confirming their earlier finding that the horse and driver did slow the pace of the race sufficiently to cause confusion among the trailing horses and fined Mr. Campbell \$150.00.

An appeal of that judges' ruling was filed by James Campbell, the Complainant and driver, and Robin Schadt, the trainer, and Odds on Racing, LLC, the owner of the horse. The

position of the Racing Commission was that only Campbell had standing to appeal. Hence, the notice of administrative hearing issued by KHRC, as well as Respondent's motion to dismiss, listed only Campbell as the Complainant. In contrast, Complainant's Response to Motion to Partially Dismiss lists Campbell, Schadt and Odds On Racing, LLC as Appellants, all represented by the same counsel. For purposes of clarity, herein "Complainant" will refer only to Campbell unless otherwise indicated.

Respondent moved to dismiss this appeal as to all parties except James Campbell and for a finding that the only issue appealable by Campbell is the severity of the penalty. By prior rulings herein, the content of which is incorporated into this recommendation for purposes of clarity in anticipation of exceptions to those rulings, the motion was granted and this hearing officer held that only the severity of the penalty would be considered at a hearing.

Subsequently, the parties entered into an agreed order, of record, stipulating facts and agreed that, given the prior order limiting the scope of the hearing to the severity of the penalty, the facts to which the parties had stipulated would suffice in lieu of a hearing. The stipulated findings of fact are set forth below as recommended findings of fact.

#### **RECOMMENDED FINDINGS OF FACT**

The following facts are stipulated by the parties pursuant to agreed order dated

1. James Campbell, the Complainant, is a licensed driver and was the driver of Odds on Equuleus during the 4<sup>th</sup> race at Red Mile on September 28, 2012.
2. Robin Schadt is the trainer of the horse and Odds on Racing, LLC, is the owner of the horse.

3. Prior to declaring an official winner of the race in question, the judges ruled that Complainant had committed a racing violation during the race and disqualified the horse, placing the horse last.
4. On October 4, 2013, an appeal to the judges was filed by James Campbell, the Complainant and driver, and Robin Schadt, the trainer, and Odds on Racing, LLC, the owner of the horse. The October 4 appeal appealed the decisions and rulings of the judges on September 29 regarding disqualification of the horse, and requested a hearing.
5. The document dated October 15, 2012, styled "Notice of Judges' Hearing" was issued to John Campbell by Rich Williams, Chief State Judge, in response to Complainant's request for a hearing, and is admitted into evidence as part of the record.
6. A hearing took place on November 19, 2012. Rich Williams was the presiding judge and an associate judge also participated.
7. A document styled Ruling No. J2012-037 was subsequently issued, and is admitted into evidence as part of the record.
8. The parties stipulate that a penalty of \$150.00 is not excessive for drivers who violate any of the rules concerning a driver's conduct during a race, though Complainant denies any rules were violated by Complainant during the race that is the subject of this appeal.

#### **RECOMMENDED CONCLUSIONS OF LAW**

This case involves interpreting the regulatory scheme that applies to all races where a party seeks to challenge the determination that a foul has occurred during a race. As such, this recommendation begins with an overview of the regulatory scheme.

**OVERVIEW OF THE REGULATORY SCHEME PROHIBITING CHALLENGE OF THE JUDGES' DISQUALIFICATION OF A HORSE FOR FOULS COMMITTED DURING A RACE**

Stewards and judges are given the authority by statute and regulation to rule on the outcome of races. KRHC by regulation has delegated determinations of fouls and disqualifications to judges, experts it has deemed qualified to make such determinations without being second-guessed. 811 KAR 1:015, Section 2, (2), a provision on qualification of judges, states

Prior to consideration by the commission for employment or approval as a judge, a person shall:

- (a) Have attended the University of Louisville Steward/Judge Accreditation School, the University of Arizona National Steward/Judge Accreditation Program, or any other accreditation school or program approved by the commission;
- (b) Have satisfactorily passed a written and oral examination given by the school;
- (c) Possess the requisite knowledge of the duties expected of the position and the rules of harness racing; and
- (d) Not be under suspension or ejection by the United States Trotting Association, Standardbred Canada, or any racing jurisdiction.

The regulations create a process that gives judges broad power to decide the outcome of races. Stewards and judges are like umpires in baseball games or referees in basketball games, playing roles of witness, investigator, prosecutor and judge all at the same time.

A Wyoming Attorney General's Opinion describes the role of stewards and judges in the following words:

The stewards are given direct authority to rule on the outcome of races as they are the "judges" hired by the Commission to perform the on-site supervision of the race meet. Incidents involving riding violations committed by jockeys or interferences by a horse and/or rider are typical of the events that can occur during the running of a race, which

may affect its outcome. The stewards watch the live race through binoculars and television monitors and then, in the case of a questionable racing incident, review the video tapes that typically show a head on view, a pan or side view and a backside view shot from the inside of the track. From these three angles, the stewards are able to review as many times as necessary a particular incident that may give rise to a foul. In addition, the stewards question the jockeys involved in the incident for their views. The review process is akin to instant replay and it helps the stewards make the most accurate decision that can be made in the time frame allowed.

