

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

FILED
1987 JUL 31 PM 2:37
SECRETARY OF STATE

NOTICE OF AN EMERGENCY RULE

AGENCY: Racing Commission TITLE NUMBER: 178

CITE AUTHORITY: WV Code § 19-23-6 (a) (3)

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES , NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: Series 1

TITLE OF RULE BEING AMENDED: Thoroughbred

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: _____

TITLE OF RULE BEING FILED AS AN EMERGENCY: _____

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE UPON FILING.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

Changes are being made to update our rules and therefore bringing them up to the standards of all other thoroughbred racing states.

Use Additional Sheets If Necessary.



DATE: July 31, 1987

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: West Virginia Racing Commission

EMERGENCY RULE TITLE: Thoroughbred: See attached sheet for enumeration.

1. Date of filing: July 31, 1987
2. Statutory authority for promulgating the emergency rule: West Virginia Code § 19-23-6(a) (3)
3. Date of filing of proposed legislative rule: July 31, 1987
4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?
These emergency rules adopt new language (these are amendments to existing rules.)
5. Has the same or similar emergency rule previously been filed and expired?
No
6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.
These rules provide for the orderly distribution of pari-mutuel pool money to the public, state and other statutorily designated parties.
Without these rules there would be no formula for distribution of the pari-mutuel pools which would be chaotic and not conducive to the public peace, health, safety or welfare.

These changes are being made to update our rules to reflect current needs in our State which have to be met as is the case in other racing states in meeting the needs and challenges confronting us today.

CharlesTown Races



Post Office Box 551 Charles Town, West Virginia 25414 • 304-725-7001

August 27, 1987

Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, WV 25305

Attention: Rich Hartman

Dear Sir:


The West Virginia Racing Commission recently filed amended rules and regulations for thoroughbred racing under the emergency legislative rules procedure. Section 15, Article 3, Chapter 29A states that an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, safety or welfare, health or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

Nothing in these amended rules would appear to fall within the scope of this provision. Certainly the provision of rule 61.3, to which we specifically protest, are not of this nature.

Section 19 - 23 - 13(a) of the West Virginia code specifically spells out the timing for the remittance of outstanding ticket monies to the West Virginia Racing Commission. By the proposed Rule Change (61.3), the Commission effectively would amend the statute to our detriment.

We respectfully request that you disapprove such rules and regulations (and specifically rule 61.3) on the grounds that an emergency does not exist justifying the promulgation of the rule as provided by Section 15A, Article 3, Chapter 29A of the code.

Sincerely,


Donald E. Hudson
General Manager

DEH:cb

DALE BAIRD, PRESIDENT
R.D. BOX 309
NEW CUMBERLAND, WV 26047
RESIDENCE (304) 387-0505



LORA BAILEY, SECY. TREAS.
R.D. BOX 178
GEORGETOWN, PA 15043
(412) 573-9804

Waterford Park Division
Horseman's Benevolent and Protection Association

c/o Waterford Park, Chester, W.Va. 26034 Telephone: (304) 387-9772

ALEX FABRIZIO, Vice President

Committee

Nancy Booth
Anna Eddy
Linda McGaffic
Valeria McMichael
Glen Witherow
John Abrams, 1st Alt.
Martin Adams, 2nd Alt.

Committee

Alex Fabrizio
Dory Maxwell
Tony Polichena
John Semer
John Yaquina
Richard Chambers, 1st Alt.
John Geyer, 2nd Alt.

August 29, 1987

Hon. Ken Hechler
Secretary of State
State Capitol
Charleston, WV 25305

Attention: Rich Hartman

Dear Sir:

We have just received notice that the West Virginia Racing Commission filed the revised Thoroughbred Rules of Racing on an emergency basis to become effective September 1, 1987. Section 15, Article 3, Chapter 29A states that an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

We feel that there is nothing in these amended rules that would justify an emergency. We specifically protest rule 37.23 and do not feel that this rule is an emergency or that it should be amended without consideration being given to both parties involved. (Jockeys and Horsemen).

We respectfully request that you disapprove these rules and regulations, specifically rule 37.23, on the grounds that an emergency does not exist justifying the promulgation of the rule as provided by Section 15A, Article 3, Chapter 29A of the code.

Sincerely,

Dale Baird

Dale Baird, President
H.B.P.A. Mountaineer Park

DB:lib

cc: WV Rules Making Committee

Horsemen's Benevolent and Protective Association, Inc.

CHARLES TOWN DIVISION-P.O. BOX 581-CHARLES TOWN, WEST VIRGINIA 25414
code 304-725-7001 ext. 308

Vice President
Robert P. Rawlings

James A. Palmer, President

Secretary/Treasurer
Rodney P. Peters

Board Members
Owners
Edward Boyd
Patricia Johnson
Don Norman
Robert Orr
Robert Palmer
ALT
Charles Russell



Trainers
Randy Funkhouser
John McKee
Vincent Moscarelli
Robert Rawlings
Frank Smith, Jr.
ALT
Richard Shockey
Harold McCormick

August 18, 1987

Mr. Rich Hartman
C/O The Secretary of States Office
State Capitol
Charleston, W Va 25305

Dear Mr. Hartman;

On behalf of the twenty eight hundred members of the Charles Town H.B.P.A., which we represent, we would like to protest one of the emergency rule changes submitted by the West Virginia Racing Commission.

We are virtually unanimously opposed to the jockeys receiving any additional monies. The Jock mount fees charged to our members have risen from nine hundred thousand dollars, to just over one million two hundred thousand dollars per year during the last several years. The increase which the Commission is trying to have approved would cost horsemen an additional seventy to one hundred thousand dollars per year.

On the following page is an illustration of expenses incurred by Owners racing their horses at Charles Town. The illustration will point out quite clearly why we are opposed to any raises to Jockeys.

Sincerely,

A handwritten signature in cursive script that reads "James A. Palmer".

James A. Palmer, President
Charles Town Division H.B.P.A.

TOTAL PURSES PAID AT CHARLES TOWN 1986		\$ 7,901,893
\$ 20 per day training expense per horse	7,300	
blacksmith fees-shoeing	540	
veterinarian fees	<u>500</u>	
TOTAL EXPENSES PER HORSE	8,340	

1,500 horses in training per year 12,510,000*

* does not include purchase price of horse

Jockey fees		<u>1,200,000</u>
TOTAL EXPENSES	\$	13,710,000
TOTAL INCOME		<u>7,901,893</u>
TOTAL LOSS		<u>5,808,107</u>

COMPARISON OF PURSES

	1987	1986	1980
AVERAGE PURSE PER RACE	\$ 3,400	\$ 3,200	2,400
OWNERS SHARE	2,040	1,920	1,440
JOCK MOUNT FEES			
winner	204	192	144
second place	45	45	45
third place	35	35	35
unplaced 7 horses	<u>210</u>	<u>210</u>	<u>210</u>
TOTAL	494	482	434

nonexistent office. The other is disqualification by express legislation." The Court, further discussing the question, held that "an office is vacated by refusal of the elected member to accept it, communicated to the proper authorities; refusal to qualify; resignation; and death. In all other instances, such as expulsion, adjudication of a controverted election, disqualification by act of the party, and acceptance of an incompatible office, ascertainment of the fact and declaration of the existence of the vacancy are necessary." See Calley v. Blake, 126 W.Va. 696, 29 S.E.2d 634.

