BEFORE THE CALIFORNIA HORSE RACING BOARD

STATE OF CALIFORNIA

In the Matter of:
FITNESS FOR LICENSURE

LUIS PENA
Appellant

Case No. SAC 12-0050

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

BEFORE THE CALIFORNIA HORSE RACING BOARD

OF THE STATE OF CALIFORNIA

In the Matter of:	Docket No.: SAC 12-0050
FITNESS FOR LICENSURE	Hearing Date: February 27, 2013 Time: 10:00 A.M.
LUIS PENA Appellant	

PROPOSED DECISION

The matter was heard on February 27, 2013 by Richard P. Margarita, a Hearing Officer designated under California Horse Racing Board rule 1414 (Appointment of Referee) at the California Horse Racing Board, 1010 Hurley Way, Suite 300, Sacramento, California.

The Appellant, Luis Pena, was present and represented by David Siegel, who is not an attorney.

The California Horse Racing Board (hereinafter referred to as CHRB) was represented by Supervisory Special Investigator Dan Dailey.

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Also present at the hearing were Appellant's two witnesses, Mr. Gene Vallandingham and Frederick Kuebler. The proceedings were recorded by court Reporter was Yvonne K. Fenner, CSR License number 10909.

PROCEDURAL BACKGROUND

The issue presented was whether Appellant, Luis Pena, was unfit for a license pursuant to CHRB Rule 1484. Appellant's occupational licenses to participate in pari-mutuel harness racing as an owner, trainer, or otherwise, was summarily suspended by the State of New York on May 24, 2012 by the New York Racing and Wagering Commission. Appellant's California Horse Racing Board Owner's license, license number 228246-8/14, Trainer license, license number 069977-8/14, Driver's license, license number 239997 – 8/14, were all suspended by the Cal Expo Harness Association on November 9, 2012.

Appellant requested a formal fitness for licensure hearing. Both parties were noticed and the hearing was scheduled for February 27, 2013 at 10:00 a.m. On that day, the hearing was called to order at approximately 10:10 a.m. in accordance with the notice provided to all parties. The CHRB submitted oral testimony through CHRB Supervisory Special Investigator Dan Dailey, as well as documentary evidence relevant to this case. Appellant submitted both oral testimony, including his own testimony, the testimony of his two witnesses, Mr. Gene Vallandingham and Frederick Kuebler, and documentary evidence. The record was closed and the matter deemed submitted on February 27, 2013.

LIST OF EXHIBITS

CALIFORNIA HORSE RACING BOARD EXHIBITS:

CHRB Exhibit # 1: Certified copy of summary suspension of Mr. Pena's license, dated May 24, 2012, from the New York Racing and Wagering Commission (Admitted).

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CHRB Exhibit # 2: Office of the Board Counsel Notice of Motion in the Matter of Luis Lou Pena, from the State of New York's Racing Commission (Admitted).

CHRB Exhibit # 3: Partial transcript of a hearing in New York State Racing and Wagering Board dated August 29th, 2012 (Admitted).

CHRB Exhibit # 4: Result of license search from New York State Racing and Wagering Commission's Web site (Admitted).

CHRB Exhibit # 5: Copy of Rule 1484, and applicable Business and Professions Code Sections (Admitted).

APPELLANT'S EXHIBITS:

Appellant Exhibit A: Accusation against Luis Pena (Admitted).

Appellant Exhibit B: Copy of the CHRB-produced stewards' minutes (Admitted).

Appellant Exhibit C: CHRB Official Ruling dated November 9, 2012 against Appellant Luis M. Pena (Admitted).

Appellant Exhibit D: CD (Admitted).

Appellant Exhibit E: Investigative Report dated 10/11/12 by Supervisor Dan Dailey (Admitted).

Appellant Exhibit F: USTA Rules (Rule 22) (Admitted).

Appellant Exhibit G: USTA Rule Book (2011/2012) (Admitted).

Appellant Exhibit H: Transcript of a Panel Discussion (Not Admitted).

Appellant Exhibit I: Internal Notes. (Not Admitted).

Appellant Exhibit J: Four letters on behalf of Appellant (Admitted).

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Appellant Exhibit J1: Letter from Christopher Schick dated 2/20/13 on behalf of Appellant (Admitted).

Appellant Exhibit J2: Letter from David Elliott dated 2/20/13 on behalf of Appellant (Admitted).

