

Commonwealth of Kentucky
Kentucky Horse Racing Commission

File No. 08-0035

Richard Dutrow Jr.

Petitioner

V

Kentucky Horse Racing Commission

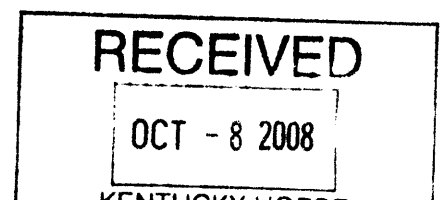
Respondent

On August 28, 2008, the hearing officer conducted the Administrative Hearing in this action on behalf of the Kentucky Horse Racing Commission. John Forgy represented the Commission and Dutrow was represented by Frank Becker and Gerald Romski. Dutrow was not present at the hearing. Mr. Forgy called as witnesses, Bernie Cuadill, Dr. Nichols, John Vietch, Albert Kind, and Dr. Barker. The petitioner did not call any witnesses. Both the petitioner and respondent filed proposed Findings of Fact and Conclusions of Law

This action is an administrative appeal by Dutrow from a stewards' ruling number 08-0035 dated June 25, 2008 to wit:

Suspension of trainer Richard Dutrow for fifteen (15) days for the horse SALUTE THE COUNT having the prohibited substance Clenbuterol in his system during the running of the 5th race at Churchill Downs on May 2, 2008. Clenbuterol is a class B drug, detection which is penalized pursuant to 810 KAR 1:028 Section 4, subsection (2) (a). The trainer is responsible for the finding of Clenbuterol pursuant to 810 KAR 1:008, Section 3, subsection 4.

The stewards also issued ruling number 08-0036 which disqualified SALUTE THE COUNT and placed him last and ordered all purse monies returned.



After considering the evidence presented at the hearing, the hearing officer recommends that the Kentucky Horse Racing Commission issue a final order overturning the two stewards' rulings. In support of that recommendation, the hearing officer submits the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Kentucky Horse Racing Commission ("KHRC") is the successor to the Kentucky Horse Racing Authority ("KHRA").
2. The petitioner was the trainer of SALUTE THE COUNT who ran second in the fifth race on May 2, 2008 at Churchill Downs.
3. After the race, urine and blood samples were taken from SALUTE THE COUNT and placed in separate containers and sealed. The samples were given the # 537003. This procedure was witnessed by the owner's representative. The employees of the KHRC properly collected and preserved the samples.
4. Iowa State University ("ISU") is the testing laboratory for the KHRC.
5. On May 5, 2008, the samples were sent to ISU while fully maintaining the chain of custody. ISU received the samples in sealed condition. Sample # 537003 consisted of one urine sample and three tubes of blood.
6. ISU tested the urine sample # 537003 and the urine was thought to be suspect for Clenbuterol.
7. Clenbuterol is a Class B drug per the Kentucky Horse Racing Authority Uniform Drug and Medication Classification Schedule and thus a prohibited substance.

8. Clenbuterol is a drug that is listed in the Kentucky Horse Racing Authority Withdrawal Guidelines which states in part as follows:

“The following withdrawal guidelines are voluntary and advisory... A licensee may present evidence of full compliance with the guidelines to the Authority and the stewards as a mitigating factor to be used in determining violations and penalties...The Withdrawal interval guidelines assume that administration of medications will be performed at doses that are not greater than the manufacturer’s maximum recommended dosage”.

9. Clenbuterol is a substance that may be administered up to 72 hours prior to the scheduled post time of the race in which the horse is to compete as long as their use follows the guidelines set forth above.

10. Per the Available Threshold Levels associated with KHRA Withdrawal Guidelines, Clenbuterol has a permissible threshold of 25 picograms per ml of serum.

11. Since Clenbuterol has a blood threshold, ISU conducted tests on the blood. ISU in its Final Report to the KHRC stated that “sample #537003 originally called suspicious is a positive medication overage. Clenbuterol was detected and confirmed at 41 pg/ml”. “Pg” stands for picogram which is one trillionth of a gram. The report was signed off by Mr. Kind after reviewing all the evidence. Mr. Kind is the program manager of the ISU racing chemistry lab.

12. Pages 46 and 47 of ISU’s documentation packet is entitled “ Confirmation for Clenbuterol in Plasma”.

13. Dutrow, after notification of the positive finding, requested that the split sample be tested by the Louisiana State University(“LSU”) equine medication surveillance laboratory. A split sample is a sample that is drawn concurrently with the primary sample and stored for future use. Split sample # 537003 had been stored under lock and key in a refrigerator in the test barn at Churchill Downs.