In accordance with the principle laid down in State v. Farrar, supra, and supported by other authorities, we are of opinion that the disqualification of Seabolt to hold the office of mayor of the Town of Cedar Grove, if such disqualification exists, results from his own act, and that the ascertainment of the removal of his residence from the Town of Cedar Grove must be had, and, if he is disqualified to hold his office by reason of change of residence, that a declaration of a vacancy is necessary before a writ of mandamus to fill the vacancy would lie.

Accordingly, we deny the writ of mandamus prayed for by relators.

Writ denied.



STATE ex rel. SPIKER v. WEST VIRGINIA RACING COMMISSION et al.

No. 10364.

Supreme Court of Appeals of West Virginia.

Submitted Jan. 30, 1951.

Decided March 1, 1951.

Original proceeding by the State on relation of Clarence W. Spiker to secure a writ of mandamus to compel the West Virginia Racing Commission, and others, to set aside the findings of the Commission in suspending a race horse owned by petitioner. The Supreme Court of Appeals, Haymond, J., held that rules of the West Virginia Racing

Commission providing for the suspension of a horse whose saliva or urine discloses the presence of any narcotic, stimulant or drug, and for the return and redistribution of the purse won by a horse found to be stimulated, are valid and not violative of any provision of the State or Federal Constitution.

--Writ denied.

1. Administrative law and procedure 386
Theaters and shows 1

Under the statute conferring power on the West Virginia Racing Commission to prescribe rules, regulations and conditions under which horse races should be conducted in the State, Commission has the authority to promulgate and enforce rules which provide that a horse owned by any person may be suspended when its saliva or urine shows presence of any narcotic, stimulant or drug, and that the purse won by a horse found to have been stimulated should be returned and redistributed. Code, 19-23-12 to 19-23-23.

2. Administrative law and procedure 390
Theaters and shows 3

Rules of the West Virginia Racing Commission providing for the suspension of the horse whose saliva or urine discloses the presence of any narcotic, stimulant, or drug, and for the return and the redistribution of the purse won by a horse found to be stimulated, are valid and are not violative of any provision of the State or Federal Constitution. Code, 19-23-12 to 19-23-23; Const. art. 3, § 10; U.S.C.A. Const.Amends. 5, 14.

3. Administrative law and procedure 455
Theaters and shows 3

Where petitioner before West Virginia Racing Commission presented his own testimony, submitted the matter for decision and did not request a continuance of the hearing or ask for further time to obtain or produce testimony of any other witness, petitioner was deemed to have waived any defect in the notice of hearing by the Commission.

4. Administrative law and procedure 455

A general appearance before an administrative tribunal and participation in a hearing held by it, by person to whom a defective notice of such hearing is given,

constitutes a waiver by such person of all defects in notice and its service.

Syllabus by the Court.

1. Under the provisions of Section 1, Article 23, Chapter 71, Acts of the Legislature, 1935, Regular Session, conferring power upon the West Virginia Racing Commission to prescribe rules, regulations and conditions under which horse races shall be conducted in this State, such commission has the authority to promulgate and enforce rules which provide that a horse owned by any person may be suspended when its saliva or urine shows the presence of any narcotic, stimulant or drug, and that the purse won by a horse found to have been stimulated shall be returned and redistributed.

2. Rules Nos. 268 and 274, promulgated by the West Virginia Racing Commission, which respectively provide for the suspension of a horse whose saliva or urine discloses the presence of any narcotic, stimulant, or drug, and for the return and the redistribution of the purse won by a horse found to be stimulated, are not violative of any provision of the Constitution of the United States or of the Constitution of West Virginia, and are valid.

3. A general appearance before an administrative tribunal and participation in a hearing held by it, by a person to whom a defective notice of such hearing is given, constitute a waiver by such person of all defects in such notice and in its service.

James M. Mason, III, F. D. Nichols, Charles Town, for relator.

William C. Marland, Atty. Gen., Thomas J. Gillooly, Asst. Atty. Gen., for respondents.

Robert O. Read, Columbus, Ohio, amicus curiae, on behalf of Dan Chappell, President, Horsemen's Benevolent & Protective Association.

HAYMOND, Judge.

In this original proceeding, instituted in this Court by the State of West Virginia

at the relation of Clarence W. Spiker, the petitioner Spiker seeks a writ of mandamus to compel the defendants, the West Virginia Racing Commission, a corporation, Mont M. McIntire, its Chairman, Frank J. Brooke, its Vice-Chairman, and Gordon P. Fought, a member of the Commission, to set aside the findings of the Commission, based upon the reported action of the stewards representing the Commission and the Wheeling Downs Racing Association, on September 6, 1950, in suspending a race horse, named Lucky Linda, owned by the petitioner, and its trainer, for a period of six months from that date, and in forfeiting the purse won by the horse in a race run on September 1, 1950, and to set aside an order made by the Commission on September 27, 1950, which confirmed the ruling of the stewards but which exonerated the petitioner of any guilt. Upon the filing of the petition on January 15, 1951, a rule was issued by this Court returnable January 30, 1951, and at that time this proceeding was heard and submitted for decision upon the petition, the answer of the defendants, the testimony given by the petitioner at a hearing held by the Commission on September 26, 1950, a brief of Horsemen's Benevolent and Protective Association, as amicus curiae, and the briefs and the oral arguments of the attorneys in behalf of the respective parties.

The material facts are not disputed and the questions presented are questions of law.

The petitioner is a duly licensed owner of thoroughbred race horses and in July, 1950, employed E. G. Hoffman, a reputable and experienced trainer to train the race horses owned and entered by the petitioner in various races conducted by licensed racing associations in West Virginia and in other states. He is also a breeder of thoroughbred race horses and operates and maintains, upon a farm in Berkeley County, West Virginia, an establishment of that character. He entered two of his horses at a meeting conducted by the Wheeling Downs Racing Association, a duly licensed association, during the period July 22, 1950, to September

30, 1950, at Wheeling, horse, Lucky Linda, fourth race held at September 1, 1950, of that race. After was subjected to a u by the rules of the C disclosed a positive urine contained a dr As a result of this September 6, 1950, and the trainer for a ordered the purse w forfeited and redist their action to the C won by Lucky Lind the horses entered ens". In horse rac ens" is a race in horses entered had It is evident that race and the pres urine of the winner that the drug had horse.

On September 5 man, who had re as to the result c tioner, who was t ing, in a telepho Commission had named Rugged " on Lucky Linda" the horse any r dope nature"; a September 6, 19 the telephone co the petitioner. tioner indicates to September 6 disclosed the pr urine of his ho pears that abou employed an att that his attorne 7, 1950, address ed that he rep owner of the stewards on S the petitioner v ist serving th presence of F from the hor

30, 1950, at Wheeling, West Virginia. The horse, Lucky Linda, was entered in the fourth race held at Wheeling Downs on September 1, 1950, and was the winner of that race. After the race, the horse was subjected to a urine test as provided by the rules of the Commission. The test disclosed a positive reaction and that the urine contained a drug known as procaine. As a result of this test, the stewards, on September 6, 1950, suspended the horse and the trainer for a period of six months, ordered the purse won by the horse to be forfeited and redistributed, and reported their action to the Commission. The event won by Lucky Linda was a race in which the horses entered were known as "maidens". In horse racing a race for "maidens" is a race in which none of the horses entered had ever been a winner. It is evident that the result of the fourth race and the presence of procaine in the urine of the winner convinced the stewards that the drug had stimulated the winning horse.