Wyoming Attorney General, Formal Opinion No. 99-005, 1999 WL 744222.

Under the regulatory scheme set forth in applicable statutes and regulations, the decisions of stewards and judges regarding foul-finding and disqualification of horses is not subject to challenge administratively in Kentucky. Kentucky is not the only racing jurisdiction that operates in this way. The aforementioned Wyoming Attorney General's Opinion, construing a statute that is similar to Kentucky's and holding that Wyoming's Pari-Mutuel Commission had no authority to review the decisions of stewards regarding the outcome of a race, states as follows:

The question is, however, whether these types of decisions are final and non-appealable to the Pari-Mutuel Commission. The statutes clearly create the right of appeal to the Commission only in those cases involving actions taken against a license: a fine or suspension. Within the statutory scheme, the Commission retains full power over licenses, with the limited exception of the minor infractions that may be ruled on by the stewards. Because the Commission is the licensing authority, it makes sense that only the Commission has the power to take major enforcement action in the nature of revocation, suspension and fine. **Decisions involving the outcome of a race, however, have been fully delegated to the three individuals chosen to supervise the conduct of racing and by statute have not been specifically included in those that may be appealed to the Commission**

Wyoming Attorney General, Formal Opinion No. 99-005, 1999 WL 744222 (emphasis added).

Although this is an attorney general's opinion from another jurisdiction, the reasoning applies to Kentucky's statute. Kentucky's statute, as will be discussed elsewhere hereinbelow, does not specifically include foul-finding as a matter that can be appealed and Kentucky's regulations expressly prohibit appeals of foul-finding. Wyoming's Attorney General even notes that

“Kentucky, a state often viewed as a center for horse racing and breeding, has long had rules prohibiting this type of appeal.”

As will become clear below, applicable statutes and regulations, and KHRC’s long-standing interpretation of them, do not contemplate that the fact-findings of the stewards regarding fouls during a race and the resulting disqualification of a horse can be challenged administratively.

**1. ONLY COMPLAINANT CAMPBELL HAD A RIGHT UNDER KRS 230.320 TO A JUDGES’ HEARING**

The regulation regarding informal hearings conducted by the judges grants authority to conduct but does not require judges to conduct informal hearings except as may be required under KRS 230.320. 811 KAR 1:105, Section 2, (1) states:

In accordance with KRS 230.320(2) and (3), the judges shall have the authority to conduct an informal hearing to review any alleged violation of the provisions of KRS Chapter 230 relating to harness racing or 811 KAR Chapter 1.

KRS 230.320(2) applies to “a person who has been disciplined by a ruling of the stewards” and speaks of the right to apply for a stay “[f]ollowing a hearing by the stewards.” KRS 230.320(3) applies to “a licensee or other person participating in Kentucky horse racing is assessed an administrative fine or required to forfeit or return a purse...” and discusses the right to appeal to the Commission “after a hearing by the stewards.” The language of the statutes implies legislative intent that persons who are to be disciplined or fined are entitled to a hearing before the judges. (Note that had there been disqualification but neither fine nor discipline, no party would be entitled statutorily to a hearing).

Schadt, the trainer, and Odds on Racing, LLC, the owner of the horse, were not fined or disciplined and therefore were not entitled to a hearing before the judges under KRS 232.320 or

811 KAR 1:105, Section 2, (1). Also, only "a person charged with a violation" is entitled to notice of a judges' hearing under 811 KAR 1:105(2)(a). Neither the trainer nor the owner was charged with a violation.

Complainant contended that the owner and trainer would have received the purse if the horse had won the race, so that they have been "required to forfeit or return a purse" by reason of disqualification of the horse. However, they never received the purse - it was never awarded, nor was there any moment in time when they a right to it because the horse was never declared the official winner. Had the horse been declared a winner and the purse been paid, and then later some violation come to light, such as through drug testing of the horse, KHRC would have had to take action against them to require them to forfeit or return the purse. Forfeit, as defined in 811 KAR 1:005, Section (1)(37), means "money due from a licensee because of error, fault, neglect of duty, breach of contract, or a penalty imposed by the judges or the commission." At no time has money ever been due from the owner or trainer with regard to this race. The provisions in question explicitly limit standing to request a hearing to those who are penalized, disciplined, or required to pay back a purse that was previously paid to them.

Complainant's concern that KHRC "could wrongfully withhold payment pending efforts to disqualify the person entitled to the money and then assert that the affected person cannot actually appeal" (Complainant's brief opposing motion to partially dismiss, p. 16) is not compelling. Even where there is allegation of a foul, official winners are declared shortly after the race is completed and once the official winner is declared, constructive ownership of the purse vests regardless of the date and time the check is delivered.