Appellant Exhibit J3: Letter from Steve Wiseman dated 2/21/13 on behalf of Appellant (Admitted).

Appellant Exhibit J4: Letter from James Lackey dated 2/27/13 on behalf of Appellant (Admitted).

Appellant Exhibit K: Letter from Lou Pena dated December 7, 2012 (Admitted).

FACTUAL FINDINGS

I.

Appellant Luis Pena's license was summarily suspended by the State of New York on May 24, 2012 by the New York Racing and Wagering Commission.

II.

Appellant's California Horse Racing Board Owner's license, license number 228246-8/14, was suspended by the Cal Expo Harness Association on November 9, 2012.

III.

Appellant's California Horse Racing Board Trainer license, license number 069977-8/14, was suspended by the Cal Expo Harness Association on November 9, 2012.

IV.

Appellant's California Horse Racing Board Driver's license, license number 239997 – 8/14, was suspended by the Cal Expo Harness Association on November 9, 2012.

V.

On February 27, 2013, Appellant's California Horse Racing Board Owner's license, license number 228246-8/14, Trainer license, license number 069977-8/14, Driver's license, license number 239997 – 8/14, were still suspended in the State of California.

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APPLICABLE LAWS AND REGULATIONS

California Horse Racing Board 1484 (Evidence of Unfitness for License). "If any applicant for a license or any licensee is under suspension, set down, ruled off, excluded from the inclosure, or otherwise barred from any racing occupation or activity requiring a license, it is prima facie evidence that he or she is unfit to be granted a license or unfit to hold a license or participate in racing in this State as a licensee during the term of any suspension or exclusion from racing imposed by any competent racing jurisdiction."

DISCUSSION OF ISSUES

The issue before this Board is whether or not the State of New York ruling is enforceable in California. More specifically, the issue is whether the CHRB should recognize reciprocity as described in CHRB rule 1484 (Evidence of Unfitness for License) and require that Appellant be suspended, as outlined in the New York ruling. The CHRB rule states in pertinent part: "If any ...licensee is under suspension, ... it is prima facie evidence that he... is unfit to...hold a license or participate in racing in this State... during the term of any suspension... imposed by any competent racing jurisdiction..." At the hearing, the CHRB presented evidence in the form of the State of New York ruling that Appellant was summarily suspended in New York. This Board views that ruling as "prima facie evidence" that Appellant Pena is unfit to hold a license in this jurisdiction. However, as Appellant correctly argued, prima facie evidence merely establishes a fact or the presumption of a fact and can be rebutted. Appellant attempted to rebut the evidence embodied by the New York ruling. In our view, those arguments were unsuccessful.

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First, Appellant argued that the ruling in the State of New York was invalid, as New York was not a Court of competent jurisdiction. (Reference is made to Reporters Transcript ("RT") page 93, lines 11 – 18). Appellant argued that due to the fact that the State of New York took such a long time in rendering a final decision against Appellant, they were "incompetent," and therefore, not a Court of competent jurisdiction. Appellant's argument misstates the definition of a Court of competent jurisdiction. A Court of competent jurisdiction is one that has jurisdiction over the subject matter involved. Subject-matter jurisdiction is the power of the court over a cause of action or to act in a particular way. The State of New York has subject matter jurisdiction over Appellant's Pena's occupational licenses to participate in pari-mutuel harness racing as an owner, trainer, or otherwise, and therefore, is a Court of competent jurisdiction.

Although Appellant may deem the State of New York to be inefficient and have taken a long time rendering a decision in the matter against Appellant, they are still a court of competent jurisdiction.

Additionally, Appellant's testimony lacked credibility. For example, Appellant testified that his license was valid in the State of Pennsylvania because he had never been notified that his license had been suspended in that state. Yet, upon further questioning, Appellant testified that he knew his license had been suspended by the USTA, and that because of the USTA suspension, he could not race in the State of Pennsylvania. (RT pages 85 – 87).

Second, Appellant argues that Appellant's license in the States of New Jersey, Pennsylvania and the U.S. Trotting Association was suspended only because his license had been suspended in

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the State of New York. Appellant misplaces his understanding of California's reciprocity rule. We are bound by and have a duty to enforce California rules and regulations as they relate to licensees. Pursuant to CHRB Rule 1484, the CHRB was well within the law, based on the State of New York's suspension of Appellant's license, to deem Appellant unfit to maintain his California license, and revoke his license.

