BEFORE THE HORSE RACING BOARD

STATE OF CALIFORNIA

In the Matter of the Accusation Against: **JEFF MULLINS** **CHRB License # 211845** **Respondent**	OAH Case No.L2007010483 CHRB Case No. 06DM011

NOTICE OF DECISION NOT TO ADOPT PROPOSED DECISION AND ORDER DIRECTING PREPARATION OF THE RECORD

Attached is a copy of the Proposed Decision in the above-titled matter submitted to the California Horse Racing Board ("Board") under the provisions of Government Code section 11517. The Board considered the Proposed Decision of the Hearing Officer in this Matter during the Closed Session of the regularly noticed Board Meeting of December 16, 2010.

By vote of the Board, the Proposed Decision was rejected, and will itself decide the Matter upon the record, including the transcript, under provisions of Government Code section 11517, subdivision (c) (2) (E). Further, the Board ordered preparation of the complete administrative record, including a transcript of all proceedings before the Hearing Officer. After a review of the complete record and any further argument submitted on behalf of the parties, the Board will issue a decision in the Matter.

Pursuant to Government Code section 11517, subdivision (c) (2) (E), the parties may submit further argument to the Board before decision. Any further argument submitted on behalf of the parties shall be in writing. Any written argument shall be filed at the board's headquarters within thirty (30) calendar days of the date that the Board mails a notice that the administrative record in this matter has been filed with the Board.

Before further action by the Board, the record of the proceedings to date, including a transcript of the hearings before the Hearing Officer will be provided to the parties upon payment of the direct costs of making the copies. This Order and the non-adopted Proposed Decision will be filed as a public record, and copies of them will be served on each party and their attorneys of record.

IT IS SO ORDERED.
Dated: December 17, 2010

Kirk E. Breed
Executive Director

For CALIFORNIA HORSE RACING BOARD

BEFORE THE
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STATE OF CALIFORNIA

In the Matter of the Accusation Against:	)	
	)	
JEFF MULLINS	)	**OAH Case No. L2007010483**
Trainer,	)	**CHRB Case No. 06DM011**
CHRB License No. 211845	)	
	)	
Respondent.	)	
	)	

PROPOSED DECISION

This Accusation and Petition to Revoke Probation was heard by Steffan Imhoff, a Hearing Officer/Appellate Judge appointed under California Code of Regulations, title 4, section 19517.5(a) by the California Horse Racing Board (CHRB). Hearings on the Accusation were held at Los Angeles, California June 2, 2010 and at Del Mar, California, on August 20, August 27, and September 3, 2010.

Supervising Deputy Attorney General Jerald Mosley represented the CHRB.

Attorney James Maniscalco of Towle Denison Smith & Maniscalco and his associates Amanda Washton and Suzanne Shoal represented Respondent Jeff Mullins.

The proceedings were transcribed by Barbara Weinstein, Hearing Reporter.

Alexandra DeKoster acted as Court Clerk.

The Case was submitted for decision on October 1, 2010.

FINDING OF FACTS AND CONCLUSIONS OF LAW

INTRODUCTION

This Proposed Decision constitutes chapter 3 in the Mullins Trilogy. The case involves a petition by the CHRB seeking to violate the probation of trainer Jeff Mullins (CHRB Lic. No.211845) and to impose a suspension of his license for 70-days. The geneses of the accusation goes back to July 8th, 2006. On that date Mullins ran Robs Coin, a horse trained by him, in the 7th race at Hollywood Park. The horse finished 2nd. Subsequent post-race testing established that Robs Coins urine sample contained a combined reading for mepivacaine and its metabolites of 30.0 ng/ml, well above the allowable amount of 10.0 ng/ml. The CHRB filed a Complaint alleging a Class II medication violation (Rules 1843.2, 1844, 1887). After extensive hearings, on January 16, 2008 the CHRB adopted ALJ Rosenman's Proposed Decision in OAH No. L2007010483, CHRB Case No. 06DM011 finding the Complaint true. Respondent's license was ordered suspended for 90-days. He was placed on probation for one year, beginning February15, 2008, with the condition that he serve a 20-day suspension of his license and that he "obey the Horse Racing Law and all regulations of the Board." The additional 70-days were stayed with the caveat that a further suspension could be imposed if Mullins violated his probation. Mullins has served his 20-day license suspension. (These proceedings will be referred to as Rob Coins or Mullins 1 or the Mepivacaine matter).