Under the applicable statutes and regulations, neither the owner nor trainer would have

standing to request a judges' hearing based solely on disqualification of the horse. In the present case, the statutes and regulations are being applied as written and not in a discriminatory fashion. If the statutes and regulations are facially unconstitutional because they do not allow owners and trainers to appeal disqualification of a horse, this hearing officer lacks authority to so declare.

## **2. KRS 13B DOES NOT APPLY TO A JUDGES' HEARING**

Complainant contended that the judges' hearing had to comply with the requirements of KRS 13B. However, KRS 13B does not apply to a judges' hearing.

### **A. THE JUDGES' HEARING IS NOT A "HEARING" AS DEFINED IN 13B BECAUSE IT IS NOT FORMAL**

KRS 13B.010(2) states:

"Administrative hearing" or "hearing" means any type of **formal** adjudicatory proceeding conducted by an agency as required or permitted by statute or regulation to adjudicate the legal rights, duties, privileges, or immunities of a named person.

KRS 230.320 does not state expressly whether the judges' hearing is informal, but does state that an *appeal* of the judges' hearing "shall be conducted in accordance with KRS Chapter 13B." The fact that the statute makes only the appeal from the judges' hearing, but not the judges' hearing itself, subject to the procedures of KRS 13B implies legislative intent that the agency may regulate the judges' hearing as it sees fit. Accordingly, the agency has adopted regulations to govern judges' hearings. 811 KAR 1:105, Section 2(1) describes the judges' hearing as "informal" and Section 1(5) says that the judges conducting the hearing "shall not be bound by technical rules of procedure and evidence."

### **B. IF THERE WERE A CONFLICT WITH KRS 13B, THE AGENCY'S PROCEDURES, RATHER THAN THE PROVISIONS OF KRS 13B, WOULD REGULATE THE JUDGES' HEARING**

KRS 13B does not apply to the informal proceeding that is the judges' hearing. However, if it did, conflicts between the agency's procedures and those in KRS 13B would be resolved, in

this case, in favor of the agency's procedures. *Abul-Ela v. Kentucky Bd. of Medical Licensure*, 217 S.W.3d 246 (Ky.App.,2006) addressed a similar situation where statutory medical licensure hearing procedures conflicted with the requirements of KRS 13B. *Abul-Ela*, at 250, states:

There are three established rules of statutory construction which are relevant to analyze the apparent conflict between these statutes. These rules are: (1) that it is the duty of the court to ascertain the purpose of the General Assembly, and to give effect to the legislative purpose if it can be ascertained; (2) that conflicting Acts should be considered together and harmonized, if possible, so as to give proper effect and meaning to each of them; and (3) that as between legislation of a broad and general nature on the one hand, and legislation dealing minutely with a specific matter on the other hand the specific shall prevail over the general. *City of Bowling Green v. Board of Education of Bowling Green Independent School District*, 443 S.W.2d 243, 247 (Ky.1969).

The three-prong test described above is applied to judges' hearings as set forth below.

i. **LEGISLATIVE PURPOSE IS TO GIVE KHRC PLENARY POWER TO INDEPENDENTLY REGULATE RACING**

KHRC is given extraordinarily powers. KRS 230.215(2) states:

It is hereby declared the purpose and intent of this chapter in the interest of the public health, safety, and welfare, to vest in the racing commission forceful control of horse racing in the Commonwealth with **plenary** power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth so as to encourage the improvement of the breeds of horses in the Commonwealth, to regulate and maintain horse racing at horse race meetings in the Commonwealth of the highest quality and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices, and to regulate and maintain horse racing at race meetings in the Commonwealth so as to dissipate any cloud of association with the undesirable and maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth. In addition to the general powers and duties vested in the racing commission by this chapter, it is the intent hereby to vest in the racing commission the power to eject or exclude from association grounds or any part thereof any person, licensed or unlicensed, whose conduct or reputation is such that his presence on association grounds may, in the opinion of the racing commission, reflect on the honesty and integrity of horse racing or interfere with the orderly conduct of horse racing.

(emphasis added). The word *plenary* means "full, complete, entire." *Black's Law Dictionary* (9th ed. 2009). *Compton v. Romans*, 869 S.W.2d 24, 27 (Ky.,1993), states that "[t]o facilitate

implementation and fulfillment of the statutory purpose, the State Racing Commission was given broad rule-making, enforcement and adjudicatory authority.... One can scarcely conceive of a broader statutory grant of regulatory authority.”

To carry out these plenary powers, KHRC is made an independent agency. KRS 230.225(1) states:

The Kentucky Horse Racing Commission is created as an independent agency of state government to regulate the conduct of horse racing and pari-mutuel wagering on horse racing, and related activities within the Commonwealth of Kentucky. The racing commission shall be attached to the Public Protection Cabinet for administrative purposes.

*Compton*, at 27, states, that “[w]ith respect to thoroughbred racing, its status as an independent agency of state government (KRS 230.220(1)) and the composition of its membership by gubernatorial appointment renders it fully comparable to a cabinet-level department.”