On September 5, 1950, the trainer, Hoffman, who had received some information as to the result of the test, told the petitioner, who was then absent from Wheeling, in a telephone conversation, that the Commission had "scratched" his horse named Rugged "due to suspicious findings on Lucky Linda" and that he had not given the horse any medicine "that was of a dope nature"; and on the following day, September 6, 1950, the trainer confirmed the telephone conversation in a report to the petitioner. The testimony of the petitioner indicates that he knew on or prior to September 6, 1950, that the test had disclosed the presence of procaine in the urine of his horse, Lucky Linda. It appears that about that time the petitioner employed an attorney to represent him and that his attorney by letter dated September 7, 1950, addressed to the Commission, stated that he represented the petitioner, the owner of the horse suspended by the stewards on September 6, 1950, and that the petitioner was informed that the chemist serving the Commission reported the presence of procaine in the urine taken from the horse after winning the race

on September 1, 1950, at Wheeling Downs, and requested that an early hearing of the matter be granted the petitioner. In response to the foregoing letter the secretary of the Commission, by letter dated September 12, 1950, notified the attorney for the petitioner that the request for a hearing had been granted and that the hearing would be held on Tuesday, September 26, 1950, at 10:00 A. M. at the office of the Commission at Wheeling Downs, Wheeling, West Virginia.

On September 26, 1950, the petitioner and his attorney appeared before the Commission and the hearing was held. From the transcript of the proceedings it appears that the petitioner, by his attorney, objected to the sufficiency of the notice and that some discussion occurred between the attorney for the petitioner and the chairman of the Commission in which the attorney contended that because of the failure of the notice to contain a report of the finding of the stewards as required by Rule No. 98 of the Commission, he and the petitioner had not been informed of the charge against the horse. Notwithstanding the objection to the sufficiency of the notice, the attorney for the petitioner, after being asked if he was then ready for a hearing with respect to the horse, replied in the affirmative and the Commission proceeded with the hearing. The only testimony produced at the hearing was that given by the petitioner. He gave evidence in relation to various matters about which he was interrogated and in the course of his examination testified that at the time the race was run and won by his horse on September 1, 1950, he was not present at Wheeling Downs; that the horse was sound; and that procaine is a drug but is not a stimulant. He indicated that procaine would relieve pain, but stated that he did not know that his horse, Lucky Linda, had been or was to be given any stimulant or drug; and that he did not authorize or permit anyone to administer any such substance. After the hearing was concluded, the Commission, on September 27, 1950, approved the findings of the stewards, entered the order of which the petitioner complains, and by letter of that

guilty of corrupt, fraudulent or improper practice or conduct, or violation of any of the rules of the Association, the Secretary of the West Virginia Racing Commission shall at once notify such person of such decision by the West Virginia Racing Commission and the ruling of the said Stewards shall be final and conclusive by the order of the West Virginia Racing Commission.

"In the event the West Virginia Racing Commission finds that the party protesting was not guilty, the action of the stewards shall be set aside and revoked.

"268. No narcotic, stimulant or drug shall be used, no drench of anything shall be administered, and no electrical, mechanical or other appliance other than the ordinary whip shall be used for the purpose of stimulating the horse or affecting his speed in any way in a race. Any person so offending shall be suspended for not less than six months, and, also, any horse showing positive from a saliva and/or urine test shall be suspended, and the case referred to the West Virginia Racing Commission for any further action deemed necessary.

"269. Any trainer, who injects, gives, uses or administers any drugs or medicines of any kind whatsoever, or who authorizes, allows or permits any other person to give, inject or administer any drugs of any kind whatsoever to a horse within forty-eight hours prior to the running of a horse in a race, must give notice to the stewards of the use, injection or administering of said drugs or medicines prior to the running of said race. Any trainer failing to give such notice may be suspended or his license revoked.

"If a horse is scratched as a result of such medication, said horse cannot be entered again for five racing days.

"271. Any owner, trainer, foreman, groom, stable employee or other person connected with any stable found with any narcotic drug in his possession while upon the grounds of any of the tracks under the jurisdiction of the West Virginia Racing Commission shall be ruled off, and such possession shall be deemed sufficient evi-

dence for such ruling without further proof.

"272. Every owner or his authorized agent or trainer of any horse or horses entered to race on any race track licensed by the Commission to operate a race track, shall immediately at any time when requested by the Commission or any of its agents or employees, submit any horse or horses, of which he is the owner or authorized agent or trainer to any veterinary surgeon designated by the Commission for such examination or tests as said veterinarian may deem advisable to make.

"273. The saliva and urine of the winner of each and every race must be taken and from such other horses as the Stewards may direct. In all such cases the trainer shall be held responsible for the condition of his horse or horses. In the event the horse or horses from which said saliva and/or urine has been taken shall have been found by the chemist to show evidence of the administration of narcotics or drugs, said responsible person so offending shall be suspended for not less than six months, and the case referred to the West Virginia Racing Commission, for any further action deemed necessary.

"274. The veterinarian, as soon as possible, shall send or deliver to the chemist designated by the West Virginia Racing Commission, a sample of such saliva and/or urine for analysis, and said chemist shall report to the presiding Steward the result thereof. Should the report of such chemical analysis disclose a positive result indicating a narcotic, stimulant or drug had been administered, or should any chemical analysis of other excretions of body fluids taken from any horse, which has run in any race, disclose beyond doubt that a narcotic, stimulant or drug has been used, any person so offending shall be suspended for not less than six months, and the case referred to the West Virginia Racing Commission for any further action deemed necessary.

"Any purse won by a horse found to have been stimulated shall be returned, and the same, upon its return, shall be redistributed as if said horse had been dis-

particulars, and as modified are now respectively Rules Nos. 268, 273 and 274 and are also quoted earlier in this opinion.

In the Morris case, Rule No. 245 was assailed as invalid. Rule No. 245, considered in the Morris case, then contained this language: "245. No narcotic, stimulant or drug shall be used, no drench of anything shall be administered, and no electrical, mechanical or other appliances other than the ordinary whip shall be used for the purpose of stimulating the horse or affecting his speed in a race. Any person so offending shall be suspended for not less than six (6) months, and also any horse showing positive from a saliva test or urine test, containing drugs or stimulant shall be disqualified, and the case referred to the West Virginia Racing Commission for any further action deemed necessary." The same rule, now Rule No. 268, quoted above, is expressed in these words: "No narcotic, stimulant or drug shall be used, no drench of anything shall be administered, and no electrical, mechanical or other appliance other than the ordinary whip shall be used for the purpose of stimulating the horse or affecting his speed in any way in a race. Any person so offending shall be suspended for not less than six months, and, also, any horse showing positive from a saliva and/or urine test shall be suspended, and the case referred to the West Virginia Racing Commission for any further action deemed necessary." It will be readily observed that the only material change in the rule in its present form and the rule in the form in which it was considered in the Morris case is that the phrase "any horse showing positive from a saliva test or urine test, containing drugs or stimulant shall be disqualified" has been superseded by the present phrase "any horse showing positive from a saliva and/or urine test shall be suspended". Rule No. 248, specifically assailed as invalid in the Morris case and there upheld as valid, has been modified to the extent of the omission of the provision which imposed responsibility upon the stable foreman or the groom in charge of the horse in case of the unavoidable absence of the trainer

and the rephrasing of the provision which suspended the responsible person in case any urine test of a horse was found to be positive; and that rule, as so modified, is Rule No. 273, quoted earlier in this opinion. Rules Nos. 249 and 249A, involved and considered in the Morris case, with certain changes not material in the decision of this case, are now incorporated in Rule No. 274, also quoted earlier in this opinion. The provision of Rule No. 249A relating to the forfeiture and the redistribution of any purse won by a horse found to have been stimulated is at present in Rule No. 274 in the identical form, except punctuation, in which it formerly appeared in Rule No. 249A.