On August 3, 2008, while Mullins was still on probation, he ran Pathbreaking, a horse trained by him, in the 3rd race at the Del Mar racetrack. Pathbreaking finished 3rd. Post-race testing of that gelding established that his blood contained a TCO2 level of 37.9 millimoles per liter. This amount exceeded the allowable amount of 37.0 millimoles per liter and thus, if true, constituted a Class III violation of CHRB rules and regulations (Rules 1843, 1843.1, 1843.6, 1887). A Complaint alleging these facts was filed by the CHRB (SAC 09-0039, CHRB No. 08DM0010). Once again exhaustive hearings were

held including testimony and documentary evidence as well as written and oral argument. The Hearing Officer's Proposed Decision upholding the Complaint and calling for a 30 day suspension of Respondent's license was adopted by the CHRB on April 5, 2010 and became effective May 8, 2010. Mullins has served his 30 day license suspension. (This decision may be referred to as Pathbreaking or Mullins 2 or theTCO2 matter).

The Petition to Revoke Probation was filed July 15, 2009. The parties agreed to put the case on the back burner until the Pathbreaking decision was issued. Hearings on the Petition began on June 2, 2010, shortly after the Pathbreaking decision, and concluded September 3, 2010. Closing Briefs were received on October 1, 2010. There were 3 primary areas of contention: (I) Pretrial Motions; (II) Probation Violation; (III) Penalty. These issues will be addressed in that order.

I. PRE-TRIAL MOTIONS

A. PEREMPTORY CHALLENGE OF HEARING REFEREE STEFFAN IMHOFF

Mullins filed a series of pre-trial motions with the OAH, however because jurisdiction over this case was with the CHRB these motions, and all subsequent hearings were heard by the CHRB. Respondent filed a peremptory challenge against Hearing Officer Steffan Imhoff. Prior to filing this motion Respondent had filed an election to have this case heard by a CHRB Hearing Officer under Cal. Code of Regulations, title 4, sec.19517.5(a). In spite of that election Respondent filed a peremptory challenge against the selected Hearing Officer. Mullins relied on Gov. Code sec. 11425.40(d) which allows, but does not require, government agencies to provide for a peremptory challenge in their administrative adjudications. While OAH has adopted such a provision (CCR, sec. 1034) the CHRB has chosen to not allow a peremptory challenge of its Hearing Officers.

These proceedings have always been, and continue to be, before the CHRB, which will ultimately issue a decision in this case. Under CHRB regulations there is no provision for a peremptory challenge.

A peremptory challenge is a creature of statute, is not constitutionally required and is not found in common law. In the absence of statute it is not permitted.

Respondent's motion was properly denied.

B. MOTION TO DISQUALIFY HEARING OFFICER STEFFAN IMHOFF FOR CAUSE

Respondent filed a motion to disqualify Hearing Officer Steffan Imhoff for cause. Significantly no proof was offered for any of the allegations in the motion or in the supporting hearsay Declaration of counsel. Respondent never asked for an evidentiary hearing to prove up his theories. The absence of proof alone would require that the motion be denied. However, even if supporting evidence had been provided the motion would still be deficient. For example Respondent finds evidence of bias in the fact that he disagrees with some of the Hearing Officer's rulings in the Pathbreaking case. We are unaware of any authority that allows such a disagreement over rulings to constitute evidence of bias.

Respondent reliance on *Peters v. Kiff* (1972) 407 U.S. 502 one of the leading civil rights cases of the 70's, is misplaced. In that case Justice Marshall held that a party need not be a member of an excluded class in order to suffer a violation of their equal protection and due process rights. In passing the Court cites Chief Justice Taft's opinion in *Tuemy v.Ohio* (1927) 273 U.S. 510, 523. In that Prohibition Era case, a mayor presided over possession of alcohol charges and received a cash payment for every defendant that was found guilty. Under these facts the Chief Justice found that "(t)he mayor---has a direct, personal, pecuniary interest in convicting the defendant." Nothing like that system is alleged by Respondent (see *Sturgeon v. County of Los Angeles*, No.BC 351286{Los Angeles Superior Court} order on summary judgment).

