BEFORE THE HORSE RACING BOARD

STATE OF CALIFORNIA

In the Matter of:

Appeal of the Board of Stewards Official Ruling #13, Los Angeles Turf Club Inc., dated January 12, 2006

JON ROHLOFF
Appellant

Case No. SAC 07-0060

DECISION

The attached Proposed Decision is hereby adopted by the California Horse Racing Board as its Decision in the above-entitled matter.

The Decision shall become effective on January 17, 2008.

IT IS SO ORDERED ON January 16, 2008.

CALIFORNIA HORSE RACING BOARD
Richard B. Shapiro, Chairman

Richard Bon Smith
Acting Executive Director

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	)	**Case No. SAC 07-0060**
JOHN ROHLOFF	)	
	)	
Appellant	)	
	)	

PROPOSED DECISION

This appeal was heard by attorney Steffan Imhoff, an Appellate Judge designated under Rule 1414 by the California Horse Racing Board, at Arcadia, California, on October 6, 2007.

William Westerman, Supervising Investigator represented the California Horse Racing Board.

Appellant John Rohloff appeared *In Propia Persona.*

The appeal was submitted for decision on October 6, 2007.

PROCEDURAL AND FACTUAL BACKGROUND

This case has a somewhat Bleak House Dickensonian background. Officially, the story begins on October 7, 2005, when African –American Jockey Kerwin John notified the Board of Stewards at the Oak Tree meeting that he had received a picture that he found offensive and disturbing. The picture is a kind of Rashomon. It may seem ridiculous or racist, hilarious or hateful, depending on one's point of view. It depicts a very young boy, almost a toddler, dressed up in a KKK robe and hood, holding an American flag. Above his head is the caption, "Meet KU KLUCK BILL, World's Youngest Klucker at Sulphur, Okl., June 16, 1924". This picture is a download from rotten.com a website devoted to weird and grotesque images. The website displayed its own captions to the picture including, "Boy becomes a Klan."--"It's Strome's world, we just live in it"—and "A relic of the more family friendly (and child safe) Good Old Days." (see Exhibit A)

On the flip side it proclaims that, "Klansmen won't have to go far to find friends in Platt National Park---where Klansmen and their families can find wholesome

surrounding and a Klan atmosphere." Finally, Klansmen are invited to "—come Sunday and visit our churches."

After receiving this picture, and Mr. John's complaint, the Santa Anita Board of Stewards, Scott Chaney, Thomas Ward, and George Slender, requested that Senior Investigators Fred Fink and Doug Aschenbrehner conduct an investigation. The investigators determined that the picture was brought to Santa Anita race track on October 6, 2005 by the Appellant, Jon Rohloff, who is an owner, licensed by the CHRB. (lic. # 279031-09/2006). Appellant gave the picture to Jockey Garret Gomez, who brought it into the Jockey Room. Garrett thought it would be amusing to give the picture to his friend and fellow jockey Kerwin John, so he instructed his groom, Rafael Castaneda, to do so. Castaneda proceeded to give the picture to Mr. John. Later Kerwin showed the picture to jockey Patrick Valenzuela who opined that it was racist and should be reported to the Stewards.

The investigation also uncovered an "Animal House" type atmosphere that pervaded the Jockey Room. The Jockeys and Valets apparently engaged in an endless series of jokes and pranks including posting unflattering, insulting and obscene pictures of each other on the Board. Mr. Aschenbrenner found, and removed from the Board, a pornographic, racist cartoon with Kerwin's name on it. However the Jockey found that cartoon funny and was not offended by it.

Ultimately the investigators concluded that there was sufficient evidence to file a Complaint. Therefore, on November 23, 2005, a Complaint was filed against Appellant (Case No. 05HPOL38), alleging that on October 6, 2005 alleging that he violated CHRB Rule 1902 (Conduct Detrimental to Horse Racing) in that:

> "Owner Jon Rohloff caused a picture to be brought to Santa Anita Race Track. Rohloff then caused the picture to be given to Jockey Garrett Gomez. Gomez then took the picture inside the Jocks room and caused it to be given to Jockey Kerwin John who was offended by the picture. Rohloff is responsible for bringing the picture to Santa Anita."

Appellant was served with the Complaint as well as a Notice to Appear at a hearing on the Complaint before the Board of Stewards to be held January 7, 2006.

