

BEFORE THE CALIFORNIA HORSE RACING BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation Against:

CRISTOPHER J. VIENNA
Respondent

CHRB No. 05BM086

OAH No. 2007090277

NOTICE OF NON-ACTION BY THE CALIFORNIA HORSE RACING BOARD

The parties are hereby informed that the California Horse Racing Board received the proposed decision of the administrative law judge in the above-entitled matter on February 14, 2008, and failed to act on the proposed decision within 100 days of said receipt. The proposed decision was therefore "deemed adopted" on May 24, 2008, as provided in Government Code section 11517, subdivision (c) (2).



Sharyn S. Jolly
Senior Investigator
Administrative Hearings Unit

Dated: May 27, 2008

BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

CRISTOPHER J. VIENNA,¹

Respondent.

Case No. 05 BM 086

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PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on December 10, 11, and 12, 2007.

Deputy Attorney General Marjorie E. Cox represented complainant Ingrid Fermin, Executive Director of the California Horse Racing Board.

Steve R. Schwartz, Attorney at Law, represented respondent Cristopher J. Vienna, who was present.

The record was held open to receive closing briefs. Respondent's brief was timely filed and marked for identification as Exhibit 343. Complainant's brief, which was marked for identification as Exhibit 44, was not timely filed; however, following a showing of good cause for the late filing, complainant's brief was read and considered. (Complainant's request to excuse the late filing of her brief was marked for identification as Exhibit 45, and respondent's objection to the late filing was marked for identification as Exhibit 344.) A facsimile transmission by complainant, transmitted on January 22, 2008 and containing new evidentiary matter, was marked for identification as Exhibit 46 but excluded on the ground that it was not timely presented. The record was closed and the matter was deemed submitted on January 23, 2008.

FINDINGS AND CONCLUSIONS

1. At all times relevant, respondent Cristopher J. Vienna was licensed as a trainer by the California Horse Racing Board (board) and was the trainer of record for the horse "Speak The Language" at Bay Meadows Racecourse in San Mateo, California. Ingrid

¹ The accusation misspelled respondent's first name as "Christopher."

Fermin filed the accusation against respondent in her official capacity as the Executive Director of the board. Respondent filed a notice of defense.

2. The accusation alleges that after winning the sixth race at Bay Meadows on March 31, 2005, Speak The Language tested positive for fluphenazine, a prohibited drug substance. Section 1843, subdivision (a), of the board's regulations² states that "[n]o horse participating in a race shall carry in its body any drug substance or its metabolites or analogues, foreign to the horse except as hereinafter expressly provided." Under the board's regulations, fluphenazine is a "Class 2" prohibited drug substance; a horse that participates in a race is not allowed to carry fluphenazine in its body in any concentration.³ (Cal. Code Regs., tit. 4, §§ 1843.1, subd. (a), 1843.2 & 1859.5.) Section 1859.5 of the board's regulations states that the presence of a prohibited Class 2 drug substance in the horse "shall require disqualification of the horse from the race in which it participated and forfeiture of any purse, award, prize or record for the race"

Respondent stipulated that Speak The Language tested positive for fluphenazine after winning the sixth race at Bay Meadows on March 31, 2005. He acknowledges that the positive test finding requires disqualification of the horse and forfeiture of the purse.

3. The accusation further alleges that, by virtue of Speak The Language's participation in the race and her subsequent positive test, respondent violated the board's "trainer-insurer" rule. That rule, set forth in section 1887, subdivision (a), of the board's regulations, states that "[t]he trainer is the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties"⁴

Respondent denies that he violated the trainer-insurer rule. He contends that the circumstances under which fluphenazine was administered to Speak The Language provide a complete defense to the charge, or mitigate his actions to such a degree that no discipline against his trainer's license is warranted.

CIRCUMSTANCES SURROUNDING ADMINISTRATION OF THE DRUG

4. Respondent was first licensed as a trainer in August or September of 2004. He has been around horses all his life. Respondent testified that he grew up at Santa Anita,

² The board's regulations are set forth in title 4 of the California Code of Regulations.

³ "Class 2" drug substances are those which are "pharmacologically active in altering consciousness or the psychic state, or therapeutic drug substances with potential for abuse." (Cal. Code Regs., tit. 4, § 1843.2.)