In fact, Mullins appears to have gotten his argument concerning potential bias in favor of the CHRB backwards. Under the process for selecting an adjudicator for Class I,

II and III violations specified in CCR 19517.5(a) it is the Trainer not the CHRB that has the choice of a Hearing Officer or a Board of Stewards to hear their case. It was Mullins not the CHRB that choose to have his case heard by a Hearing Officer. Applying Respondent's logic would lead to the conclusion that any Hearing Officer would be biased in favor of the horse trainer. In any event we reject this bias argument, and find no authority for the proposition that speculative future employment would prejudice a Hearing Officer.

Respondent has failed to prove that bias was present in this hearing as to any party.

The motion to disqualify the Hearing Officer was properly denied.

C. MOTION TO CHANGE LOCATION OF HEARING

The first hearing in these proceedings was held on June 2, 2010 in the Attorney General's conference room at the Los Angeles State Building. Respondent argued that the location was prejudicial and was further evidence of bias in favor of the CHRB. Respondent urged the Hearing Officer to exercise his discretion under Gov. Code 11508(c) to move the location of the hearing. The Hearing Officer failed to find prejudice but did agree that CHRB hearings should be conducted at a racing facility. It was ordered that all further hearings be moved to the Del Mar Race Track. The remaining three hearings on August 20, 2010, August 27, 2010 and September 3, 2010 were all held in the Executive Conference rooms of the Del Mar Race Track.

The motion was granted in the Hearing Officer's discretion.

D. MOTION TO QUASH SERVICE AND DISMISS

Respondent filed a motion to quash service of the petition to revoke probation. His theory was that the case was a closed OAH proceeding so he could not be served by the CHRB. A motion to dismiss on the same grounds was also filed. We disagree with the premise of these motions. This case has always been and continues to be a CHRB

proceeding. Respondent was properly served and he was given more than ample time to prepare. There was no cause for a dismissal.

The motions are denied.

E. MOTIONS TO CONTINUE

Respondent filed a motion to continue the original June 2, 2010 hearing. The allegation that discovery had not been completed was made moot when all of the substantive issues were put over to be heard at the summer meeting at Del Mar. At the June 2nd hearing the matter was specifically set over to be heard at Del Mar on August 13, 2010. On July 7, 2010 Respondent moved for a continuance on the same grounds; that he had not received the record in the mepivacaine matter. At that point the Hearing Officer set a new schedule in the following order:

> "It is my firm intention that Mr. Mullins' Del Mar case---(CASE NO. 06 DM11) be fully litigated during the 2010 Del Mar meeting that opens on July 21 and closes on September 8. In order to insure that both sides have adequate time to prepare the present schedule shall in each instance be set back a fortnight. Therefore, simultaneous Opening Briefs will be due on July 28; Simultaneous Reply briefs shall be due on August 11. Briefs shall be filed by e-mail. Motions will be heard August 20 at 11am in the Del Mar downstairs Executive Office Conference Room; Hearing on the Probation violation shall be concluded on August 27 at 11 am in the Del Mar upstairs Executive Conference Room."

On July 13, 2010 Respondent, by letter, continued to object to the time it was taking to complete the mepivacaine transcripts and the effect on their ability to prepare for the hearings. At that point the Hearing Officer determined that the delay in the transcript preparation was being caused by Respondent's failure to pay the required fees. Therefore, it was found that the timing of any transcript preparation was controlled by Mr. Mullins and there was no good cause for a continuance.

The motions to continue were granted when supported by good cause and were properly denied when not supported by good cause.

II. PROBATION VIOLATION

A. ADMISSIBILITY OF ROBS COIN AND PATHBREAKING DECISIONS

The CHRB proposed to establish that Mullins had violated his probation through the Robs Coin and Pathbreaking decisions; Robs Coin to show that he was on probation and Pathbreaking to demonstrate that he violated his probation. The Board pointed out that those decisions were admissible as Public Records (Evidence Code Sec. 1280), as Administrative Hearsay (Government Code Sec. 11513) or by Official Notice (Government Code Sec. 11515). We have found that both of these decisions come under the Official Notice doctrine and therefore exhibit 8 (Robs Coin Decision) and exhibit 9 (Pathbreaking decision) were admitted into evidence.