The rules under consideration in the Morris case, which, as above indicated, are substantially the same as those dealing with the same subject matter, quoted in this opinion, were upheld as valid and as not violative of any provision of the Constitution of the United States or of the Constitution of this State. Though the writer of this opinion dissented from the decision of this Court in the Morris case, he and the other members of this Court recognize the binding force and effect of the decision in that case and consider it applicable to, and adversely decisive of, the contentions of the petitioner that the rules of the Commission, assailed as invalid in this proceeding, are invalid because not authorized by the statute and because they are violative of the due process of law provisions of the Constitution of the United States and of the Constitution of West Virginia. In that case, in sustaining the power of the Commission, under the rule making provisions of the statute, to promulgate the rules then under consideration, and in upholding their validity, this Court said: "We are of the opinion, therefore, that the grant of regulatory power made to the West Virginia Racing Commission by the Legislature, in the exercise of its police power, was legal and valid; and that in consideration of all the circumstances surrounding the establishment and operation of race tracks, and the racing of horses thereon, the Racing Commission, in the promul-

gation of Rules Nos. 245 to 249-A, both inclusive, did not exceed the power so granted. Admittedly the said rules, especially Rule 248, constitute a harsh exercise of power, but in the circumstances, under which some rule fixing responsibility would seem to have been imperative, we think it was a necessary and valid exercise of power. As stated above, the power to assure fairness in racing must rest somewhere, and responsibility therefor must be definitely fixed, if any practical results are to be expected. * * * Making the owner-trainer or the trainer responsible for the condition of his horse when it enters a race is one way, and perhaps the best way, of assuring the racing authorities, and the track patrons, that the race will be fair. In our opinion, a rule which so provides cannot be held to be unreasonable or in violation of any statutory or constitutional right." In the syllabus, in specifically sustaining the validity of one of the challenged rules, this Court used this language: "Rule No. 248, framed and promulgated by the West Virginia Racing Commission, under the power of regulation granted to it by the Legislature of this State, by Chapter 71, Acts of the Legislature, 1935 * * *, is a valid exercise of the police power of the State, as related to horse racing over which the State has assumed control, legally delegated to such Racing Commission by the Legislature, and is not violative of any provision of the State or Federal Constitutions." Under the authority of the Morris case, which is recognized as the settled law of this State and is now adhered to by this Court, both contentions of the petitioner are rejected and the validity of each of the rules challenged in this proceeding is upheld.

The petitioner insists that the decision in the Morris case, which upheld the validity of Rule No. 248 dealing with the suspension of the trainer of a horse the test of whose urine was found to be positive with respect to narcotics does not apply to, or sustain as valid, any rule of the Commission which imposes a penalty against an owner who does not act as trainer of his horse. In the Morris case

the trainer who was suspended by the Commission under Rule No. 248 was also the owner of the horse. It is contended that there is a valid distinction between the rule of the Commission which authorizes the suspension of a trainer of the horse who is also its owner and the rules which prohibit the owner of a suspended horse from racing it during the period of suspension and deprive the owner of the purse won by such horse. There is no merit in this contention. As already indicated, of necessity, valid rules of the Commission may be adopted and promulgated which apply to and regulate the conduct of, and impose penalties upon, an owner and a trainer alike whether the trainer and the owner are the same person or different persons. It is clear that under the statute, the Commission has the power and the authority to adopt, promulgate, and enforce rules that relate and apply to either or both. There is, however, a clear distinction between the effect of the action of the Commission in the Morris case and the effect of its action in this case. In the Morris case, because the owner was also the trainer of the suspended horse and other horses, the suspension of the trainer prevented other horses trained by him from participating in races during the period of suspension. In this case, however, the order of the Commission does not suspend the petitioner as the owner of the suspended horse from entering any other horse owned by him in any race or does not undertake directly to interfere with his activities as a breeder of horses. In fact, the order of the Commission expressly holds that the petitioner, as owner, is blameless and free from fault and it adversely operates directly against him only to the extent that it suspends a particular horse owned by him and deprives him of the purse won by that horse.

[2] In the majority opinion in the Morris case, this Court, in language which applies to and adversely disposes of the first two contentions advanced by the petitioner, said: "The State of West Virginia being in full possession of its police power, the Legislature, as a depository of that power,

had the right to en- regulation of horse to delegate that por- ing Commission; ar- the rules and regul- are now concerned. State's power lawfu- ed. The questions er irrebuttable or involved. What is of the State to ma- regulation which in- the morals and pr- good of the State a- As enacted, our rac- management thereo- sion, and gave it co- rules and regulatio- so it has chosen to- and trainers of hor- absolute responsib- of the horses. The- presumption involv- cise of naked, but r- trol a business wh- requires strict cont- to the proposition- immunities of citiz- under the Fourtee- Constitution of the- wise, shall be so fa- the power of the S- control over horse- tivities, requiring- interests of the co-

[3,4] The rem- petitioner is that- mission which foll- September 26, 19- notice of the hear- and, in consequ- deprived of his rig- termination of the- is clear that the r- mission, because c- port of the findin- not satisfy the- Rule No. 98 of th- the notice was cl- respect, it was su- tioner of the tir- hearing; and pur-

had the right to enact legislation for the regulation of horse racing; had the right to delegate that power to the State Racing Commission; and the promulgation of the rules and regulations with which we are now concerned, was an exercise of the State's power lawfully and legally delegated. The questions of presumption, whether irrefutable or otherwise, are not here involved. What is involved is the power of the State to make a particular rule or regulation which it deems necessary for the morals and protection of the public good of the State and its people. * * * As enacted, our racing laws delegated the management thereof to a Racing Commission, and gave it complete power to adopt rules and regulations therefor. In doing so it has chosen to impose upon the owners and trainers of horses entered for racing absolute responsibility as to the condition of the horses. There is no question of any presumption involved. It is a plain exercise of naked, but necessary, power to control a business which, in its very nature, requires strict control. We cannot assent to the proposition that the privileges and immunities of citizens of the United States, under the Fourteenth Amendment to the Constitution of the United States, or otherwise, shall be so far extended as to destroy the power of the State to exercise its police control over horse racing, and other activities, requiring strict regulation in the interests of the common good."

[3, 4] The remaining contention of the petitioner is that the action of the Commission which followed the hearing held on September 26, 1950, is void because the notice of the hearing was fatally defective and, in consequence, the petitioner was deprived of his right to a fair trial and determination of the questions involved. It is clear that the notice given by the Commission, because of its omission of the report of the findings of the stewards, did not satisfy the express requirement of Rule No. 98 of the Commission. Though the notice was clearly insufficient in that respect, it was sufficient to advise the petitioner of the time and the place of the hearing; and pursuant to the notice, the

petitioner and his counsel appeared at the designated time and place. The petitioner, by his attorney, objected to the notice as insufficient because it failed to contain a report of the finding of the stewards, and insisted that, because of that omission, the petitioner was not advised of the character of the hearing or given an opportunity to present his defense against the finding of the stewards; but the petitioner and his attorney participated fully in the hearing and did not accept the offer of the Chairman of the Commission to afford the petitioner a further hearing in the matter. It also appears, from the testimony of the petitioner at the hearing on September 26, 1950, that he knew that the charges affecting him were based upon the presence of the drug procaine in the urine of his horse, as disclosed by the test, and it is not apparent how or in what manner the failure of the notice to state the findings of the stewards, which would have disclosed that fact, deprived him of any information or evidence material to his defense that could not have been used at a subsequent hearing involving those matters, which hearing the Commission at the time indicated its willingness to grant but which the petitioner failed to agree to or accept. Instead of insisting upon any proposed or suggested further hearing, the petitioner offered his own testimony and submitted the matter for decision. He did not request a continuance of the hearing or ask for further time to obtain or produce testimony of any other witness. In the circumstances the petitioner must be deemed to have waived any defect in the notice, and he can not now be heard to complain of its insufficiency. Numerous decisions of this Court declare that appearance and participation by a defendant in the trial of the merits of a proceeding operate as a waiver of alleged defects in and objections to the process or the return of service of such process. *Damron v. Williamson Construction & Engineering Co.*, 109 W.Va. 122, 153 S.E. 250; *Chilhowie Lumber Co. v. Lance*, 50 W.Va. 636, 41 S.E. 128; *State v. Thacker Coal & Coke Co.*, 49 W.Va. 140, 38 S.E. 539; *Blankenship v. Kanawha & Michigan Railway Co.*, 43 W.Va. 135, 27 S.E. 355;