A separate Complaint (Case No. 05SA0226), arising out of the same incident, and alleging the same rule violation (Rule 1902) was filed against Jockey Garrett Gomez. The cases, without objection, were consolidated for the hearing before the Board of Stewards. The hearing was conducted at Arcadia, California on January 7, 2006. Mr. Rohloff and Mr. Gomez both appeared *In Propria Persona,* and both specifically waived the right to counsel. The CHRB was represented by Mr. Aschenbrenner.

Jockeys Kerwin John, Garrett Gomez and Patrick Valenzuela, as well as Groom Rafael Castaneda and Mr. Rohloff testified at the hearing.

Mr. John testified that he was not offended by the picture; however he was upset and concerned for his safety because neither Castaneda nor Gomez would tell him where the picture came from. Based on the fact that the Complaint alleged that Mr. John was offended by the picture and the fact that under oath he testified he was not offended, Mr. Aschenbrenner adopted an "unorthodox" position. He made a motion that the Complaints against both Mr. Rohloff and Mr. Gomez be dismissed. The Stewards took the matter under submission and then denied the motion.

There was extensive testimony as to the chain of custody of the picture. Appellant received the picture from a business associate when he was on his way to Santa Anita Race Track. He sarcastically stated that it was "his birthday picture." Appellant put the picture in his pocket along with some homemade beef jerky. When he got to the track he saw Garrett Gomez, a jockey who had ridden for him, headed for the Jockey Room. At this point the evidence is somewhat in conflict. Either Appellant reached into his pocket to get the jerky, and the picture fell out of his pocket, and Gomez picked it up, or he handed the picture to Gomez. In any event the jockey then took the picture into the Jockey Room and gave it to his groom, who then gave it to Kerwin John.

All of the witnesses who spent time in the Jockey Room confirmed a fraternity house atmosphere where the riders are constantly joking and teasing each other, often with racial overtones.

At the conclusion of the hearing the Complaints, which included the picture as an exhibit, were received into evidence and the record was closed.

On January 12, 2006 the Stewards filed their decision in both the Gomez (LATS #012) and Rohloff (LATS #013) case.

They held that:

#012 Jockey GARRETT GOMEZ having appeared before the Board of Stewards in a formal hearing to answer California Horse Racing Board Case #05SA0226, is hereby fined ONE THOUSAND DOLLARS ($1000.00) for violation of California Horse Racing Board rule# 1902 (Conduct Detrimental to Horse Racing)

#013 Owner JON J. ROHLOFF, having appeared before the Board of Stewards In a formal hearing to answer California Horse Racing Board case #05HP0138, is hereby fined ONE THOUSAND DOLLARS ($1000.00) For violation of California Horse Racing Board rule#1902 (Conduct Detrimental to Horse Racing)

The Stewards also stated in their minutes that "(we) determined that although there was no animus involved in the case, this type of behavior cannot be condoned."

In their Official Ruling a reference was made to Rule1532: "Fine shall be paid to the Paymaster within seven calendar days from the date of this ruling, or the license of the person upon whom the fine has been imposed shall be suspended."

Mr. Gomez elected to pay the $1000.00 fine and not appeal the ruling.

Mr. Rohloff also paid the $1000.00 fine; however on January 14, 2006 he filed a timely Declaration and Notice of Appeal. The grounds cited for the appeal include a claim, without citation, of a Constitutional right to posses the picture in question.

On August 08, 2007, at the request of the California Horse Racing Board, the same Board of Stewards (Chaney, Slender and Ward) issued a Statement of Decision in this case. The only facts the Stewards found were that on October 6, 2005, Mr. Rohloff, a licensed owner, brought the picture in question to Santa Anita Race Track, and gave it to Jockey Garrett Gomez. In discussing Rule 1902 the Stewards conceded that, "---a cogent argument could be made that this particular rule is overbroad and ambiguous and therefore does not specifically prohibit the behavior in which (Rohloff) engaged---." The Statement makes no finding as to whether or not this argument was in fact made.

Ultimately the Stewards found " that bringing racist literature to the premises of a race track and distributing it to another licensee is the type of behavior the CHRB should prohibit. Moreover, this behavior is literally 'detrimental to the best interests of horse racing' and should not be tolerated." Therefore they reiterated their previous ruling of January 12, 2006 imposing a $1000.00 fine on Appellant.