The statute concerning appointment to the 15-member Commission contemplates that its members will be experts in the racing industry:

In making appointments, the Governor may consider members broadly representative of the Thoroughbred industry and members broadly representative of the standardbred, quarter horse, Appaloosa, or Arabian industries. The Governor may also consider recommendations from the Kentucky Thoroughbred Owners and Breeders, Inc., the Kentucky Division of the Horsemen's Benevolent and Protective Association, the Kentucky Harness Horsemen's Association, and other interested organizations.

KRS 230.225(2).

Clearly the legislative intent is to give broad power to an independent agency of racing experts to regulate racing as it sees fit.

ii. **KRS 13B AND APPLICABLE AGENCY STATUTES CAN BE HARMONIZED**

As described above, KRS 13B.010(2) makes the chapter applicable only to

“formal” proceedings, and KRS 230.320 provides that the appeal of the judges’ hearing, but not the judges’ hearing, “shall be conducted in accordance with KRS Chapter 13B.” Had the legislature intended that the judges’ hearing also conform to 13B, it could have said so easily. Accordingly, the agency has adopted regulations to govern judges’ hearings. 811 KAR 1:105, Section 2(1) describes the judges’ hearing as “informal” and Section 1(5) says that the judges conducting the hearing “shall not be bound by technical rules of procedure and evidence.” However, if a party appeals from the judges’ hearing, KRS 13B will apply.

**iii. THE SPECIFIC PROVISION IN KRS 230.320 LIMITING APPLICATION OF 13B TO APPEALS FROM JUDGES’ HEARINGS CONTROLS OVER BROAD PROVISIONS IN KRS 13B**

Even if a judges’ hearing was a “formal hearing” to which KRS 13B applied, the fact that KRS 230.320 expressly references KRS 13B by identifying that it applies to appeals from judges’ hearings implies legislative intent that judges’ hearings themselves are exempt from application of KRS 13B. This also is consistent with KRS 13B.020(2)(h), which makes KRS 13B inapplicable to “[l]imited exemptions granted for specific hearing provisions and denoted by reference in the text of the applicable statutes or administrative regulations.”

**3. THE PROCEDURAL REQUIREMENTS FOR THE JUDGES’ HEARING SET FORTH IN THE REGULATIONS WERE FOLLOWED**

Complainant contended that the procedural requirements for the judges’ hearing set forth in applicable regulations were not followed. This hearing officer finds that they were followed.

**A. THE NOTICE REQUIREMENTS WERE SATISFIED**

811 KAR 1:105 (2)(a) provides that

[a] person charged with a violation of the provisions of KRS Chapter 230 relating to harness racing or 811 KAR Chapter 1 shall be provided with prior notice, either personally or by mail, before a judges’ hearing is held concerning the violation, unless the person charged

waives the notice requirement in writing. **Prior notice shall not, however, be required for any routine driving or racing offense as set forth in 811 KAR 1:075.**

(emphasis added). Thus, under the regulation, the judges may find a violation and disqualify a horse for a routine driving or racing offense without notice to anyone. The present case involves routine driving or racing offenses as set forth in 811 KAR 1:1075, as explicitly identified in the notice that was given, notwithstanding Complainant's argument that the consequences of disqualification were "clearly much more than a routine driving offense." (Complainant's response, p. 10). Under the applicable regulation, no notice was required for the judges to find that the violation occurred and to disqualify the horse. If the judges choose to reconsider their decision that a foul was committed, under the regulations it is a matter of grace rather than Complainant's right. Notice is required, however, to impose a penalty.

In the present case, Complainant requested a hearing, one was scheduled, and notice was given. The requirements of the notice are set forth in 811 KAR 1:105(2)(b).

The first requirement is the date, time and place of the hearing. This appears in the notice. The second requirement is designation of the statutes or regulations allegedly violated. This appears in the notice. The fourth requirement is that the party be advised of the right to counsel or to be represented by a member of a racing trade association. This appears in the notice. The fifth requirement is a statement advising the party of his or her right to subpoena witnesses and documentary evidence through the Authority. This appears in the notice.

The third requirement is one with which the Complainant takes issue. The requirement is that the notice provide

[a] clear and concise factual statement sufficient to inform each party with reasonable definiteness of the type of acts or practices alleged to be in violation of the statute or administrative regulation.

The factual statement given for the hearing is as follows:

This hearing is to determine if any infractions of the above rules were committed by the driver of Odds on Equuleus in the 4<sup>th</sup> race on 9/29/2012 at The Red Mile. These rule violations my [sic] carry a penalty of up to a 30 day suspension and fines not to exceed \$5000.00 for each offense.