Layne v. Ohio River Railroad Co., 35 W. Va. 438, 14 S.E. 123; Mahany v. Kephart & B. & O. R. Co., 15 W.Va. 609. In Harvey v. Skipwith, 16 Grat., Va., 410, the opinion contains this language: "It is a well established rule that by appearing and pleading to the action the defendant waives all defects in the process and in the service thereof. The cases go further and imply such a waiver from the defendant's taking or consenting to a continuance, as fully as they do from his pleading to the action. The object of the writ is to apprise the defendant of the nature of the proceeding against him. The fact of his taking or agreeing to a continuance is evidence of his having made himself a party to the record, and, of his having recognized the case as in court. It is too late for him afterwards to say that he has not been regularly brought into court."

The writ of mandamus, prayed for in the petition, is denied.

Writ denied.



ADAMS v. FERRELL et al.
No. 10232.

Supreme Court of Appeals of West Virginia.

Submitted Jan. 16, 1951.

Decided March 1, 1951.

Suit in equity instituted by Sallie Adams against Willie Arthur Ferrell, and others, to obtain a release of a deed of trust upon certain land owned by the plaintiff, and to have the deed of trust cancelled and declared to be void as a cloud upon her title. The Court of Common Pleas, rendered a decree which granted plaintiff relief prayed for. The Circuit Court, Kanawha County, refused an appeal from the final decree of the Court of Common Pleas and an appeal was granted by the Supreme Court of Appeals. The Supreme Court of Appeals, Haymond, J., held that finding by trial chancellor was neither against preponderance of evidence nor clearly wrong and would therefore not be disturbed.

Affirmed.

1. Appeal and error ⇒1009(3)

A decree based on conflicting evidence will be reversed when it appears that it is contrary to preponderance of evidence or is clearly wrong, but findings of trial chancellor based on conflicting evidence will not be disturbed on appeal unless such findings are clearly wrong or against preponderance of evidence.

2. Appeal and error ⇒1009(3)

A decree based on conflicting depositions, which are of such doubtful and unsatisfactory character that different courts might reasonably disagree as to facts proved by, or proper conclusion to be deduced from, will not be reversed on appeal.

3. Appeal and error ⇒1009(4)

In suit to obtain a release of a deed of trust upon certain land owned by plaintiff, and to have deed of trust cancelled and declared to be void as a cloud on her title, finding that 94 interest bearing notes executed by prior owner and secured by the deed of trust had been paid was not against preponderance of evidence nor clearly wrong.

Syllabus by the Court

The finding of fact of a trial chancellor, based on conflicting evidence, will not be disturbed on appeal unless it is clearly wrong or against the preponderance of the evidence.

M. O. Litz, Charleston, for appellants.

Jackson D. Altizer, Charleston, for appellee.

HAYMOND, Judge.

This suit in equity was instituted in the Court of Common Pleas of Kanawha County on May 4, 1945, by the plaintiff, Sallie Adams, to obtain a release of a deed of trust upon certain land owned by the plaintiff, executed by R. H. Thomas and Helen Thomas, husband and wife, to W. L. Poling, trustee, dated February 14, 1924, and to have that instrument cancelled and declared to be void as a cloud upon her title. Willie Arthur Ferrell, Mary Logan Ferrell and William Ferrell, often referred to in the record as W. A. Ferrell, were named as

defendants in the proceeding to the test Ferrell, Willie Arthur and William Ferrell. The question involved bearing notes in the each, executed by J to the defendant, W ed by the above m have been paid. Th the bill of complain the joint and separ defendants, and upon respectively taken a plaintiff and the de cree entered Decem of Common Pleas relief prayed for in ordered the release declared it to be n the plaintiff, and dir A. Ferrell, who is as William Ferrell Logan Ferrell, to release of the deed fed period, and a missioner to execu lease in the event Ferrell, failed or that provision of th

By decree enter Circuit Court of K an appeal from t Court of Common decree of the Circ granted by this Co

By deed dated A view Company, a conveyed to the d three lots or parce erals and mineral view Addition, C awna County. Th here involved are and it appears to ignated in the al Lot "C". On No defendants, W. A. Ferrell, his wife, Mortgage and Dis and as evidence o promissory notes \$22.05 each. The

September 28, 1956

Auditor.

General
Agent

Following questions:

1. Are supplemental or excess salaries required to pay the income of the 1956 Legislature previously provided in supplemental or excess

2. For eliminating the supervision of the basic and advanced salaries of the county board of education in the manner and direction in accordance with the requirements of Section 18, Article 9b, Sec-

3. The salary of teachers as set forth in West Virginia, and we quote

4. The rate of salary to be paid to teachers in accordance with the classifications and re-

5. The salary fixed for teachers in accordance with the schedule of the teachers. Such schedule:

6. For other certificates which require two years of collegiate work, or one year and one month.

7. The training required at the time of the certificate, not less than

8. For elementary, first-class high school graduates based on a bachelor's degree with not less than three hun-

9. For a master's degree in an intermediate or high school work, or have completed one year of collegiate elementary, or one year of equal rank, three hun-

10. For a doctor's degree from an institution approved to confer the same, or a master's degree, first-class high school graduates with not less than three hundred

11. The basic and advanced salary schedule in Section 11, Article 9A, Chapter 9A, as follows:

"In addition thereto, an amount of state aid necessary and for the purpose of paying basic and advanced salary increases for teachers, as provided by the fifty-second legislature, shall be allocated to each county in an amount sufficient to pay such increases for the number of full-time teachers actually employed within the county during the preceding school year."

An opinion was rendered by this office under date of December 14, 1944, to Dr. W. W. Trent, State Superintendent of Schools, and published in the Report and Opinions of the Attorney General, 1943-44, page 60, which considered the question of a county board of education increasing teachers' salaries above the basic or advanced salaries provided in Section 2, Article 7, Chapter 18 of the Code. We quote the following pertinent language from the said opinion:

"The only limitation placed on teachers' salaries under existing law is found in Section 2, Article 7, Chapter 18 of the Code, which provides that boards of education shall fix the rate of salary to be paid teachers in accordance with the classifications and requirements therein set forth. Minimum salaries are enumerated for the various classifications contained in this section, but no provision is made regarding maximum salaries."

The Supreme Court, in the case of *Lawson v. County Court*, 80 W. Va. 612, 92 S. E. 786, said:

"Within the limits fixed by law, the power and discretion of county courts, boards of education and municipal authorities, as to funds they legally provide themselves with for public expenses and improvements, by taxation, are supreme and uncontrollable by citizens and taxpayers. * * *"

We find no legislation which restricts the power and discretion vested in a county board of education to expend moneys they legally provide themselves from taxation for public expenses and improvements. Therefore, in view of the foregoing authority, we believe that the matter of increasing or reducing supplemental or excess salaries of teachers beyond the basic or advanced salaries as set forth in Section 2, Article 7, Chapter 18 of the Code, is within the discretion of the county board of education, subject to the approval of the State Board of School Finance, pursuant to Article 9B, Chapter 18 of the Code.