This appeal was originally set at Del Mar on August 25, 2007. For good cause the hearing was rescheduled for October 6, 2007 at Santa Anita Race Track in Arcadia. The case was heard by Appellate Judge Steffan Imhoff by appointment under CHRB Rule1414. Appellant, appearing *In Propria Persona,* waived his right to representation.

The CHRB was represented by Supervising Investigator William Westermann. Mr. Rohloff and Mr. Westermann were the only witnesses to testify at the hearing.

Little new evidence was offered but both parties stated their positions. Appellant argued that he had no intent to offend or frighten anyone, and never intended that the picture wind up in the Jockey Room. He argued that lack of intent was a defense. He also argued that the picture was a joke and was not racist. Since it was not racist he should be exonerated.

Mr. Westermann, at the request of the court, explained his position on the motion to dismiss the Complaint. He disagreed with the previous investigator's attempt to dismiss the Complaint and thought there was no legal or factual basis for the motion. On the question of intent he conceded that Appellant's actions were neither intentional nor malicious. However he argued that intent was not required under Rule1902. He also took the position that a finding that the picture was racist was not required under the rule.

The picture upset a jockey and put him in fear. That was detrimental to the best interests of horse racing.

The exhibits were received into evidence and the hearing was closed and the case submitted on October 6, 2007.

CONTROLLING LAW

Appellant was found to have violated CHRB Rule 1902 Conduct Detrimental to Horse Racing:

> No licensee shall engage in any conduct prohibited by this Division nor shall any licensee engage in any conduct which by its nature is detrimental to the best interests of horse racing including, but not limited to:
>
> (a) Knowing association with any known bookmaker, known tout, or known felon.
>
> (b) Indictment or arrest for a crime involving moral turpitude or which is punishable by imprisonment in the state or federal prison, which when such indictment or arrest is the subject of notorious or widespread publicity in the news media, and when there is probable cause to believe the licensee committed the offenses charged.
>
> (c) Solicitation of or aiding and abetting any other person to participate in any act or conduct prohibited by this Division.

This Appeal to the CHRB is authorized by Rule 1761. Appellant has the burden of proof on appeal under Rule 1764. The focus of the hearing was whether or not the evidence demonstrated that Appellant's conduct was detrimental to horse racing as defined by Rule 1902.

The Stewards have general authority and supervision over all licensees, including licensed owners such as Mr. Rohloff. (Rule 1527, Business & Professions Code Sec. 19420) That authority includes their ability to impose a fine or suspension for violating CHRB Rules, including Rule 1902. (Rule 1528, Business & Professions Code Sec. 19440).

Under the provisions of Business and Professions Code Section 19517, the CHRB may overrule a Stewards' Decision if a preponderance of the evidence shows either that the Stewards mistakenly interpreted the law, new evidence of a convincing nature is produced or the best interest of racing may be better served. A Stewards Decision will be sustained if supported by "substantial evidence". *Overturf v. CHRB(1978)* 86 CA3d 979,986.

DISCUSSION

A. *Intentional Misconduct*

This case, in large measure, is controlled by *Stokes v. CHRB* (2002) 98 Cal.App. 4th 477. *Stokes* is the only published case that we are aware of to discuss California Horse Racing Board Rule 1902:

"---Stokes argues that rule 1902, which prohibits licensees from engaging 'in any conduct prohibited by this division' or 'any conduct which by its nature is detrimental to the best interests of horse racing' (Cal. Code Regs., tit. 4, & 1902) requires intentional, not merely negligent, conduct. **Because Stokes cites no authority for that argument, we decline to endorse it.**" (Id. p. 483, emphasis added)

Under the authority of the California Supreme Court in *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal2d 450,455 "---all tribunals exercising inferior jurisdiction are required to follow decisions of court exercising superior jurisdiction."

Appellant provided no authority for his argument that Rule 1902 requires malicious or intentional misbehavior. As in *Stokes* this argument must be rejected.