⁴ "The trainer is the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties, except as otherwise provided in this article. If the chemical or other analysis of urine or blood test samples or other tests, prove positive showing the presence of any prohibited drug substance defined in Rule 1843.1 . . . , the trainer of the horse may be fined, his/her license suspended or revoked, or be ruled off. . . ." (Cal. Code Regs., tit. 4, § 1887, subd. (a).)

where his father trained thoroughbreds and show horses; his mother was active in the “show horse world.” He worked for his father as an assistant trainer for several years before he became licensed as a trainer. Respondent estimates that he has trained 30 to 40 horses. In Fall 2005, respondent asked to change his licensure to assistant trainer. Since that time, he has been working for his father.

5. Respondent first saw Speak The Language on the night of March 14, 2005. Respondent and two others had purchased the filly in a claiming race at Santa Anita on March 11, 2005, and she was delivered to Bay Meadows by van on March 14. Respondent was planning to race her at Bay Meadows on March 31. When respondent first saw Speak The Language, she was nervous and uneasy in her stall – pacing and walking in circles. Respondent expected her to settle down during the night.

In the morning, on March 15, Speak The Language was worse. She was spinning her rear end in the stall and she was nervous when respondent walked her in the shed row. Respondent consulted with veterinarian Kenneth Allison, D.V.M., who came to the barn and examined Speak The Language. Respondent knew Dr. Allison; he had worked with Dr. Allison before, and Dr. Allison had also worked with respondent’s father. Respondent told the veterinarian that he had a “very nervous filly” and described Speak The Language’s actions over the last few hours. Dr. Allison looked at the horse and saw that she was nervous, excited, and acting unruly.

Respondent gave inconsistent statements on whether he asked Dr. Allison to administer fluphenazine or whether the veterinarian made the initial recommendation. On April 16, 2005, the board’s supervising investigator Anne Glasscock interviewed respondent; at that time, respondent was aware of Speak The Language’s positive test finding. Respondent told Glasscock that he had asked Dr. Allison to give fluphenazine to Speak The Language to calm her down, because fluphenazine is often used in hunter-jumpers for that purpose. At hearing, respondent and Dr. Allison both testified that Dr. Allison recommended the use of fluphenazine. Dr. Allison stated that trainers do not tell him what drugs to use, but that he tries to arrive at a joint decision on the appropriate medication.

Respondent testified that, before Dr. Allison administered the drug, he told Dr. Allison that he planned to race the horse in 16 or 17 days. Dr. Allison told respondent that the horse would be “safe at seven days.” Dr. Allison and respondent both understood that statement to mean that, at seven days, the drug would have cleared the animal’s system and she would pass a post-race test. Dr. Allison testified that he had administered fluphenazine hundreds of times and had always recommended a seven-day “withdrawal time” to his clients; before Speak The Language, he had never had another horse come back positive for fluphenazine. On January 20, 2005, Dr. Allison had administered fluphenazine to Fuego Maximo, another horse that respondent trained; Fuego Maximo then ran on January 26, 2005, and passed its post-race drug test.

Dr. Allison, with respondent’s knowledge and consent, then administered two milliliters of fluphenazine to Speak The Language on March 15, 2005. Respondent was

present when Dr. Allison administered the medication. The evidence established that two milliliters is a typical therapeutic dose.

On March 15, Dr. Allison completed a Confidential Veterinarian Report, using the form prescribed by the board, stating that that he had administered fluphenazine to Speak The Language that day. The Confidential Veterinarian Report was filed with the official veterinarian presiding over the race meeting.

6. Although it was developed as an antipsychotic medication for humans, fluphenazine is used "off-label" by horse trainers as a tranquilizer. Rick Arthur, D.V.M., the Equine Medical Director for the board, acknowledged at hearing that fluphenazine has a legitimate therapeutic use as a tranquilizer for horses; he also noted, however, that it is a long-lasting tranquilizer with the potential to influence the outcome of a race and therefore presents a high risk of abuse.

7. Respondent entered Speak The Language in the sixth race at Bay Meadows on March 31, 2005. She was favored by the handicappers and she won. Respondent testified that he relied on the advice of Dr. Allison and his own experience with Fuego Maximo, and concluded that it would be safe to race Speak The Language 16 days after the administration of fluphenazine.