The factual statement references "the above rules," which are the regulations that may have been violated, and which appear in the notice as 811 KAR 1:075 section 1(4), section 1(6), section 1(9), section 1(14), and 811 KAR 1:015 section 11(9). The violations described in the four references to 811 KAR 1:075 are, respectively:

- Swerve in and out or pull up quickly
- "Carry a horse out" or "sit down in front of him", take up abruptly in front of other horses so as to cause confusion or interference among the trailing horses, or do any other act which constitutes "helping";
- Commit an act which impedes the progress of another horse or causes the horse to "break";
- Fail to set or maintain a pace comparable to the class being raced, including traveling an excessively slow quarter or any other distance that changes the normal pattern, overall timing, or general outcome of the race.

Incorporating by reference the regulations that are at issue constituted a clear and concise factual statement that was sufficient to inform Complainant with reasonable definiteness of the type of acts or practices alleged to be in violation of the statute or administrative regulation. While Complainant vehemently denies that anything he did could constitute a foul, Complainant knew, as set forth in the *Daily Racing Form* article published three days before Complainant requested a hearing before the judges, and which was attached to Complainant's own October 4, 2012,

request for a hearing before the judges, that Complainant was accused of “causing confusion to trailing horses by slowing the pace abruptly.”

Complainant’s real argument was that the notice should identify not only the type of act but also the evidence that shows that the act occurred. Complainant argues that the notice should have included specific allegations of the affidavit of Yannick Gingras. In effect, Complainant is arguing for discovery. Neither the agency statutes nor the regulations pertaining to judges’ hearings provide for discovery. While there is no Kentucky case on point, other states have held that there is no constitutional right to discovery in administrative proceeding. See: *Dutchess Business Services, Inc. v. Nevada State Bd. of Pharmacy*, 191 P.3d 1159 (Nev.,2008); *Hammen v. Baltimore County Police Dept.*, 818 A.2d 1125 (Md.,2003); *UGI Utilities, Inc. v. Unemployment Compensation Bd. of Review*, 851 A.2d 240 (Pa.CmwltH.App.,2004); *California Teachers Ass’n v. California Com’n on Teacher Credentialing*, 4 Cal.Rptr.3d 369 (Cal.App.3.Dist.,2003); *Archuleta v. Santa Fe Police Dept. ex rel. City of Santa Fe*, 108 P.3d 1019 (N.M.,2005).

**B. THE HEARING WAS TIMELY HELD IN THE FORMAT REQUIRED UNDER THE REGULATION**

Provisions concerning the timing and format of the hearing set forth in 811 KAR 1:105, Section 2, are as follows:

(3) A judges' hearing shall be conducted no more than thirty (30) days after service of the notice. The judges may grant a continuance of the hearing if all parties agree. The executive director and the chairman of the Authority shall be promptly notified of any continuance of a judges hearing.

(4) A judges' hearing shall be closed to the public, and the judges shall cause no public announcement to be made concerning a matter under investigation until the hearing has concluded and the party charged has been notified of the decision.

(5) The presiding judge shall conduct the hearing to ascertain and determine the substantial rights of the parties involved, and shall not be bound by technical rules of procedure and evidence.

(6) The presiding judge and at least one (1) associate judge who was serving as judge at the time of the incident in question shall be present at all times at a judges' hearing.

Complainant does not take issue with paragraphs (3), (4) or (6). Regarding paragraph (5),

Complainant argues that Richard Williams should not have served as the presiding judge. In

Complainant's motion for recusal, Complainant argued that Williams was biased, alleging that

[a]fter the movants filed their appeal and requested this hearing, Judge Richard Williams called John Campbell and stated that he and the other two judges have already decided that John Campbell and Odds On Equuleus are each 50% guilty of abruptly stopping during the race, but that Mr. Campbell would not be further sanctioned. Mr. Williams stated that Mr. Campbell was being punished enough by not receiving the driver's portion of the winning purse. Mr. Campbell told Mr. Williams that this was a terrible decision. Mr. Williams stated that he and the other two judges absolutely stand by their determination.

Complainant's motion for recusal, p. 1. Assuming the foregoing is true, it must be remembered that the judges had already decided, at the time of the race, that a foul occurred and had disqualified the horse and thought they were correct to have done so. The Judges' Hearing requested by Complainant is like a motion to reconsider a ruling that has already been made. While the statute requires a judges' hearing before imposing a fine, neither agency statutes nor regulations give anyone a right to a hearing on whether a foul was committed. To the extent the judges choose to reconsider, it is a matter of grace rather than of right, at least as far as the statutes and regulations require. Williams also was a witness and part of the investigation that led to the disqualification decision and as such necessarily formed an opinion. It is the nature of the process that the judges at a judges' hearing will always come into that hearing with opinions that

have been formed prior to hearing any testimony. It is the very fact that they formed an opinion with which the driver disagrees that brings about the hearing in the first place.