14. Dutrow’s representative, Dr. Landry, witnessed the unlocking of the refrigerator and the locating of the sample and its subsequent shipment to LSU.

15. Sample #537003 was received by LSU intact with no problems and cool, not frozen. The sample is in no way compromised if is not frozen. LSU tested the sample and issued a report entitled “Analytical results for sample 537003 Equine Plasma Sample positive for clenbuterol”. The report stated that “ the concentration detected in the plasma sample was approximately 0.04 ng/ml” which is the same as 40 picograms. There is no significant difference between 41 picograms and 40. The testing at LSU was done under the direction of Dr. Barker, director of the lab.

16. After the report from LSU was received by the Commission, John Vietch, Chief State Steward for the Commission, informed Dutrow that “ we had confirmed the presence of Clenbuterol at a level that was still considered a positive by the Kentucky Horse Racing Commission”. Dutrow was informed of his right to a stewards’ hearing, but he waived his right to the hearing. The stewards, John Vietch, Brooks Becraft, and Richard Leigh, issued the rulings above.

17. Upon notification of the rulings, Dutrow filed a timely appeal.

18. Plasma is the clear yellowish fluid portion of blood in which cells are suspended. It differs from serum in that it contains fibrinogen and other soluble clotting elements. There was no evidence presented from either ISU or LSU which gave any concentration of clenbuterol in serum. Neither was there any evidence to explain the difference between serum and plasma.

Conclusions of Law

1. The Kentucky Horse Racing Commission is authorized pursuant to KRS Chapter 230 to oversee and regulate the conduct of horse racing in the Commonwealth.

2. Under KRS 230.320 (1), the Commission may sanction any licensee who has violated a statute or regulation relating to horse racing.

3. The hearing in this action was authorized pursuant to KRS 230.320 and was conducted in accordance with the provisions of KRS Chapter 13B.

4. Under KRS 13B.090 (7), the Commission had the burden to prove by a preponderance of the evidence that the factual allegations against the petitioner in the Notice of Hearing were true, that the petitioner violated the Commission’s statutes or regulations, and that the sanction imposed was appropriate for the misconduct.

5. The Commission has not met its burden.

6. 810 KAR 1:008, Section 3, subsection 4 in part states that “ a licensed trainer...shall bear primary responsibility for horses he enters as toabsence of prohibited drugs or medications”. This is the violation listed in the stewards’ ruling and the Notice of Hearing .

7. 810 KAR 1:028 Section 4, subsection 3, states in part “ a licensee who administers, or is a party to or responsible for administering a Class B drug to a horse in violation of KAR 1:018 shall be subject to penalties”. The petitioner argues that since neither the stewards’ ruling nor the Notice of Hearing listed this regulation, the Commission did not meet its burden under KAR 1:028. In support of his position, the petitioner cites KRS 13B.050 and 810 KAR 1:029 Section 3 which require that the “ notice set forth a specific statute or administrative regulation alleged to have been violated”. The court in Yellow Freight System, Inc. v. Martin, 954 F.2d 353 (6th Circuit 1992) held that “ due process is not offended if an agency decides an issue the parties fairly and fully litigated at a hearing. When parties fully litigate an issue they obviously have notice of the issue and have been given an opportunity to respond. The test is one of fairness under the circumstances of each case”. The petitioner was given sufficient notice of the basis of the Commission’s action to satisfy administrative due process.

8. 810 KAR 1:018 Section 14, subsection 2 in part states that “a trainer shall be responsible for the presence of a prohibited drug, medication...including permitted medication in excess of the maximum-allowable concentration” .. Dutrow as the licensed trainer of SALUTE THE COUNT is responsible, if the Commission proves the presence of the prohibited drug and Dutrow cannot offer an affirmative defense. This was referred to as the “trainer responsibility rule” by the court in Allen v. Kentucky Horse Racing Authority, Ky. App., 136 S. W. 3d 54 (2004). Dutrow did not offer an affirmative defense.

9. 810 KAR 1:018 Section 2, subsection 5 states in part as follows:

“It shall be prima facie evidence that a horse was administered and carried while running in a race a drug, medication.....prohibited by this section if...blood from the horse was taken under the supervision of the Authority veterinarian promptly after the race and the Authority laboratory presents to the Authority a report of a positive finding”. In the case at hand, the blood and urine from SALUTE THE COUNT were taken promptly after the race under the supervision of the Commission veterinarian and the Authority laboratory presented the Commission a finding but that finding did not rise to the level of a positive finding.