We trust this answers your inquiry.

No. 23

October 2, 1956

REQUESTED BY: John Ambrose, Chairman
W. Va. Racing Commission
Charleston, W. Va.

OPINION BY: John G. Fox, Attorney General
Fred H. Caplan, Assistant

We have your letter of August 28, 1956, wherein you request an official opinion as to whether Rule 61 of the Rules and Regulations of Racing is an unlawful interference with the internal business or affairs of a licensee, as contemplated by Chapter 13, Article 23, Section 15, of the Acts of the Legislature, Regular Session, 1956.

For your information Rule 61 and said Section 15 are quoted as follows:

Rule No. 61. "Each racing association applying for license to conduct racing on any track in West Virginia shall submit to the commission, at the time application for license is made to conduct such meet, the proposed total purse distribution together with the stake, purse, or reward, all of which shall be subject to the approval of the commission. The minimum purse shall not be less than four per cent of the total pari-mutuel handle. Each association, at least thirty days prior to the opening date of each race meeting, shall before publishing, submit to the commission the conditions for all races it proposes to hold, all of which shall be subject to the approval of the commission. The laws of West Virginia and the rules of racing supersede the conditions of the race or the regulations of the race meeting, and, in matters pertaining to racing, the orders of the association, and, in turn, the orders of the commission shall supersede the orders and rulings of the stewards. Failure to comply with this rule, said associations shall be fined two hundred fifty dollars for each day in violation."

Chapter 13, Article 23, Section 15. *Internal Affairs and Business of Licensee*. "The commission shall not interfere in the internal business or affairs of any licensee."

Does the provision in Rule 61 for a minimum purse of four per cent of the pari-mutuel handle constitute an interference in the internal business and affairs of a licensee? It is pertinent in arriving at an answer to this question to determine what powers and duties have been delegated by law to the Racing Commission. Chapter 13, Article 23, Section 1, of the 1956 Acts contains the following language in relation to the powers of the Commission:

"* * * Said commission shall have all the powers necessary to carry out fully and effectively all the purposes of this act, and shall have the power to prescribe reasonable regulations under which all races shall be conducted within the state of West Virginia except as hereinafter provided. * * *"

It is noted that the Legislature has delegated to the Racing Commission the powers necessary to carry out fully and effectively all the purposes of this act. The obvious purpose of the act is to regulate horse racing as permitted in this State. Our court said in *Spiker v. The West Virginia Racing Commission, et al.*, 135 W. Va. page 512, at page 520:

"* * * The general purpose of the statute which created the West Virginia Racing Commission is to legalize the business or the enterprise of horse racing under supervision and control of the State to be exercised by the Commission. * * *"

In relation to the regulating powers of the Racing Commission, the court, in *State ex rel. Morris v. The West Virginia Racing Commission*, 133 W. Va. 179 (1949), said:

"* * * Therefore, the Legislature, in enacting the racing statute, realized the importance and necessity of the power of regulation of racing, and gave to the Racing Commission, set up thereunder, full and complete powers of regulation. The language is broad and general; but it is assumed that it was intended to apply to all problems affecting horse racing, without going into particular detail, or without attempting to set up any particular standards under which the commission might act."

See also *Tweel v. West Virginia Racing Commission, et al.*, 135 W. Va. 531 (1953).

The propriety of re-established, it now beco Racing Commission can at hand, it appears that prescribe any reasonable business or affairs of an as to whether the amount the internal business or adjective describing the collegiate dictionary defini in the thing itself; not c

The payment of purses of horse racing under th no purse or reward, an amount of the purse or owner. In fact the offer an owner's entrance into the purse offered is a m of horse racing are vita that the offer of purses evidence at other tracks the quality of racing an track. This being so, it not a matter of internal matter which affects rac association or licensee, the organization itself, s employees.

If the Commission wer generally, what regulato ferred such powers. It that it intended to nullifi tically all of the regulati manner, the business or tion placed upon such p regulation which is inter erally cannot be said t affairs of the licensee.

It is our considered c prescribing a minimum stitute an interference i contemplated by Section constitute a valid regul mentioned in Rule 61 i are not prepared to com

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The propriety of regulation of horse racing by the state being well established, it now becomes necessary to consider what regulations the Racing Commission can reasonably formulate. In relation to the question at hand, it appears that the Racing Commission is authorized by law to prescribe any reasonable regulations which do not interfere in the internal business or affairs of any licensee. Again we are faced with the question as to whether the amount of purses paid to winners of horse races affects the internal business or affairs of the licensee. The word "internal" is an adjective describing the affairs "business" and "affairs." Webster's new collegiate dictionary defines internal as follows: "Belonging to or inherent in the thing itself; not derived from or dependent on anything external."

The payment of purses or rewards to winners of a race is the very essence of horse racing under the pari-mutuel system of wagering. If there were no purse or reward, an owner would not enter his horse in a race. The amount of the purse or reward is of great interest and concern to the owner. In fact the offer of a very low purse or reward may not warrant an owner's entrance into a race. We therefore believe that the amount of the purse offered is a matter with which persons engaged in the business of horse racing are vitally interested and earnestly concerned. It follows that the offer of purses or rewards in sums appreciably less than those in evidence at other tracks of similar nature and size could materially affect the quality of racing and could lead to the deterioration thereof at such track. This being so, it is our thought that the size of the purse offered is not a matter of internal business or affairs of the licensee but is rather a matter which affects racing as a whole. Internal business or affairs of the association or licensee, we believe, connotes matters of business within the organization itself, such as salaries or working hours of its officers or employees.

If the Commission were powerless to regulate matters which affect racing generally, what regulatory powers exist? The Legislature doubtless conferred such powers. It cannot be assumed, by the addition of Section 15, that it intended to nullify all regulatory powers of the Commission. Practically all of the regulations formulated by the Commission affect, in some manner, the business or affairs of the racing association. The only restriction placed upon such powers is that provided by said Section 15, and any regulation which is intended to promote the quality of horse racing generally cannot be said to be an interference in the internal business or affairs of the licensee.

It is our considered opinion, therefore, that the provisions of Rule 61, prescribing a minimum purse, if such minimum is reasonable, do not constitute an interference in the internal business or affairs of a licensee, as contemplated by Section 15, Article 23, Chapter 13 of the 1956 Acts, and constitute a valid regulation. Whether or not the four per cent figure mentioned in Rule 61 is reasonable is a question of fact upon which we are not prepared to comment.



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

CHARLES G. BROWN
ATTORNEY GENERAL

(304) 348-2021

CONSUMER HOT LINE
(800) 368-8808

December 23, 1987

Harry L. Buch, Chairman
West Virginia Racing Commission
Suite 310
Charleston, West Virginia 25301

Dear Mr. Buch:

This will acknowledge receipt of your letter of October 9, 1987, in which you request the opinion of the Attorney General with respect to the authority of the West Virginia Racing Commission. The specific question raised is whether or not the West Virginia Racing Commission may through the promulgation of rules and regulations regulate the fees paid to jockeys.

