

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2007-000507-001 DT

07/09/2008

HON. MARGARET H. DOWNIE

CLERK OF THE COURT  
S. Bindenagel  
Deputy

KEITH BENNETT

IVY L KUSHNER

v.

ARIZONA RACING COMMISSION (001)  
ARIZONA STATE DEPARTMENT OF RACING  
(001)

BLAIR C DRIGGS

OFFICE OF ADMINISTRATIVE  
HEARINGS

ORAL ARGUMENT

9:05 a.m. This is the time set for oral argument re: administrative review. Plaintiff is represented by counsel Ivy L. Kushner. Defendant is represented by counsel Blair C. Driggs.

A recording of this proceeding is made by CD (FTR) in lieu of a court reporter.

Argument is presented.

IT IS ORDERED taking this matter under advisement.

9:33 a.m. Matter concludes.

LATER:

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**RULING**

Plaintiff Keith Bennett (“plaintiff” or “Bennett”) appeals from disciplinary action taken against him by defendant Arizona State Department of Racing (“defendant” or “Department”). This court has jurisdiction pursuant to the Administrative Review Act, A.R.S. §§ 12-901, *et seq.* It has considered the record from the administrative proceedings, as well as the parties’ memoranda and the arguments of counsel.<sup>1</sup>

**Factual<sup>2</sup> and Procedural Background**

Plaintiff is licensed by the Department as a horse trainer. Queena Nina, a horse trained by Bennett, finished first in a race at Turf Paradise on November 10, 2006. A urine/blood sample was taken from the horse, and it revealed the presence of an excessive amount of Clenbuterol – a bronchodilator. An independent test requested by plaintiff confirmed the results.<sup>3</sup>

The Turf Paradise Board of Stewards issued a notice of hearing to Bennett, stating, *inter alia*:

You are advised that the following matters are asserted in connection with this proceeding:

Receipt of affidavit from Industrial Laboratories indicating a positive finding of a prohibited substance “Clenbuterol” (class 3) in excess of the official threshold (5 ng/ml) found in a sample (**E30439**) collected from “**Queena Nina**” following the 2<sup>nd</sup> race on November 10, 2006 (1<sup>st</sup> offense within a year) at Turf Paradise, Phoenix, Arizona. A.A.C. R19-2-112.12; A.A.C. R19-2-111.A.,C.; A.A.C. R19-2-121.E.2; A.A.C. R19-2-121.E.3; A.A.C. R19-2-121.E.3, d., f., g.; A.A.C. R19-2-121.E.6, a, b; A.A.C. R19-2-112.16; A.A.C. R19-2-112., 15., a., i., ii., iv., v., vi.

The Board of Stewards held a hearing on December 9, 2006. Plaintiff appeared and testified. The Board of Stewards issued an order dated December 9, 2006 that stated, in pertinent part:

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<sup>1</sup> The court has not considered documents attached to plaintiff’s opening brief that are not part of the administrative record.

<sup>2</sup> This court considers the facts in the light most favorable to sustaining the agency’s final decision. *See Baca v. Arizona Dept. of Economic Security*, 191 Ariz. 43, 951 P.2d 1235 (App. 1998).

<sup>3</sup> Bennett has characterized the level as “300% above the legal limit for Clenbuterol.” *Appeal of Director’s Order*.

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Owner-Trainer Keith A. Bennett, ADOR License 0401559, having been properly notified to appear for a hearing and having appeared to present evidence and testimony is hereby fined the sum of five-hundred dollars plus 5% surcharge . . . and suspended thirty days, December 9, 2006 through January 7, 2007 for the presence of “Clenbuterol” (Class 3) in sample E30439 collected from “Queena Nina” following the 2<sup>nd</sup> race on November 10, 2006, in excess of the official threshold of 5 ng/ml (16 ng/ml) and confirmed in split of sample E30439 sent to Louisiana State University in a report dated December 4, 2006 at 14/hg ml. (1<sup>st</sup> offense within a year). Violation of and/or in accordance with A.A.C. R19-2-112., 12., 16, 17., 17.a., c., e.; A.A.C. R19-2-111 A “Queena Nina” is hereby disqualified and unplaced for all but pari-mutuel purposes. The purse is redistributed as follows . . .