10. 810 KAR 1:018 Section 2, subsection 6 states as follows:

“ The Authority shall utilize the ‘Kentucky Horse Racing Authority Uniform Drug and Medication Classification Schedule’ (11-05) for classification of drugs and medications violating this administrative regulation. Penalties for violations of this administrative regulation shall be implemented in accordance with 810 KAR 1:028”. Clenbuterol is listed as a Class B drug as one “that may have a legitimate therapeutic indication in the equine athlete but also have a high potential to influence performance”.

11. The Commission recognizing the therapeutic value of Clenbuterol permits horses to be treated with the drug but only if a horse has less than 25 picograms per ml of serum in its system while participating in a race. (See The Kentucky Horse Racing Authority Withdrawal Guidelines.)

12. The Commission had the burden to prove that the concentration of Clenbuterol exceeded the threshold of 25 pg/ml of serum. Under the regulations, a “positive finding” only exists where the substance was present in the sample “in excess of the established level”. The results from ISU and LSU only state that the concentration was for plasma. There is nothing in the record which addresses the issue as to the difference between serum and plasma.

13. The Petitioner in his proposed findings argues that the fact that the split samples were not kept in a freezer as promulgated in 810 KAR 1:018 Section 11 would render the test results void. The petitioner further argues that the fact the Commission did not present evidence as to the maintenance of a log of the openings of the freezer per the above regulation would also render the test results void. There was no evidence presented that the samples tested by LSU were in any way tampered with. The sample was received intact and cool. The sample is not compromised if it is cool and thawed. “It is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that the reasonable probability is that the evidence has not been altered in any material respect” Mollette v. Kentucky Personnel Bd., Ky. App., 997 S.W. 2d 492 (1999). Therefore the petitioner’s arguments are not persuasive.

14. In the case at hand, the Commission proved by substantial evidence that SALUTE THE COUNT ran on May 2, 2008 with Clenbuterol in his system and that Dutrow, as the trainer, was responsible for the presence of the medication. The Commission failed to prove that the amount of Clenbuterol was above the threshold of “25 picograms per ml of serum”. The Commission proved that the amount of Clenbuterol in SALUTE THE COUNT was indeed 41 picograms per ml of plasma. No evidence was presented to explain the difference. When dealing with two amounts, that are as Dr. Barker of LSU stated “pharmacologically insignificant”, it is imperative that there is specificity as to the amounts.

15. 810 KAR 1:018 Section 18, subsection 5, reads in part:

“If the purse money has been distributed, the stewards shall order the money returned at the conclusion of an investigation finding that a prohibited drug, medication.....was administered to a horse eligible for purse money”.

The stewards issued ruling 08-0036 which ordered the return of the purse money won by SALUTE THE COUNT for testing positive for the prohibited substance, Clenbuterol. As a result of finding that it was not proven that SALUTE THE COUNT participated with an amount over the threshold limit, this ruling must also be reversed.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is herein recommended that the Kentucky Horse Racing Commission issue a Final Order which overturns the stewards’ ruling number 08-0035 and the stewards’ ruling number 08-0036 for failure to show that SALUTE THE COUNT on May 2, 2008 had clenbuterol in his system in excess of the permissible threshold level.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), a party has the right to file exceptions to this recommended decision:

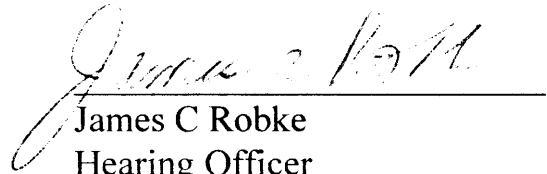
A copy of the hearing officer’s recommended order shall also be sent to each party in the hearing and each party shall have fifteen days from the date the recommended order is mailed to file exceptions to the recommendations with the agency head.

A party also has a right to appeal the Final Order of the agency pursuant to KRS 13B.140(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 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 the 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 addressees of all parties to the proceeding and the agency involved, and a statement of the grounds on which review is requested. The petition shall be accompanied by a copy of the final order.

So Recommended this 7th day of October, 2008.


James C Robke
Hearing Officer
3491 Reeves Dr.
Fort Wright, Kentucky 41017

Certificate of Service

I hereby certify that the original of this Recommended Order was mailed this 7th day of October, 2008 by first class mail, postage prepaid, to:

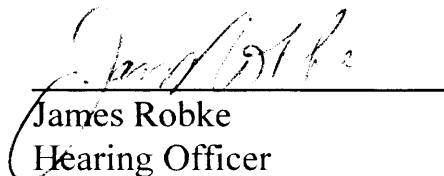
John Forgy
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4063 Iron Works Parkway
Building B
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for filing: and a true copy was mailed, postage prepaid, to:

Frank Becker
218 Sycamore Road
Lexington, Kentucky. 40502

and to:

Gerald Ronski
84 Business Park Drive
Suite 204
Armonk, New York, 10504


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