We determined that Respondent's objections to their admission or use were not well taken. The focus of Respondent's objections was the Pathbreaking decision. For example in his brief of July 27, 2010 Respondent lists five reasons to not rely on the Pathbreaking decision:

(1) The doctrine of collateral estoppel does not apply because the decision is not conclusive. This is incorrect. While we have taken judicial notice that Mullins has applied for a writ in superior court the Pathbreaking decision is final in so far as the Board's jurisdiction is at issue. Respondent, in fact has already served his 30 day suspension in that case. The Board can take no further action in that TCO2 case unless ordered to do so by a higher court. The Finding of Facts and Conclusions of Law from Mullins 1 and Mullins 2 can be used in this probation revocation matter.

(2) The Pathbreaking Decision is inadmissible hearsay without an exception. We rejected this position and ruled this was admissible administrative hearsay.

(3) Mullins' due process rights grant him an opportunity to confront all witnesses against him. This statement is accurate and Mullins was given precisely that opportunity at the Pathbreaking hearing were his attorney cross examined every CHRB witness. Respondent also argues that if the Pathbreaking decision is considered it would violate his basic due process rights that the United States Supreme Court has held are

required in a probation violation hearing (*Morrissey v. Brewer* (1972) 408 U.S.471). At the time of the *Morrissey* decision parole and probation violation were summary proceedings that provided virtually no due process protections. It was that situation that Chief Justice Burger sought to remedy in *Morrissey*. The use of the Pathbreaking decision in the Mullins probation violation hearing is at the opposite end of the spectrum. Mullins was represented by counsel and was allowed to cross examine witnesses, present documentary and testimonial evidence and submit written and oral argument. There was no lack of due process. As the Attorney General points out the United States Supreme Court recognized the propriety of using a new conviction as a basis for violating parole in the *Morrissey* decision: "Obviously a parole cannot relitigate issues determined against him in other forums as in the situation presented where the revocation is based on the conviction of another crime" (*id.* p.409). There is no California law that contradicts this principle.

Respondent's due process rights were not violated.

(4) Mullins' right to a speedy hearing in this matter has been violated. This is not correct. His attorneys agreed to the hearing dates in this case and the hearing dates were set for the convenience of all parties. Under California law when a party agrees to a date beyond the statutory limit, as Mullins did in this case, they waive any speedy trial claims (*Drescher v. Superior Court* (1990) 218 Cal. App. 3rd 1140).

(5) The Pathbreaking Decision is solely based upon a strict liability theory and not a volitional act by Mullins. This is an attack on Rule 1887 the Trainer Insurer Rule. Throughout these proceedings Respondent has repeatedly denied his culpability both in oral and written motions by arguing the unfairness and unconstitutionality of the Trainer Insurer Rule. The California Supreme has not only rejected Respondent's argument they also, in Justice Shenk's Opinion, explained in some detail why the Trainer Insurer Rule is necessary and proper:

Our Supreme Court has said: "Rule 313 {now rule 1887} *is designed to afford the wagering public* a *maximum of protection* against race horses being stimulated or depressed by making the trainer the insurer of the horses condition. That the wagering public merits such protection is evident from the magnitude of its patronage…Should

responsibility be imposed only for actual guilty participation or culpable negligence…there would exist a possible field of activity beyond the affirmative protection thereby afforded to patrons of the pari-mutual system. Remedial action subsequent to the pay-off…may in some instances be effective as between competitors for the purse money. Such action may constitute a delay in payment of the prize money until the determination of the saliva, urine or other test…The recognized interest of the wagering patrons is sought to be safeguarded by rule 313 {now rule 1887}. In most instances the very existence of the condemned activities creates a nonremedial situation. Detection of the condition may not be possible until long after the race is run and the pari-mutual winners paid off. The closer the supervision to which the trainer is held the more difficult it becomes for anyone to administer a drug or chemical to the horse. The exaction of the ultimate in that regard is justified by the peril to be avoided. Legislation for regulatory purposes, which dispenses with the condition of awareness of wrongdoing and places the burden of acting at his peril on a person otherwise innocent "but standing in personal relation to a public danger"…is a traditional means of regulation *(People v. Scott,* 24Cal 2d 774, 782…) …By express language the rule imposes strict liability for the condition of the horse. Fault in the sense of actual administration of the drug or negligent care by the trainer is neither the basis nor an element of liability. In may not be injected into the case by way of subtle hypothesis. Whether the trainer drugged the horse or knew that it was drugged, or was negligent in not properly seeing that the horse was not drugged are not elements of liability (Italics added) *(Sandstrom v. Cal. Horse Racing Board* (1948) 31 Cal. 2d 401, 408-409) as quoted in *Vienna v. California Horse Racing Bd.* (1982) 133 Cal. App. 3d 387, 395-396).