Plaintiff appealed the Stewards’ order to the Director of the Department of Racing. The Director held an evidentiary hearing on March 8, 2007. Plaintiff appeared with counsel and testified. At the outset, he noted that he was not contesting the fact that Queena Nina had an excessive amount of Clenbuterol in her system. He argued, though, that he had not administered the drug to the horse and did not believe that any of his current employees had done so. He opined that a disgruntled former employee whom he had fired might have done so.<sup>4</sup> He presented some evidence in support of this suspicion. Plaintiff testified that he keeps Clenbuterol in his tack room (with a veterinarian’s prescription) and uses it for training, but not in racing.<sup>5</sup> He stated that he would not have administered such a high dosage to Queena Nina.<sup>6</sup>

On April 3, 2007, the Director issued a ruling denominated, “Findings of Fact, Conclusions of Law and Order.” The Director affirmed the Stewards’ decision. The Director’s Conclusion of Law no. 6 states:

Pursuant to Arizona Administrative Code R19-2-112(13)(b), if laboratory analysis indicates the positive presence of any substance above the established thresholds, the licensee may be subject to license suspension or revocation or civil penalties, as set forth in Arizona Administrative Code R19-2-121(E)(3)(f) and A.R.S. § 5-108.05(A).

The Director further stated, “To determine that the Respondent was guilty of this offense was proper.” He elaborated as follows:

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<sup>4</sup> Plaintiff’s counsel explained to the Director that “[W]e are posing that as a – a scenario that could have easily have occurred.” She further stated, “But we’re certainly not saying we know for sure.” Bennett could not recall the name of the terminated employee, and he had not seen that person at Turf Paradise since his termination.

<sup>5</sup> Plaintiff testified that he uses Clenbuterol in training 90% of his horses.

<sup>6</sup> Plaintiff testified that he has never been cited for a Clenbuterol violation in Arizona, though he had “several incidents” “all at one time” involving Clenbuterol in Idaho – where he is also licensed.

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The Director refers to two relevant Arizona Administrative Code provisions as the basis for his analysis and ruling on this matter.

1. A.A.C. R19-2-111(C) states “Trainers shall be responsible for the condition of horses under their care and are required to protect such horses from acts of other parties.”
2. A.A.C. R19-2-112(16) states “The trainer, groom, and any other person charged with the custody and care of a horse is required to protect and guard the horse against administration, either internally or externally, of any foreign substance. A positive test, indicating the presence of a foreign substance (except as set forth in paragraphs 12 and 13 of this Section), creates the presumption of failure to meet the duty imposed by this rule.”

The Administrative Code provisions give trainers exclusive responsibility, notwithstanding others’ actions, for the care and condition of their horses. The Respondent denies responsibility for the occurrence, and places the blame on another individual without admitting that he had responsibility for what occurred.

In this case, denial of responsibility is no defense. Nor is it a mitigating factor in determining guilt and consequences. If the Director were to accept this defense, it would be too easy for licensees to avoid responsibility and the sanctions they deserve. More importantly, the Department of Racing would not be able to properly enforce the laws that protect the safety and integrity of the industry.

The Department of Racing has been both proactive and aggressive in its efforts to identify and enforce animal medication violations. This is a critical issue throughout the entire horseracing industry as there has been an increased realization that the testing and enforcement of horse drug issues are essential to maintain the integrity of the industry.

Bennett appealed the Director’s decision to the Racing Commission, arguing that it was “not justified by the evidence and is contrary to law.” He further claimed that he received an “excessive penalty.” The Racing Commission heard arguments from counsel at its meeting on June 14, 2007.<sup>7</sup> It subsequently issued a written decision affirming the orders of the Board of

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<sup>7</sup> Although the Racing Commission’s meeting was tape-recorded, apparently the tape was re-used, so that there is no recording or transcript of the meeting. Counsel agreed that they both presented arguments and responded to questions from Commission members. Although plaintiff was present telephonically, neither counsel could recall whether Bennett participated in any substantive fashion in the proceedings. Had the Commission accepted new evidence, the lack of a recording/transcript might be problematic. There being no indication that this occurred, though, this court is not hampered in its ability to review the agency’s final decision. *See Schmitz v. Arizona State*

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Stewards and the Director. Plaintiff thereafter filed a timely complaint for judicial review in the Superior Court. Pursuant to the parties' stipulation, this court granted a stay of the agency's disciplinary action while these proceedings were pending.

