BEFORE THE CALIFORNIA HORSE RACING BOARD

STATE OF CALIFORNIA

In the Matter of:
FITNESS FOR LICENSURE

BRIAN PHARIES
Applicant

Case No. SAC 12-0049

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 April 16, 2013.

IT IS SO ORDERED ON April 11, 2013.

CALIFORNIA HORSE RACING BOARD
David Israel, Chairman

Kirk E. Breed
Executive Director

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In the Matter of: FITNESS FOR LICENSURE	)	
	)	Case No. SAC 12-0049
BRIAN PHARIES Appellant	)	

PROPOSED DECISION

This matter was heard on January 15, 2013 by C. Scott Chaney, a Hearing Officer designated under California Horse Racing Board rule 1414 (Appointment of Referee) at Santa Anita Race Track in Arcadia, CA.

The Appellant, formerly licensed owner, trainer and driver Brian Pharies (hereinafter "Appellant" or "Mr. Pharies"), represented himself.

The California Horse Racing Board (hereinafter "CHRB") was represented by CHRB Investigator Bill Westerman.

Also present at the hearing was a witnesses on the behalf of the Appellant – owner Michael DePaulo. The proceedings were recorded by court reporter Barbara Weinstein.

PROCEDURAL BACKGROUND

On September 22, 2012, Appellant applied for a CHRB license in the license categories of driver and owner (and trainer by inference). On the license application, he truthfully answered "yes" to the following questions: (a) "[h]ave you ever been convicted of an offense by a court?" and (b) "Has any of your license(s) to participate in racing EVER been revoked or suspended for more than 10 days?" Mr. Pharies also indicated to CHRB Investigator Jim Hamilton and also noted on his application that he had been discharged from probation on August 31, 2012 pursuant to two federal felony convictions: theft of government property and forgery. On that same day, the CHRB issued a document entitled "Notice of Refusal of License" to Mr. Pharies. That document stated the reason for the denial of a CHRB license: "You are unqualified to engage in the occupation for you applied. You have failed to meet the following requirements or qualifications: was on 3 yrs formal probation/CHRIS printout not eligible til 8/31/2017." This refusal is not discretionary pursuant to CHRB Directive 01-09 which establishes a CHRB Investigator's authority in approving licenses for individuals with criminal

histories. Mr. Pharies then appealed the denial and requested a formal fitness for licensure hearing. Both parties were noticed and the hearing was scheduled for January 15, 2013. On that day, the hearing was called to order at approximately 12:00 noon in accordance with the notice supplied to all parties. The CHRB submitted documentary evidence relevant to the matter, while the Appellant presented oral testimony in the form of witnesses, including himself. The record was closed and the matter deemed submitted that same day.

LIST OF EXHIBITS

CHRB Exhibit #1 – CHRB document containing several different documents pertaining to this hearing: Cover page, Table of Contents, Notice of Hearing, Written request for a fitness for license hearing from Appellant to Sharyn Jolly, CHRB Investigations file, Notice of Refusal of License, Declaration of service by certified and first class, Appellant's CHRB license history, a license application completed by Appellant, a Statement of Decision dated November 8, 2009 by the Board of Stewards at Cal Expo Harness Association, and ruling #18 by the Cal Expo Board of Stewards dated October 22, 2009.

CHRB Exhibit #2 -- California Horse Racing Board Directive 01-09 "License Refusals and Denials," dated January 6, 2009.

FACTUAL FINDINGS

I

Owner/trainer/driver Brian Pharies is 51 years old and has held a California Horse Racing Board license in some capacity from 1989 until of October 2009 when it was suspended in a ruling by the Board of Stewards at Cal Expo Racing Association.

II

On June 2, 2009, Mr. Pharies was convicted by U.S. District Court of two felonies – theft of government property and forgery, for which he was sentenced to 3 years of formal federal probation and ordered to make restitution in the amount of $26,901.80.

III

The convictions stemmed from a plea agreement in which Appellant admitted to cashing numerous social security checks that were issued to his mother after she died. Mr. Pharies also forged signatures on several checks, including one written to the California Horse Racing Board.

IV

On October 3, 2009, the Board of Stewards at Cal Expo held a formal hearing regarding Appellant's felonies and as result, issued Ruling #18 on October 22, 2009, suspending Mr. Pharies' licenses and recommending that he not be considered for any license until August 31, 2017.

V

Mr. Pharies was discharged from probation on August 31, 2012.

VI

On September 22, 2012, Mr. Pharies applied for an owner's and driver's license from the CHRB. On that same date, in accordance with the CHRB Rules and Regulations and the Cal Expo Ruling, and pursuant to a CHRB directive on these matters, Mr. Pharies was refused a license due to his felony conviction and recent of release from probation.

VII

Mr. Pharies appealed the denial; that appeal is being heard here.

APPLICABLE LAWS AND REGULATIONS

California Horse Racing Board Directive 01-09 "License Refusals and Denials," dated January 6, 2009.

A license applicant *will not* be considered for licensing and will be refused or denied a license based on the following minimum criteria:

> . . .
>
> b. Felony Convictions (except as noted above subsection "a"): A license applicant is not eligible for licensing for a term of (5) years following the termination of the parole and/or probation of the felony conviction.
>
> . . .

The Investigative Staff has no discretionary authority to approve a license if the applicant does not meet the aforementioned time lines relative to disqualifying criminal convictions. . .