Respondent argues that the 811 KAR 1:015, Section 1, defines who constitutes a presiding judge at a race meeting, that other provisions of 811 KAR 1:015 define the presiding judges duties to investigate interference (Section 12(2)) and to levy fines and penalties (Section 11(1)-(3)). 811 KAR 1:105, Section 2, paragraph 5 requires that same presiding judge to conduct the hearing. The process is described in Respondent's Motion to Partially Dismiss, p. 16-17, as follows:

[T]he Chief State Judge first investigates such matters at the time they are committed and acts as the finder of fact on the scene, well before he presides over the sentencing phase of that same process (i.e., the Judges' Hearing) and issues the Judges' ruling regarding penalty. The Hearing is therefore not independent of the Judges' fact finding role up to that point; it is an extension of that continued role. In other words, he remains the Chief State Judge during all phases of the process leading up to an administrative appeal of that Ruling.

This hearing officer agrees with Respondent that the process as described hereinabove is exactly what is contemplated in the regulations, including the fact that judges have also been investigators, are witnesses, and have formed opinions regarding the facts prior to any hearing.

Complainant also argued that Williams was a material witness and should be subject to being cross-examined by Complainant. Respondent's reply to this argument is

[t]his continued status is not that of a "material witness," and Mr. Williams did not testify as a witness at the Judges' Hearing. It would have therefore been neither possible nor appropriate for Mr. Williams to recuse himself from performing his legally-mandated roles, and it was not error for him to serve as presiding Judge.

Respondent's Motion to Partially Dismiss, p. 17. Under the regulations applicable to judges' hearings, it is contemplated that judges conducting the hearing will have factual knowledge about the matter that in judicial proceedings would disqualify judges. However, the regulations

provide that formal rules of evidence and procedure do not apply to judges' hearings, and there is nothing in the regulations to suggest that judges conducting the hearing can be required to testify as witnesses.

**C. A RECORD WAS CREATED IN CONFORMITY WITH APPLICABLE REGULATIONS**

Provisions concerning the record created at the hearing set forth in 811 KAR 1:105, Section 2(7), are as follows:

Testimony shall be given under oath and a record shall be made of the hearing, either by use of a tape recorder or by court reporter's transcript. The party charged with the violation may, however, waive the recording and the transcription of the testimony. The judges shall not be required to receive testimony under oath in cases in which their ruling is based solely upon a review of a video tape of a race.

In the present case a record was made and testimony was taken under oath. The affidavit of Yannick Gingras was a statement under oath. Complainant argues that he was not given an opportunity to cross-exam Gingras. However, under the administrative regulations applicable to judges' hearings the judges are not bound by rules of evidence and procedure.

**D. A RULING WAS ISSUED IN CONFORMITY WITH THE APPLICABLE REGULATIONS**

Provisions concerning the requirements of the judges' ruling are set forth in 811 KAR 1:105 are as follows:

(8) If, at the conclusion of the hearing, the judges find that a statute or an administrative regulation has been violated, they shall within five (5) days issue a written ruling which sets forth the:

- (a) Full name of the person charged with the violation;
- (b) Identification of the person, if licensed, by license classification and address;

(c) Statute or administrative regulation number and pertinent parts of the statute or administrative regulation violated;

(d) Finding by the judges as to the violation of the statute or administrative regulation; and

(e) Penalty affixed by the judges.

Addressed below are points with which Complainant takes issue.

**i. THE REGULATIONS DO NOT REQUIRE THAT THE JUDGES' DECISION TO DISQUALIFY BE BASED UPON THE RECORD ONLY**

As described elsewhere hereinabove, the process contemplates that the judges' ruling may be based upon information gathered by the judges prior to the hearing, including their own impressions, that is not introduced into a formal record.

**ii. THE RULING WAS RENDERED BY THE JUDGES' PANEL, NOT BY ONE JUDGE, AND COMPLIED WITH FORM REQUIREMENTS OF THE APPLICABLE REGULATIONS**

Complainant alleges that the ruling is void because it is signed only by the presiding judge. Complainant concedes that "the presiding judge and at least one (1) associate judge who was serving as judge at the time of the incident in question" were, per 811 KAR 1:105, Section 2(6), present at the hearing, but argues that the following language in 811 KAR 1:105, Section 2(8) requires that both judges sign the ruling:

If, at the conclusion of the hearing, the judges find that a statute or an administrative regulation has been violated, they shall within five (5) days issue a written ruling....

(emphasis added). Complainant also argues that "the defect is fatal, because the five-day period to issue a valid order has expired." (Complainant's Response, p. 11).

Complainant is correct that for a two-judge panel, both judges would need to be in agreement. However, *the regulation in question does not require that the ruling be signed by anyone*, only that it be in writing, and on its face there is nothing about the ruling to suggest that

it was not the collective act of the two-judge panel or is otherwise irregular. It is not unusual in a judicial setting for a multi-judge tribunal in unanimous agreement to designate a single justice to issue its opinion.

By previous order herein, Respondent was directed to supplement the record with an affidavit from the associate judge confirming his assent to the ruling. This hearing officer does not know whether that has been done, but given the stipulation as to the facts, this hearing officer assumes that Complainant does not contest whether the order signed by the chief judge in fact represented the act of both judges.