The California Supreme Court has also spoken, through Justice Schauer's concurring opinion on Mullins' repeated criticism that the Trainer Insurer Rule is too "harsh":

"I concur. While at first thought the rule which we upheld appears to be a harsh one I am persuaded that upon reflection its seeming harshness largely disappears and its justice becomes manifest. The effect of the decision simply is that a trainer is held penally responsible on his warranty that a horse entered by him in a race has not been 'doped'.

That the public are entitled to protection against the practice of drugging race horses is not in disputed; that the trainer who has charge of a horse, who undertakes to condition it for a race and who actually enters it in the race and permits it to compete shall be charged with absolute responsibility for its condition seems within the bounds of moral reason and legislative power. Contrary to the suggestion which has been made in argument the trainer is not defenselessly liable to punishment for the act of another person; he is liable only for his own act or omission; i.e., causing or permitting a horse warranted by him to be free from drugs to participate in a race while drugged. [¶] The trainer can protect himself by protecting the horse and by checking its condition at the last reasonably possible moment before the race. If he finds that despite his earlier care the horse has been drugged he must, of course, withdraw it from the contest; from the time of the last condition check until the race it is not unreasonable that the trainer shall be held to the responsibility of either so guarding the animal as to preclude its being drugged or of withdrawing it from the race" ((*Id.* at pp. 413-414; see also *Jones* v. *Superior Court* (1981) 114 Cal. App. 3d 725, 730 [170 Cal. Rptr. 837]) (As quoted in *Vienna v. California Horse Racing Bd.*,supra 133 Cal. App.3d at pg 396)).

Respondent was not denied due process by application of the Trainer Insurer Rule.

B. CONCLUSION ON ADMISSIBILITY OF MEPIVACAINE AND TCO2 DECISIONS

Respondent's principal arguments against the admissibility of the mepivacaine and TCO2 decisions have been rejected by the United States or California Supreme Courts. We agree with the reasoning of those decisions. However even if we did not we would be compelled to reject respondent's arguments and admit those decisions. Justice Peters, speaking for a unanimous California Supreme Court, explained a lower tribunal's obligation to follow precedent: "Under the doctrine of *stare decisis* all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction" (*Auto Equity Sales v. Superior Court.* (1962) 57 Cal.2d 450, 456).

The Robs Coin and Pathbreaking decisions have been properly admitted into evidence and may be used to determine if Mullins has violated his probation.

C. CONCLUSION ON PROBATION VIOLATION

The Robs Coin and Pathbreaking decisions contain all the information necessary to determine if Mullins has violated his probation:

1) Jeff Mullins is a thoroughbred horse trainer licensed by the California Horse Racing Board. (CHRB Lic. No. 211845).
2) Mullins was a licensed trainer on July 8, 2006.
3) On July 8, 2006 Mullins was the trainer of the race horse Robs Coin.
4) On July 8, 2006 Robs Coin ran in the 7th race at the Hollywood Park race track and finished 2d.
5) Following the race Robs Coin's urine was tested and was found to contain 30.0 ng/ml of mepivacaine and its metabolites.
6) The maximum allowable level of mepivacaine and its metabolites is 10.0 ng/ml (Rule 1844 (e) (2)).
7) Based on these facts the CHRB filed a Complaint (OAH No. L2007010483, CHRB Case No. 06DM011) charging Mullins with a Class II Medication Violation.
8) The Complaint was found to be true by an assigned ALJ.
9) The following penalty was imposed on Mullins in a Proposed Decision:
   a) He was placed on one year probation;
   b) His trainer's license was ordered suspended for 90-days;
   c) He was ordered to serve a 20-day suspension which has been served;
   d) 70-days of the suspension were stayed;
   e) As a condition of probation Mullins was required to obey all horse racing laws;
   f) If Mullins violated probation the stayed suspension could be imposed.
10) The Board adopted the ALJ's Proposed Decision.

11) Mullins' one year probation ran from February 15, 2008 to February 14, 2009.