DISCUSSION OF ISSUES

The issue in this matter is whether the terms of CHRB Directive 01-09 should be waived with respect to Mr. Pharies' conviction. Also at issue, is whether the Cal Expo Board of Stewards' decision with respect to eligibility for licensure should be enforced. As an initial matter, the CHRB investigative staff appropriately applied the conditions set forth in Directive 01-09 and denied Mr. Pharies' license application based on his felony convictions and the recent (less than five years) discharge from probation. Directive 01-09 is very specific in restricting the ability for the CHRB investigators to grant licenses under these circumstances. It is clearly intended to require that license applicants with recent criminal history be subjected to more scrutiny (and by extension, more due process) than an individual investigator's assessment as to whether these individuals would be good candidates for licensure. That additional scrutiny is the purpose of this

hearing. In some ways, this hearing has already been held by the Cal Expo Board of Stewards who, although admittedly were considering suspension rather than eligibility for licensure, nevertheless concluded that there was no reason to deviate from the Directive's strict application.

As this hearing officer has acknowledged in previous proposed decisions in this area, the CHRB clearly has an interest in withholding licenses from certain individuals in order to regulate the industry in a way that promotes fairness, integrity and safety. For example, individuals who do not possess the requisite skills are precluded from procuring trainers' licenses; individuals not employed by associations are prevented from acquiring racing official or valet licenses; and more to the point, those who have been convicted of crimes related to book making cannot be licensed by the CHRB. It is this concern with criminal history and its potential deleterious effect that led to the promulgation of Directive 01-09. Its application, however, is less clear. As stated earlier, the CHRB would certainly not want to license a convicted bookmaker or race fixer, but probably has no interest in barring individuals with minor traffic infractions. The gray area of criminal convictions between these two extremes is more difficult, but is guided by the conditions set forth in the Directive. Applied strictly in this case, Mr. Pharies would be precluded from applying for a license until August 31, 2017 (five years after the discharge from his probation). It is the purpose of this hearing to determine if the evidence indicates that a waiver of all or part of the time that Mr. Pharies is precluded from applying for a CHRB license is appropriate.

A review of Appellant's history and the evidence presented at hearing seems relevant here. Appellant is candid in explaining and regretting his crimes. He testified on his own behalf. He explained that he should eligible for a CHRB license for the following reasons: (1) he admitted his mistake; (2) he was expressed contrition for the crimes; (3) he has served three years of probation; (4) he has held a horse racing license for a very time; (5) he has some knowledge and hard lessons to offer the horse racing industry; (6) he wants to make money in order to complete restitution; (7) his license history is otherwise unremarkable; and (8) that he believed his holding a license was not a danger to the horse racing industry. Appellant also called licensed owner Michael DePaulo as a character witness. Mr. DePaulo has known Mr. Pharies for 10 years. He explained that Appellant has a strong interest in caring for animals, that he was recently married, he goes to church on Sunday, has a new stepson, is a family man and a good harness driver. Mr. DePaulo also testified that he would try to give him a horse to train and would certainly give him opportunities to drive horses he now owns.

On the other hand, this case is categorically different than the drug or alcohol related convictions that seem to predominate this type of hearing. Those matters are different in the sense that there is typically evidence of sobriety and rehabilitation. In the instant case, the only evidence of rehabilitation is Appellant's contrition and the fact that he has not been engaged in criminal activity since that conviction. More troublesome in this case, however, is that this crime was ongoing – continuing for more than two years. This was not a one off incident that can be simply characterized as a mistake, rather at best can only be described as a series of mistakes or a continuing lapse in judgment until Appellant's criminal activity was discovered and stopped. Further, it is illogical to claim that this crime does not pose a danger to the horse racing industry. Stealing taxpayer money in the form of social security checks and forging signatures on checks is a

behavior that could have a direct, negative impact on horse racing. (To wit, one of the forgeries was on a check to the California Horse Racing Board). Arguably this type of crime is far more threatening and detrimental to horse racing than an individual whose conviction was rooted in addiction. Lastly, this hearing officer is particularly troubled by the small amount of restitution completed by Appellant. At the $100/month rate that the Cal Expo Board of Stewards delineated (payments which are not up to date), the amount will not be paid in full for more than 25 years. While admittedly, Appellant explains that he cannot obtain gainful employment outside of the horse racing industry because of his skill set and felony status, it is not clear to this hearing officer that it is the horse racing industry's role to correct this difficulty. Appellant has not obtained any gainful employment since the conviction.

Ultimately, these types of cases are risk/benefit analyses with respect to whether this is the type of individual that the CHRB should license given their criminal past and potential future. On the one hand, Appellant's history is serious, and he presents some risk should he acquire a license; on the other hand, Appellant seems sorry for crimes and willing to work toward restoring his life. Frankly though, his contrition alone is not enough to overcome CHRB Directive 01-09's restrictions or the Cal Expo Board of Stewards recommendations. However, in addition to the passage of time, Appellant can take certain actions that will supplement his contrition and make him eligible for licensure ahead of the August 31, 2017 date.

CONCLUSION/PROPOSED DECISION

Given all of the foregoing, it is recommended that Brian Pharies not be permitted to apply for a California Horse Racing Board license until February 28, 2015 at which time he must show evidence that he has paid at least half of the restitution ($14,000.00) as outlined in his conviction and sentencing. At that time, Mr, Pharies should only be eligible for an owner's and driver's license and not be permitted to apply for a trainer's license until August 31, 2017. At all times that he hold a license, it shall be considered probationary, and any stewards' rulings against Mr. Pharies can be grounds for automatic revocation.

DATED: March 10, 2013.

C. SCOTT CHANEY
Hearing Officer