

RESPONSE TO THE COMMENT

WEST VIRGINIA RACING COMMISSION

DUE PROCESS AND HEARINGS 178 CSR 6

The Commission received one comment on the proposed amendment to its Due Process and Hearings Rule, 178 CSR 6, (a procedural rule). The proposed amendment seeks to increase the security fee required to be paid to the Racing Commission in connection with the filing of appeals by permit holders of stewards'/judges' rulings from \$100.00 to \$500.00. Such security fee is set forth in 178 CSR 6, § 3.10.d.

The Charles Town Horsemen's Benevolent and Protective Association (CTHBPA) was the lone commenting part on the proposed security fee increase. The CTHBPA opposes the fee increase because it claims that such increase is not good public policy.

The CTHBPA comments that it is not good public policy to raise the fee to seek to deter the filing of potentially frivolous appeals and appeals over small fines. The CTHBPA believes that the potential of the imposition of the full costs of the hearing if the permit holder does not prevail is enough of a deterrent to stop frivolous appeals. The CTHBPA further comments that "the more that West Virginia's due process procedures deviate from the due process provided in other states with horse racing, the more you discourage horsemen in other jurisdictions from coming to West Virginia."

West Virginia Code § 19-23-16(c) states that the Racing Commission may require a permit holder filing an appeal of a stewards'/judges' ruling to give "reasonable security" for the costs of the appeal hearing and if such person does not substantially prevail at such appeal hearing, such costs shall be assessed against the permit holder.

The fee set forth in 178 CSR 6, § 3.10.d. is the security fee permitted by West Virginia Code § 19-23-16(c). Upon information and belief, the security fee imposed by the Commission has been \$100.00 for eighteen (18) years or more.

The Commission has recently experienced several appeals over small fines, as low as \$100.00, imposed by the stewards or judges. Moreover, the Commission has experienced appeals over medication violations in which the permit holder does not contest any of the predicate facts related to the medication positive (i.e., chain of custody, test result) and then appears at the appeal hearing and fails to put on any evidence in defense.

In all of these recent cases, the Commission has given express oral and written notice that if the permit holder does not prevail, the costs of the hearing will be assessed. Despite that notice, permit holders have persisted in pursuing these non-meritorious appeals. Therefore, the potential of the imposition of the costs of the hearing does not appear to have deterred some permit holders. In addition, in recent cases in which costs have been assessed against

non-prevailing permit holders, the commission has had difficulty and will continue to have difficulty collecting those assessed costs.

The costs associated with conducting an appeal hearing can run from around \$2,500.00 to over \$5,000.00, depending upon the circumstances. Inasmuch as the security fee of \$100.00 has been the established fee for eighteen (18) years or more, and the Commission's cost of conducting hearings has naturally increased over time, it is rational for the Commission to consider increasing its security fee to keep pace with such increased costs. Given the overall costs of conducting an appeal hearing and the many years that have lapsed without any change in its security fee, the Commission believes that an increase to \$500.00 is proportionate and justified.

Moreover, the CTHBPA presents no evidence, nor is the Commission otherwise aware of any evidence, that raising the security fee will make the Commission's hearing process substantially different from the hearing process in other racing states. Absent such evidence, the Commission does not find the CTHBPA's objection in this regard to have sufficient merit to justify keeping the fee at \$100.00.

Based upon the foregoing, the Commission determined to make no amendments to its proposal to increase the fee from \$100.00 to \$500.00. Therefore, the Commission files this rule to take effect thirty (30) days from filing with the increase to \$500.00 left unchanged.