**iii. THE JUDGES' FINDING SUPPORTS IMPOSITION OF A PENALTY FOR VIOLATION OF A REGULATION**

Complainant argues that the findings are inadequate to support a determination that a foul occurred because the word "abrupt" is not included in the ruling. However, failing to expressly state in a finding that Complainant's conduct was "abrupt" does not violate 811 KAR 1:105(8)(d), which only requires a "[f]inding by the judges as to the violation of the statute or administrative regulation" and does not require specific findings of fact to support the finding of a violation.

Complainant argues that the regulation in question only applies to the home stretch portion of the race because the language prefatory to listing fouls states "[a]fter selecting a position in the home stretch, a driver of a horse shall not do any of the following things, which shall be considered violation of driving rules." However, this poorly-worded regulation is ambiguous and requires construction as a whole. For example, "after selecting a position in the home stretch" conflicts with "during any part of the race" in (1); "at all times during the race in (11); and "[f]ail to set or maintain a pace comparable to the class being raced, including traveling

an excessively slow quarter or any other distance that changes the normal pattern, overall timing, or general outcome of the race” in (14). It also duplicates “after selecting a position in the home stretch” in (10).

Complainant is correct that KRS 13A.130 renders void any internal policy that modifies or expands a regulation, but in this instance the regulation is ambiguous and requires interpretation. Complainant’s construction of the regulation would be that the phrase “after selecting a position in the home stretch, a driver shall not do any of the following things” modifies all of the fouls listed, which would lead to the absurd result that drivers can commit any sort of interference they like throughout the race, so long as they stop by the time they reach the home stretch. This is an absurd and manifestly unjust result. When construing statutes, the Supreme Court presumes that the General Assembly did not intend an absurd or manifestly unjust result. *Richardson v. Louisville/Jefferson County Metro Government*, 260 S.W.3d 777 (Ky. 2008) The same principle should apply in construing a regulation.

It is clear when comparing this regulation and Rule 18 of the United States Trotting Association, upon which Kentucky’s regulation is modeled, the drafter of Kentucky’s regulation simply made an inadvertent error. Kentucky’s Section 1 reads “A leading horse shall be entitled to any part of the track. After selecting a position in the home stretch...” Rule 18’s Section 1 reads “Although a leading horse is entitled to any part of the track except after selecting his position in the home stretch...”

Notwithstanding the apparent flaw in the wording of the regulation, this hearing officer does not find it plausible that Complainant truly believes that no fouls can be committed except in the home stretch. This would be so contrary to the established practices in racing that it would be completely absurd. Furthermore, as discussed in Respondent’s reply brief, 811 KAR 1:015,

Section 11(3) and Section 11(9) provide broad authority to “[d]ecide...any contingent matter which arises, that are not otherwise provided for in this administrative regulation” and to “[m]ake decisions in the public interest and in the best interest of racing that are required by extraordinary circumstances no covered by 811 KAR Chapter 1.”

**4. THE OWNER AND TRAINER LACK STANDING TO APPEAL THE JUDGES’ RULING**

KRS 13B.020(1) provides that Chapter 13B “shall not be construed to confer upon any person a right to hearing not expressly provided by law,” so any statutory right to appeal the decision of judges must be based in the agency’s statutes. KRS 230.320(3) provides as follows:

If any license is denied, suspended, or revoked, or if any licensee or other person participating in Kentucky horse racing is assessed an administrative fine or required to forfeit or return a purse, after a hearing by the stewards or by the racing commission acting on a complaint or by its own volition, the racing commission shall grant the applicant, licensee, or other person the right to appeal the decision, and upon appeal, an administrative hearing shall be conducted in accordance with KRS Chapter 13B.

By its very terms, the person granted a right to appeal is one whose license has been denied suspended, or revoked; one assessed an administrative fine; or one who is required to forfeit or return a purse. As discussed in the portion of this ruling concerning the right to a judges’ hearing, neither the owner nor the trainer qualify under these provisions as a licensee or other person entitled to appeal. Furthermore, 811 KAR 1:105(10) provides that a party who is the subject of any order or ruling of the judges may appeal to the Authority for a review of the judges’ order or ruling. Neither the owner nor trainer were the subject of the judges’ ruling that is being appealed.

**5. THE RIGHT TO APPEAL A JUDGES’ RULING IS LIMITED TO SEVERITY OF THE PENALTY**

The scope of an appeal of a judges’ ruling is also defined in KRS 230.320(3):

If any license is denied, suspended, or revoked, or if any licensee or other person participating in Kentucky horse racing is assessed an administrative fine or required to

forfeit or return a purse, after a hearing by the stewards or by the racing commission acting on a complaint or by its own volition, the racing commission shall grant the applicant, licensee, or other person the right to appeal the decision, and upon appeal, an administrative hearing shall be conducted in accordance with KRS Chapter 13B.