The authority of the West Virginia Racing Commission to regulate the racing of horses generally is found in Chapter 19, Article 23 of the Code of West Virginia of 1931, as amended (hereinafter Code). The West Virginia Racing Commission is established by Code 19-23-4. The powers and authority of the Racing Commission are found in Code 19-23-6 which provides in full as follows:

"The racing commission shall have full jurisdiction over and shall supervise all horse race meetings, all dog race meetings and all persons involved in the holding or conducting of horse or dog race meetings, and, in this regard, it shall have plenary power and authority:

"(1) To investigate applicants and determine the eligibility of such applicants for a license or permit or construction permit under the provisions of this article;

"(2) To fix, from time to time, the annual fee to be paid to the racing commission for any permit required under the provisions of section two [§ 19-23-2] of this article;

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"(3) To promulgate reasonable rules and regulations implementing and making effective the provisions of this article and the powers and authority conferred and the duties imposed upon the racing commission under the provisions of this article, including, but not limited to, reasonable rules and regulations under which all horse races, dog races, horse race meetings and dog race meetings shall be held and conducted, all of which reasonable rules and regulations shall be promulgated in accordance with the provisions of article three [§ 29A-3-1 et seq.], chapter twenty-nine-A of this Code;

"(4) To register colors and assumed names and to fix, from time to time, the annual fee to be paid to the racing commission for any such registration;

"(5) To fix and regulate the minimum purse to be offered during any horse or dog race meeting;

"(6) To fix a minimum and maximum number of horse races or dog races to be held on any respective racing day;

"(7) To enter the office, horse racetrack, dog racetrack, kennel, facilities and other places of business of any licensee to determine whether the provisions of this article and its reasonable rules and regulations are being complied with, and for this purpose, the racing commission, its racing secretary, representatives and employees may visit, investigate and have free access to any such office, horse racetrack dog racetrack, kennel, facilities and other places of business;

"(8) To investigate alleged violations of the provisions of this article, its reasonable rules and regulations, orders and final decisions and to take appropriate disciplinary action against any licensee or permit holder or construction permit holder for the violation thereof or institute appropriate legal action for the enforcement thereof or take such disciplinary action and institute such legal action;

"(9) By reasonable rules and regulations, to authorize stewards, starters and other racing

officials to impose reasonable fines or other sanctions upon any person connected with or involved in any horse or dog racing or any horse or dog race meeting; and to authorize stewards to rule off the grounds of any horse or dog racetrack any tout, bookmaker or other undesirable individual deemed inimicable to the best interests of horse and dog racing or the parimutuel system of wagering in connection therewith;

"(10) To require at any time the removal of any racing official or racing employee of any licensee, for the violation of any provision of this article, any reasonable rule and regulation of the racing commission or for any fraudulent practice;

"(11) To acquire, establish, maintain and operate, or to provide by contract for the maintenance and operation of, a testing laboratory and related facilities, for the purpose of conducting saliva, urine and other tests on the horse or dog or horses or dogs run or to be run in any horse or dog race meeting, and to purchase all equipment and supplies deemed necessary or desirable in connection with the acquisition, establishment, maintenance and operation of any such testing laboratory and related facilities and all such tests;

"(12) To hold up, in any disputed horse or dog race, the payment of any purse, pending a final determination of the results thereof;

"(13) To require each licensee to file an annual balance sheet and profit and loss statement pertaining to such licensee's horse or dog racing activities in this State, together with a list of each such licensee's stockholders or other persons having any beneficial interest in the horse or dog racing activities of such licensee;

"(14) To issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of any books, records and other pertinent documents, and to administer oaths and affirmations to such witnesses, whenever, in the judgment of the racing commission, it is necessary

to do so for the effective discharge of its duties under the provisions of this article;

"(15) To keep accurate and complete records of its proceedings and to certify the same as may be appropriate;

"(16) To take such other action as may be reasonable or appropriate to effectuate the provisions of this article and its reasonable rules and regulations;

"(17) To provide breeders' awards, purse supplements and moneys for capital improvements at racetracks in compliance with section thirteen-b [§ 19-23-13b] of this article.

"The racing commission shall not interfere in the internal business or internal affairs of any licensee."

It is a clear rule of law in West Virginia that administrative agencies such as the West Virginia Racing Commission have only those powers which are expressly conferred upon them by statute or which arise out of necessary implication from those powers expressly conferred upon them by statute. Mohr v. County Court of Cabell County, 145 W. Va. 377, 115 S.E.2d 806 (1960).

If the West Virginia Racing Commission has the power to establish regulations governing the fees paid to jockeys, that power must be expressly conferred upon it by statute or arise by necessary implication from a power conferred upon the West Virginia Racing Commission by statute.

The Legislature has the authority to regulate horse racing. Hubel v. West Virginia Racing Commission, 376 F. Supp. 1 (S.D. W. Va. 1974); aff'd, 513 F.2d 240 (4th Cir. 1975). The Legislature by enacting Code 19-23-1 et seq. permitted horse racing under the supervision and control of the State of West Virginia through the West Virginia Racing Commission. State ex rel. Morris v. West Virginia Racing Commission, 133 W. Va. 179, 55 S.E.2d 263 (1949); State ex rel. Spiker v. West Virginia Racing Commission, 135 W. Va. 512, 63 S.E.2d 831 (1951); Santiago v. Clark, 444 F. Supp. 1077 (N.D. W. Va. 1978). In delegating its authority to regulate horse racing to the West Virginia Racing Commission, the Legislature is not required to "set up standards for the guidance of such boards and commissions in the use and the application of the power granted." State of W. Va. ex rel.

Morris v. West Virginia Racing Commission, ibid, at 192-193. "As enacted, our racing laws delegated the management (of horse racing) to a racing commission, and gave it complete power to adopt rules and regulations therefor." State of West Virginia ex rel. Morris v. West Virginia Racing Commission, ibid, at 201. The adoption of a regulation by the West Virginia Racing Commission is a "plain exercise of naked, but necessary, power to control a business which, in its very nature requires strict control."

Code 19-23-6 provides, in pertinent part, as follows:

"The racing commission shall have full jurisdiction over and shall supervise all horse race meetings, all dog race meetings and all persons included in the holding or conducting of horse and dog race meetings, and, in this regard, it shall have the plenary power and authority:

* * *

"(3) To promulgate reasonable rules and regulations implementing and making effective the provisions of this article and the powers and the duties imposed upon the racing commission, under the provisions of this article, including, but not limited to, reasonable rules and regulations under which all horse races, dog races, horse race meetings and dog race meetings shall be held and conducted, all of which reasonable rules and regulations shall be promulgated in accordance with the provisions of article three * * *, chapter twenty-nine-A of this Code;

* * *

"(16) To take such other action as may be reasonable or appropriate to effectuate the provisions of this article and its reasonable rules and regulations; * * *" (Emphasis added.)

It was the clear intention of the Legislature to give the West Virginia Racing Commission broad powers to regulate the horse racing industry. The Legislature has the authority to delegate broad police powers to regulate the horse racing industry to the West Virginia Racing Commission without providing or setting up standards for the guidance of the Commission. State ex rel. Morris v. West Virginia Racing Commission, supra. The

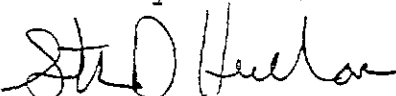
express authority granted to the Commission is broad enough to permit the West Virginia Racing Commission to promulgate rules and regulations establishing a minimum fee to be paid to jockeys.