B. *Constitutional Considerations*

Stokes also compels us to reject considering the Constitutional Issues percolating thru the facts of this case. For example one could argue under the First Amendment that there was a government regulation over the content of messages expressed by a private individual which requires strict scrutiny. *Turner Broadcast System v. FCC* (1994) 512 U.S 622, 641-642; *Rock Against Racism* (1989 491 U.S. 781, 796. However this argument was not made and no authority was cited.

Even the Stewards noted, *sue esponte*, that a reasonable due process argument could be made that rule 1902, as applied in this case was unconstitutionally vague. (see *City of Misquite v. Aladdin's Castle, Inc.* (1982) 455 U.S. 283, 285.

In addition, given the rowdy nature of the Jockey's Room, proceeding against Appellant, and not proceeding against licensed jockeys and grooms, who may have posted similar offensive material, is an arguable equal protection violation. (see *Vill. Of Willowbrook v. Olech* (2000) 528 U. S. 562, 564).

At both the Stewards and Appellate Hearings Appellant specifically waived his right to be represented by counsel. (Rule 1539) Because he represented himself Mr. Rohloff was given wide evidentiary latitude. But that latitude cannot extend to considering issues which were not raised, or claims where no authority is provided.

Under *Stokes* these constitutional claims will not, and as a practical matter could not be considered. We therefore offer no opinion on the merits of such claims.

C. *Issue of Racism*

First it must be stated that there is absolutely no evidence in the record that Mr. Rohloff is a racist or that there was any racial motivation on his part in bringing the picture to Santa Anita. Appellant argues that in order to come under Rule 1902 the picture would have to be racist material and that this depiction of a KKK toddler was comic, a self perpetuating joke on the violent and despicable Klan. If it is merely a joke the question comes to mind---has anyone been fined or jailed for a joke since comic Lenny Bruce?

The Board of Stewards, in their Statement of Decision did specifically find, contrary to Appellant's position, that the picture constituted "racist literature." We find it unnecessary to resolve this dispute. Rather we find the position taken by Supervising Investigator Westermann at the Appellate Hearing persuasive. He argued that the crux of the case was not racism but disruption of the Jockey Room. Kerwin John was put in fear for his well being and safety because he believed that some unknown "fan" was out there with an indiscernible agenda. Having a jockey disrupted in this way, particularly on a racing day, is a situation that is detrimental to horse racing.

D. *Proximate Cause*

The remaining question is whether or not Appellant by bringing the photograph to the race track and allowing Jockey Garrett Gomez to bring it into the Jockey room can be held accountable for the chain of events that transpired in the room. The seminal case on proximate cause is *Palsgraf v. Long Island R. Co.* (1928) 248 N.Y. 339. In *Palsgraf,* "while Mrs. Palsgraf stood on a platform of defendant's railroad, a man carrying a package of fireworks rapped in newspapers attempted to board a moving train. A railroad employee assisted him, and the package was dislodged, fell and exploded. The shock threw down platform scales many feet away, and these struck Mrs. Palsgraf." *Turner v. State Farm Fire and Casualty Co.* (2001) 92 Cal.App.4th 681,691 ft.1.

Justice Cardozo in *Palsgraf* formulated his famous view of proximate cause as the "risk reasonably to be perceived defines the duty to be obeyed." (see also Justice Thomas' dissent, joined by Justice Stevens in *Archer v. Warner* (2003) 538 U.S. 314.) It was difficult to perceive the bizarre series of events that resulted in Mrs. Palsgraf's injuries. Appellant's case is another matter. When a KKK picture goes into a Jockey Room it is not hard to perceive some mischief resulting. While Mr. Rohloff's conduct was neither racist, intentional or malicious it created a situation that was detrimental to horse racing. Therefore, we find that there is substantial evidence to support the finding of the Board of Stewards that Mr. Rohloff violated Rule 1902. Appellant has failed to sustain his burden of proof that Decision LATS #13 of the Board of Stewards should be overruled.

ORDER

Official Ruling # 13, Los Angeles Turf Club Inc., dated January 12, 2006, imposing a ONE THOUSAND ($1000.00) Fine on Appellant JON J. ROHLOFF, (Owners Lic. # 279031/09-06) for Conduct Detrimental to Horse Racing under rule 1902, at the Santa Anita Race Track on October 6, 2005 is hereby AFFIRMED.

DATED: 12-13-07

STEFFAN IMHOFF
Designated Appellate Judge