Complainant argues that the word "decision" means not only the decision to impose a fine, but also gives a right to appeal the judges' determination that a foul occurred and the decision to disqualify the horse. Respondent contends that the "decision" appealable is only the penalty.

KHRC has adopted regulations that embody its long-standing interpretation of this statute. With regard to harness racing, 811 KAR 1:070, Section 22, (4) states:

Rulings and decisions of the judges may be appealed to the commission, **except those made by the judges as to:**

- (a) Findings of fact as occurred during and incident to the running of a race; and**
- (b) A determination of the extent of disqualification of horses in a race for fouls committed during the race.**

(Emphasis added). There is even a regulation that limits the Commission's authority to second guess the decision of judges regarding fouls and disqualification:

Upon appeal of a matter determined by the judges the commission may:

- (a) Order a hearing de novo of a matter determined by the judges; and**
- (b) Reverse or revise the judges' ruling in whole or in part, except as to findings of fact by the judges' ruling regarding matters that occurred during or incident to the running of a race and as to the extent of disqualification fixed by the judges for a foul in a race.**

811 KAR 1:095, Section 12 (2) (emphasis added). These regulations are consistent with like regulations that apply to stewards' decisions in thoroughbred racing. 810 KAR 1:029, Section 2, (9) states:

Any party who is the subject of any order or ruling of the stewards may apply to the authority for a review of the stewards' order or ruling, **except as to extent of**

**disqualification for a foul in a race or as to a finding of fact as occurred during an incident to the running of a race.**

(emphasis added). 810 KAR 1:017, section 4, states:

The stewards shall make all findings of fact as to all matters occurring during and incident to the running of a race; shall determine all objections, and inquiries based on interference by a horse, improper course run by a horse, foul riding by a jockey, and all other matters occurring during and incident to the running of a race; and, shall determine the extent of disqualification, if any, of horses in a race for a foul committed during the race. **Findings of fact and determination shall be final and no appeal may be taken thereon.**

(Emphasis added).

It is beyond dispute that the agency's long-standing interpretation of the statutes it implements, embodied in its regulations, insulates stewards and judges from administrative challenge regarding finding of fouls and disqualification of horses. KHRC's interpretation of KRS 230.320(3) is reasonable does not conflict with any provision that statute or other statutes concerning horse racing. Construction of a law or regulation by officers of an agency continued without interruption for a long period of time is entitled to controlling weight upon judicial interpretation. *White v. Check Holders, Inc.*, 996 S.W.2d 496 (Ky.,1999); *Kenton County Fiscal Court v. Elfers*, 981 S.W.2d 553(Ky.App.,1998).

**6. THIS HEARING OFFICER CANNOT ADDRESS COMPLAINANT'S DUE PROCESS CHALLENGE TO THE JUDGES' FINDING OF A FOUL AND DISQUALIFICATION OF THE HORSE**

The gravamen of Complainant's appeal was that the foul-finding process violates due process, or that as applied in this case violated due process.

This hearing officer has found that a judges' hearing was conducted in accordance with KHRC regulations and the statutes they implement and that no administrative appeal of the foul-finding or disqualification is permitted. This hearing officer lacks authority to declare those

statutes or regulations unconstitutional facially, and because administrative appeal of the finding of a foul and disqualification is not permitted lacks jurisdiction to consider whether the regulations were unconstitutionally applied when finding that a foul occurred.

#### **7. THE PENALTY IMPOSED WAS LAWFUL AND NOT EXCESSIVE**

Ruling No. J2012-037 was issued finding that Complainant had committed a foul. The parties have stipulated that a penalty of \$150.00 is not excessive for drivers who violate any of the rules concerning a driver's conduct during a race. Therefore, the penalty is lawful and not excessive.

#### **RECOMMENDED ORDER**

Wherefore, this hearing officer recommends that a final order be entered adopting the foregoing findings of fact and conclusions of law and affirming the ruling of the Stewards.

#### **NOTICE OF EXCEPTION AND APPEAL RIGHTS**

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the mailing of the Recommended Order within which to file exceptions with the agency head, the Executive Director of the Kentucky Horse Racing Commission.

The final order of the Kentucky Horse Racing Commission may be appealed pursuant to KRS 13B.140 which states:

(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on

which the review is requested. The petition shall be accompanied by a copy of the final order.

(2) A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

Dated April 1, 2013.



MIKE WILSON, HEARING OFFICER

CERTIFICATION:

The original of this document was mailed to Attn: Margi Wintz, Docket Clerk, Kentucky Horse Racing Commission, 4063 Ironworks Parkway, Building B, Lexington KY 40511; and a copy of the foregoing was mailed postage pre-paid to William C. Hurt, Jr., Hurt, Crosbie & May, PLLC, 127 W. Main St., Lexington, KY 40507 and to Hon. Michael T. Davis, Kentucky Horse Racing Commission, 4063 Ironworks Parkway, Building B, Lexington KY 40511, on April 1, 2013



MIKE WILSON, HEARING OFFICER