Although the Supreme Court of West Virginia has never addressed the issue, several other jurisdictions have addressed the issue of whether or not a racing commission under color of a general statute may regulate jockey fees. These jurisdictions have uniformly held that the test of whether or not a racing commission with general powers to regulate the horse racing industry may promulgate regulations regarding the fee to be paid jockeys is whether or not the regulation has a direct relation to horse racing. State Racing Commission v. Robertson, 172 N.E.2d 628 (Ohio, 1960); Brann v. Mahoney, 48 A.2d 605 (Md., 1946); Euster v. Eagle Downs Racing Association, 677 F.2d 992 (1982); Horsemen's Benovolent and Protective Association v. Pennsylvania Horse Racing Commission, 530 F. Supp. 1098 (1982); Gilligan v. Pennsylvania Horse Racing Commission, 432 A.2d 275 (1981); Gilligan v. Pennsylvania Horse Racing Commission, 422 A.2d 487 (1980); Collella v. State Racing Commission, 274 N.E.2d 331 (1971); Department of Business Regulation v. Vandervoort, 273 So.2d 66 (1972). The jurisdictions are split with the majority of jurisdictions holding that the payment of fees to a jockey is an appropriate matter for regulation. However, Florida has held that the payment of fees to a jockey is not a subject of regulation. Department of Business Regulation v. Vandervoort, *id.*

The West Virginia Racing Commission is authorized to make a determination that a minimum fee for jockeys is necessary and directly related to the conduct of horse racing. Accordingly, the West Virginia Racing Commission has the authority under its general enabling act to promulgate a regulation establishing a minimum fee for jockeys. Further, the language of Code 19-23-6 emphasized above expressly authorizes the West Virginia Racing Commission to regulate all aspects of the conduct of horse races. It is the opinion of the Attorney General that the West Virginia Racing Commission may regulate the minimum fee paid to jockeys by administrative regulation.

Very truly yours,

CHARLES G. BROWN
Attorney General

By  Solicitor General
STEPHEN D. HERNDON

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Secretary of State

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Deputy Secretary of State

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STATE OF WEST VIRGINIA

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Special Assistant

(Plus all the volunteer
help we can get)

September 11, 1987

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE


AGENCY: Racing Commission

RULE: Amendments to Series 1, Thoroughbred Rules

DATE FILED AS AN EMERGENCY RULE: July 31, 1987

DECISION NO. 22-87

Following review under WV Code 29A-3-15a, it is the decision of the Secretary of State that the above emergency rule be approved, with the exceptions of sections 37.23 and 61.3(F) which are disapproved. A copy of the complete decision with required findings is available from this office.



KEN HECHLER
Secretary of State

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Sept 11, 1987
ADMINISTRATIVE LAW DIVISION

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MARY P. RATLIFF
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Corporations: 342-8000



STATE OF WEST VIRGINIA
SECRETARY OF STATE

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DECISION

Emergency Rule Decision
(ERD 22-87)

AGENCY: Racing Commission
RULE: Amendments to Series 1; Thoroughbred Rules
DATE FILED AS AN EMERGENCY RULE: July 31, 1987

- par. 1 The Racing Commission has filed as an emergency amendments to the above Series 1.
- par. 2 West Virginia Code 29A-3-15A requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [29A-3-15a(a)].
- par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the ERD is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

- par. 6 The Racing Commission has filed this emergency rule with supporting documents with the Secretary of State on July 31, 1987, and with the LRMRC on September 4, 1987.
- par. 7 It is the determination of the Secretary of State that the Racing Commission has complied with the procedural requirements of WV Code §29A-3-15.
- par. 8 (B) Statutory Authority -- WV Code §19-23-6(3) reads:

§19-23-6. Powers and authority of racing commission.

(3) To promulgate reasonable rules and regulations implementing and making effective the provisions of this article and the powers and authority conferred and the duties imposed upon the racing commission under the provisions of this article, including, but not limited to, reasonable rules and regulations under which all horse races, dog races, horse race meetings and dog race meetings shall be held and conducted, all of which reasonable rules and regulations shall be promulgated in accordance with the provisions of article three (§29-3-1 et seq.) chapter twenty-nine-A of this Code.

- par. 9 WV Code §19-23-6 reads in part:

The racing commission shall not interfere in the internal business or internal affairs of any licensee.

- par. 10 Although the Racing Commission has full power to regulate the industry, the above limit is still in force. The Supreme Court in State ex rel. Spiker v. W. Va. Racing Commission et al. (63 SE2d 831) states:

"Horses and owners, trainers, jockeys and other persons whose efforts or services are required in the conduct of a horse race and without which the business or the enterprise of horse racing cannot be effectively conducted, are necessarily within the scope of this statute."

The Racing Commission proposed to increase the fee's paid to jockeys. This provision currently exists in the rule under section 37.23. The question has been put that these fees or salaries are internal business and not subject to regulations by the Racing Commission. The jockeys are not employed by the Racing Commission, but by the Association (i.e. the licensee) either as employees or contract workers.

The Attorney General in a 1956 opinion stated that the size of the purse offered is a valid subject of regulation and not a matter of internal business or affairs of the licensee. The opinion goes on to state:

"Internal business or affairs of the association or licensee, we believe, connotes matters of business within the organization itself, such as salaries or working hours of its officers or employees." [47 op. Att'y Gen. 65 (1956)]

It is the opinion of the Secretary of State that section 37.23 regulating jockey fees exceeds the statutory authority of the Racing Commission. Although this office cannot void the existing Section 37.23, it can void the changes put into effect as an emergency rule. Therefore, it does void the changes to section 37.23.

par. 11 WV Code §19-23-13 reads in part:

§19-23-13. Disposition of funds for payment of outstanding and unredeemed pari-mutuel tickets; publication of notice; irredeemable tickets; stake races for dog tracks.

(a) All moneys held by any licensee for the payment of outstanding and unredeemed pari-mutuel tickets, if not claimed within ninety days after the close of the horse or dog race meeting in connection with which the tickets were issued, shall be turned over by the licensee to the racing commission within fifteen days after the expiration of such ninety-day period, and the licensee shall give such information as the racing commission may require concerning such outstanding and unredeemed tickets.

The Racing Commission proposes changes to these rules which required that 70% of these funds shall be deposited in an insured, interest-bearing account after 15 days has passed from the date of the meeting. While this system may be laudable, the statute does not require any movement of funds until the expiration of 90 days and empowers the Racing Commission to only require additional information concerning such money.

par. 12 As such, the Secretary of State disapproves the proposed changes to Section 61.3(f) as exceeding statutory authority.

par. 13 All other provisions of this emergency rule are approved.

par. 14 (C) Emergency: WV Code 29A-3-15(g) defines "emergency" as follows:

(g) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 15 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 16 The facts and circumstances as presented by the Racing Commission are as follows:

These rules provide for the orderly distribution of pari-mutuel pool money to the public, State and other statutorily designated parties. Without these rules there would be no formula for distribution of the pari-mutuel pools which would be chaotic and not conducive to the public peace, health, safety or welfare.

These changes are being made to update our rules to reflect current needs in our State which have to be met as is the case in other racing states in meeting the needs and challenges confronting us today.

- par. 17 The remainder of these emergency rules relate to wagering mechanisms and clarifications of existing rules. As stated in ERD 21-87, par. 13, such changes are in the public interest
- par. 18 It is the decision of the Secretary of State that this emergency rule be approved except for sections 37.23 and 61.3(F), which are disapproved.
- par. 19 This decision shall be cited as Emergency Rule Decision 22-87 or ERD 22-87 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with the Racing Commission, the Attorney General and the Legislative Rule Making Review Committee.



KEN HECHLER
SECRETARY OF STATE

FILED IN THE OFFICE OF
THE SECRETARY OF STATE

THIS DATE Sept 11, 1987

Entered _____

ADMINISTRATIVE LAW DIVISION