12) On August 3, 2008 Mullins was a CHRB licensed trainer.

13) On August 3, 2008 the Mullins trained race horse Pathbreaking ran in the third race at the Del Mar race track and finished 3rd.

14) Post-race testing established that Pathbreaking's blood contained a TCO2 level of 37.9 mm/l.

15) The maximum amount of TCO2 allowed on race day is 37.0 mm/l.

16) Based on the excessive TCO2 level the Board filed a Complaint (Case No. Sac. 09-0039) alleging a Class III Medication Violation. (Rules 1843, 1843.1, 1843.6, 1887).

17) A Hearing Officer, in a Proposed Decision found the Complaint to be true and ordered a 30-day suspension of Mullins license, which has been served.

18) The CHRB adopted the Proposed Decision in Case No. Sac. 09-0039.

Only one conclusion can be drawn from these facts: Trainer Jeff Mullins was on CHRB probation for a Class II mepivacaine violation and while he was on probation he committed a Class III TCO2 offence in direct violation of the conditions of his probation. The only remaining question is the penalty to be imposed for his probation violation.

III. PENALTY

1) **Ruling on Hearing Officers Discretion.**

The mepivacaine probation order includes the following provision:

" 3. Failure to comply with any term of probation is a violation of probation. If Respondent violates probation in any respect, the Board, after giving Respondent notice and an opportunity to be heard, **may** revoke probation and carry out the disciplinary order that was stayed" (Emphasis added).

In a rare moment of unanimity both Mr. Mosely and Mr. Maniscalco agreed that the Hearing Officer and ultimately the Board had discretion as to whether to violate

Mullins probation and if violated whether to impose the full 70-days stayed or some lesser suspension. The use of the terms "shall" or "may" is the gold standard for interpreting legal discretion; shall means there is no discretion and may means there is. Therefore we agree with the parties and hold that whether to violate Respondent's probation and what penalty to impose is within the sound discretion of the Board.

2) **Position of the Parties on Probation Violation.**

In spite of their agreement on discretion the Board and the Respondent have taken the opposite positions on how that discretion should be exercised. The Board argued that Respondent's probation should be violated and the full 70 stayed suspension days should be imposed. Respondent argued that his probation should not be violated and if it was there should be no further suspension. We have already ruled that Respondent's probation should be violated.

In deciding upon penalty we turn to the penalty hearing evidence.

3) **Penalty Evidence.**

A. Ground Rules.

The Hearing Officer made it clear to the Board and the Respondent that this Penalty Hearing on his probation violation would be limited in scope. Only relevant evidence that was not excludable under Evidence Code Sec. 352 would be considered. But beyond that we ruled that there would be absolutely no re-litigation of the facts and legal conclusions of the mepivacaine and TCO2 decisions. Therefore Mullins was estopped from putting in evidence and raising arguments on issues that had already been decided in those decisions.

Mullins moved to put evidence in under Rule 1843.3 Penalties for Medication Violations. Rule 1843.3 (b) states that "Mitigating circumstances and aggravating factors which must be considered, include but are not limited to…" The section then goes on to list 11 categories of evidence which "must" be considered. The Board objected to allowing evidence under this section because it amounted to double counting. In reaching a decision in both Robs Coin and Pathbreaking evidence under Rule 1843.3(b) had already been considered. Initially the Board's objection was overruled and the evidence

allowed. We now believe that was an error. To allow this evidence to be considered twice is unfair and confusing and is not really relevant on the issue of imposing a penalty following a probation violation. We think the proper course is to focus on evidence that was not considered in the penalty determination of the mepivacaine and TCO2 decisions.

B. Evidence Offered by the Board.

The Board introduced Exhibit 11 a printout of Mullins CHRB record from 1999 to the present. They withdrew from evidence Exhibit 10, a summary of the Exhibit 11 printout. Item 21 of Exhibit 11 was ruled inadmissible because it was not a CHRB matter. The items contained in the exhibit, other than the mepivacaine and TCO2 matters, were minor violations. CHRB Senior Investigator Sharyn Jolly testified and authenticated the document. Exhibit 11 is admissible under Evidence Code Sec. 1521 and 1552. Ms. Jolly also testified that the record of violations in Exhibit 11 looked "pretty typical" for a trainer. We find them to be equivalent to "equine traffic tickets" and assign them little weight.