**Legal Analysis**

A.R.S. § 12-910(E) sets forth the scope of this court's review, stating:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

As a threshold matter, the court notes that plaintiff makes arguments on appeal that he did not raise below. For example, he now argues that the prohibited levels of Clenbuterol are not codified or clearly established and conveyed to licensees. The failure to raise an argument before an administrative tribunal generally precludes judicial review of that claim on appeal unless it is jurisdictional in nature. *DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 686 P.2d 1301 (App. 1984); *Rouse v. Scottsdale Unified School Dist. No. 48*, 156 Ariz. 369, 752 P.2d 22 (App. 1987). Plaintiff's challenge is not jurisdictional. Moreover, as noted *supra*, in the proceedings below, plaintiff himself described the test findings as "300% above the legal limit for Clenbuterol." He also stated at the outset of the Director's hearing that he was not contesting the fact that Queena Nina had an excessive amount of Clenbuterol in her system. The Stewards' notice of hearing alleged that there was a "positive finding of a prohibited substance "Clenbuterol" (class 3) *in excess of the official threshold (5 ng/ml)*"<sup>8</sup> in Queena Nina's system. Plaintiff could have litigated this issue below, but failed to do so. The court will not address the matter for the first time on appeal.<sup>9</sup>

Nor can the court find that the agency's decision was arbitrary, capricious, or contrary to law. This court does not function as a "super agency" and may not substitute its own judgment for that of the agency where factual questions and agency expertise are involved. *See DeGroot v. Arizona Racing Comm'n*, 141 Ariz. 331, 686 P.2d 1301 (App. 1984). The court reviews the

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*Board of Dental Examiners*, 141 Ariz. 37, 684 P.2d 918 (App. 1984) (in determining sufficiency of administrative record, threshold question is whether the record is complete enough to reflect the basis for the agency's decision so as to enable meaningful judicial review).

<sup>8</sup> Emphasis added.

<sup>9</sup> As noted *supra*, the court has not considered documents attached to plaintiff's opening brief that are not part of the administrative record. Moreover, plaintiff failed to preserve any proportionality argument below based on California's regulatory structure.

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record to determine whether there has been “unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.” *Petras v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981), quoting *Tucson Public Schools, District No. 1 of Pima County v. Green*, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972). Judicial deference is given to agencies charged with the responsibility of carrying out specific statutes or regulations. *Blake v. City of Phoenix*, 157 Ariz. 93, 754 P.2d 1368 (App. 1998); *Baca v. Arizona Dept. of Economic Security*, 191 Ariz. 43, 951 P.2d 1235 (App. 1998); *Maldonado v. Arizona Dept. of Economic Security*, 182 Ariz. 476, 897 P.2d 1362 (App. 1994).

Substantial evidence supports the determination that plaintiff violated A.A.C. R19-2-111(C), which states: “Trainers shall be responsible for the condition of horses under their care and are required to protect such horses from acts of other parties.” Similarly, the record supports the conclusion that Bennett ran afoul of A.A.C. R19-2-112(16), which provides: “The trainer, groom, and any other person charged with the custody and care of a horse is required to protect and guard the horse against administration, either internally or externally, of any foreign substance. A positive test indicating the presence of a foreign substance (except as set forth in subsection (12) and (13) of this Section), creates the presumption of failure to meet the duty imposed by this rule.”

Turning to the sanction decision, this court’s scope of review is limited. In *Petras v. Arizona State Liquor Board*, the court stated:

[P]etitioner’s sole contention is that the sanction imposed by respondent was excessive. In this situation, the role of the courts in reviewing the penalty imposed by an administrative agency is extremely limited. Indeed, it is well settled that “where the finding of guilt is confirmed and punishment has been imposed, the test is whether such punishment is ‘so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness.’”

*Petras v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981). See also *Lathrop v. Ariz. Board of Chiropractic Examiners*, 182 Ariz. 172, 894 P.2d 715 (App. 1995) (courts will not disturb a penalty imposed by an administrative body unless there has been a clear abuse of discretion); *Schillerstrom v. State*, 180 Ariz. 468, 471, 885 P.2d 156, 159 (App. 1994) (an administrative penalty is excessive “only if it is so disproportionate to the offense as to shock one’s sense of fairness.”).

The \$500 fine and 30-day suspension were well within the agency’s authority, were not the maximum authorized penalties, and are not so disproportionate to the offense as to shock one’s sense of fairness. The Director articulated valid reasons for the agency’s strict

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enforcement of medication standards. Even if this court would have imposed a lesser penalty, it cannot label the Department's decision inappropriate. "Abuse of discretion" is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Torres v. North American Van Lines, Inc.*, 135 Ariz. 35, 658 P.2d 835 (App. 1982). "A difference in judicial opinion is not synonymous with 'abuse of discretion.'" *Quigley v. City Court*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982).

IT IS ORDERED affirming the final decision of the Arizona State Department of Racing/Arizona Racing Commission.

IT IS FURTHER ORDERED rescinding the stay order issued by this court on August 27, 2007.

/s/ Margaret H. Downie  
HON. MARGARET H. DOWNIE