Third, Appellant attempted to challenge the constitutionality of CHRB rule 1484, which was inapplicable for this fitness hearing.

Appellant submitted a letter to the Board dated December 7, 2012 (Exhibit K). Appellant essentially alleged that he has been denied due process and fairness. As part of the Board's evidence, Exhibit 1 clearly demonstrates that the State of New York Office of Board Counsel had proven a prima facie case, "that respondent (Appellant) had committed the alleged violations and an interim ruling "that the final disposition of this matter is very likely to result in a period of license suspension or revocation that will greatly exceed any period of summary suspension that respondent (Appellant) Luis ("Los") Pena is likely to incur while this matter is pending administratively before the New York State Racing and Wagering Board." The charges set forth against Appellant in the State of New York, as delineated in Exhibit 1, were multiple, and extensive. The charges involve horses trained by Appellant and raced in the State of New York that were administered various drugs which Appellant knew of, and intended that each horse was illegally drugged and raced. Exhibit 1 clearly sets forth the facts that between January 2010 and April 2012, Appellant was responsible on 675 occasions for the racing of illegally drugged harness horses in pari-mutuel races in the State of New York. These are not deminimis allegation and charges.

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As part of Exhibit 3, there is a portion of the transcript from the Appellant's State of New York August 29, 2012 hearing, as well as a Decision/Order dated October 3, 2012 by the Honorable Vincent J. Reilly, Jr., New York Supreme Court Justice. In Judge Reilly's ruling as a result of Appellant Pena's filing of a "hybrid proceeding," seeking a judgment pursuant to CPLR Article 78, annulling the respondent's (State of New York) determination imposing a summary suspension in the State of New York, and seeking declaratory and injunctive relief declaring that the equine administration regulations that formed the basis of the charges against him (Appellant Pena) were invalid and cannot be enforced. Judge Reilly went to great lengths in his analysis relative to the State of New York rules for effectively preventing the use of improper devices, the administration of drugs or stimulants, or other improper acts for the purpose of affecting the speed of harness horses in races in which they are about to participate. Judge Reilly opined that, "Under emergency circumstances, State Administrative Procedure Act section 401 (3) expressly grants the Board the authority to suspend such a license without a hearing pending the completion of further proceedings for revocation. Pursuant to the statute, such a summary suspension is authorized "[i]f the agency finds that public health, safety, or welfare imperatively requires emergency action, incorporates a finding to that effect in its order." Judge Reilly then opined that, "respondent's (State of New York) findings were based upon an extensive examination of veterinary records and petitioner's (Appellant Pena) own records of the horses trained by petitioner (Appellant Pena). After examining the horses' veterinary records and comparing the treatment dates to race dates, the Board (State of New York) determined that 84 horses were illegally administered drugs on approximately 1,719 occasions too close in time before 675 races between the period of January 2010 and April 2012. The Board also reviewed petitioner's (Appellant Pena's) own records which showed that during the year 2011, his horses illegally started 428 races due to the illegal administration of drugs and that his horses had been drugged in violation of Board rules 88% of the time… In the Court's view, the horses' veterinary record and petitioner's (Appellant Pena's) own records are sufficiently reliable

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evidence for the purpose of providing probable cause for the Board's determination that petitioner's (Appellant Pena) horses had been drugged in violation of Board rules…" Judge Reilly declined to annul the State of New York's determination imposing the summary suspension, and also declined to grant injunctive relief to Appellant Pena, thereby sustaining the suspension of Appellant Pena in the State of New York.

Therefore, this Board finds that the CHRB adequately provided prima facie evidence that the State of New York ruling should be carried out in this jurisdiction as required by CHRB rule 1484 (Evidence of Unfitness for License), and also finds that Appellant Pena has failed to rebut this presumption, and as such, is unfit to be granted his California Horse Racing Board licenses.

CONCLUSION/PROPOSED DECISION

For the foregoing reasons, and overwhelming evidence presented against Appellant Pena, it is the ruling that the Board enforce reciprocity of the State of New York ruling as required by CHRB rule 1484 (Evidence of Unfitness for License); and therefore suspend Appellant Pena's license, and deem him unfit to possess any California Horse Racing Board licenses.

DATED: 3/27/13

Richard P. Margarita

RICHARD P. MARGARITA, ESQ.
Hearing Officer

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