C. Evidence Offered by Mullins.

The testimony of Respondent Jeff Mullins was his primary source of evidence on penalty. We believe that the following summaries of portions of that testimony demonstrate credible evidence of mitigation:

1) Good Character – I Want Revenge.

In 2009 Mullins was the trainer of the morning line favorite to win the Kentucky Derby - I Want Revenge. On the morning of the race Mullins discovered some filing in the horse's left front ankle. The horse was then examined by respondent's vet as well as renowned veterinarian surgeon Dr. Bramlage. The vets advised him that the I Want Revenge was not lame and could run in the Derby but it was in the horse's best interest not to run. Putting aside his chance to enjoy the fame and fortune associated with training a Kentucky Derby winner Mullins did what was in the best interest of I Want Revenge and scratched the horse from the Derby.

Mullins version of this event was verified by an eyewitness Kelly Wietsma. Ms.Wietsma is a horse racing publicist who has worked with Mullins and who also

testified to other aspects of his good character. We believe that Mullins performance at the 2009 Derby demonstrated grace and fortitude under extreme pressure that constitutes evidence of mitigation.

2) Professional Recriminations

Mullins has suffered some professional reversals as a result of the mepivacaine and TCO2 matters and the associated suspensions already served. Most telling is the raw numbers. He has dropped in yearly purses from over 4 million dollars to around $900,000; his numbers of starts have decreased from around 500 to around 200 and the number of horses he has in training have fallen in half. While not all these reductions can be assigned to the mepivacaine and TCO2 findings we believe that a portion of it can. We find some mitigation in this evidence.

We are less impressed with other aspects of Respondent's testimony. The bad publicity testified to is the natural result of the mepivacaine and TCO2 cases and does not show mitigation. Likewise, Respondent's forced resignation from the CTT was also based on the medication violations and also does not establish mitigation.

Finally, we are unable to assign mitigation to Mullins' personal travails. This Board is not the forum to unwind the complexity of emotions that prevail in a rocky marriage.

D. Evidence of a Change in Penalties.

The effective date of the mepivacaine decision was February 15, 2008. On May 23, 2008, about three months later, a new medication penalty section went into effect. Under Rule 1843.3 a mepivacaine violation is classified as a Category "B" Penalty. Because this was treated as a Licensed Trainer 1st Offence Mullins would have been subject to the following penalties if sentenced under this section:

"Minimum 30-day suspension absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of a 60-day suspension."

AND/OR

Minimum fine of $500 absent mitigating circumstances. The presence of aggravating factors could be used to impose a fine of $10,000 (We are unconcerned with

the imposition of the fine because a fine was rejected by the ALJ and the Attorney General has not requested one).

As to the suspension Respondent argues that under the doctrine of "amelioration" he is entitled to receive the more lenient punishment. That would mean that the maximum suspension possible would have been 60-days rather than the 90-days imposed. Respondent cites out of state cases for this proposition and we are unaware of any California cases making this mandatory as opposed to permissive. Nevertheless, for the Board to adopt this penalty schedule so close to the mepivacaine sentencing is powerful evidence of what the maximum penalty for these charges should be. ALJ Rosenman noted in his proposed decision that the Board at that point had not adopted penalties for medication violations though authorized to do so. If the ALJ had the guidance of Rule 1843.3 he probably would not have recommended a suspension of more than 60-days.

CONCLUSION

We have found in these hearings some mitigating circumstances and no aggravating factors. Based on these findings we believe that Mullins should not be subject to more than a 60-day suspension in the mepivacaine matter. Since he has already served 20-days we will impose an additional suspension of 40-days.

ORDER

The CHRB Petition to Revoke Probation in OAH CASE No. L2007010483, CHRB CASE No. 06DB011 is GRANTED.

The CHRB enters the following ORDER:

1) **Trainer Jeff Mullins probation in OAH CASE No. L2007010483, CHRB CASE No. 06DB011 is hereby terminated.**
2) **Trainer Jeff Mullins license (Lic. No. 211845) is suspended for a period of 60-days, he shall be given credit for 20-days already served, and his present suspension shall run for 40-days.**
3) **The timing of the serving of the suspension shall be decided by Kirk Breed, Executive Director California Horse Racing Board.**

IT IS SO ORDERED

Dated: 11/1/2010

STEFFAN IMHOFF,
Hearing Officer