8. After the race, urine and blood samples were collected from Speak The Language and a portion of each sample was sent for analysis to the Kenneth L. Maddy Equine Analytical Chemistry Laboratory at the University of California, Davis (Maddy Lab). In early 2005, the board had contracts with two testing facilities: about two-thirds of its tests were performed by the Truesdail Laboratory in Southern California, and the remaining one-third were performed by the Maddy Lab. (Since July 2005, all of the board's testing has been done by the Maddy Lab.) The Maddy Lab had more sophisticated and more sensitive testing equipment than the Truesdail Lab. A practical effect of the Maddy Lab's enhanced capabilities is to extend the time in which a prohibited substance can be detected.

The blood sample from Speak The Language tested positive for fluphenazine at a concentration of one nanogram per milliliter (1.0 ng/mL). Scott Stanley is the director of the Maddy Lab. He holds a doctorate in pharmacology and toxicology and he is an associate professor at the University of California School of Veterinary Medicine, Davis. In the opinions of Drs. Stanley and Arthur, a concentration of 1.0 ng/mL of fluphenazine is pharmacologically active. In Dr. Arthur's opinion, a concentration of 1.0 ng/mL is not a "residue" of medication. No contrary expert evidence on this issue was offered.

9. Establishing a reliable withdrawal time for a drug administered to a horse is difficult because it depends on many variables such as the dose, the frequency of doses, the size and weight of the horse, its gender and its body type. Establishing a withdrawal time for fluphenazine, which is eliminated through bile rather than urine, is particularly difficult. The Maddy Lab has never established a withdrawal time for fluphenazine and, to Dr. Stanley's knowledge, no laboratory in the country has done so. To establish a reliable withdrawal time

would require a research study of at least 20 horses and no such study has been done. There is no evidence that the board, in 2005 or before, recommended withdrawal times for fluphenazine or any other prohibited drug substance. The Racing Medication and Testing Consortium, Inc., now posts on its website withdrawal guidelines for fluphenazine that have been recommended by some states other than California, and they vary widely from seven days to 30 days. In a July 2007 memorandum to equine veterinarians in California, Dr. Arthur recommended a minimum withdrawal time of 30 days.

MATTERS RESPONDENT ASSERTS IN DEFENSE OF THE CHARGE THAT HE VIOLATED THE TRAINER-INSURER RULE

10. The matters set forth in Findings 1, 2, 5, 7 and 8 establish a prima facie violation of the trainer-insurer rule: respondent was the trainer of Speak The Language on March 31, 2005, and, after participating in a race that day, she tested positive for a prohibited drug substance.

11. Respondent contends that he falls within the defense to the rule established by subdivision (c) of section 1888 of the board's regulations. That section states that a trainer may defend a charge of violating the trainer-insurer rule if he shows that he "made every reasonable effort to protect the horses in his care from tampering by unauthorized persons." This defense, however, does not apply where the trainer himself approved the administration of the prohibited substance. A trainer cannot approve the administration of a prohibited substance, and then defend against a charge of violating the trainer-insurer rule by proving that he protected the horse from tampering by others.

12. Respondent contends that the trainer-insurer rule is not a rule of strict liability and that, by showing that he was not negligent or that there are matters in mitigation, he can establish a complete defense to the charge that he violated the rule. He is incorrect. In *Vienna v. California Horse Racing Board* (1982) 133 Cal.App.3d 387, the court held that

"... [b]y express language the [trainer-insurer] 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. It 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."

(*Id.* at p. 396, quoting from *Sandstrom v. California Horse Racing Board* (1948) 31 Cal.2d 401, 408-409.) The apparent harshness of the trainer-insurer rule is justified by the need to protect the betting public from drugged horses. (*Vienna v. California Horse Racing Board, supra*, at 133 Cal.App.3d at p. 396.)

13. Respondent violated the trainer-insurer rule. (Findings 1, 2, 5, 7, 8, 10 and 11.) A trainer who violates the rule may be fined, his license may be suspended or revoked, or he may be warned off. (Cal. Code Regs., tit. 4, § 1887, subd. (a); Bus. & Prof. Code, §§ 19460 & 19461.) Cause exists to impose discipline against respondent.

Respondent argues that, under Business and Professions Code section 19582, subdivision (3)(B), a fine cannot be based solely upon a violation of the trainer-insurer rule. That section, however, only applies to violations of Business and Professions Code section 19581. No such violation is alleged here.

MATTERS RESPONDENT ASSERTS IN MITIGATION

14. The board has long recognized that mitigating circumstances can reduce the severity of a violation of the trainer-insurer rule and thereby reduce the discipline that should be imposed. In CHRB Directive 11-92, issued on September 23, 1992, the board identified mitigating circumstances that may affect the penalty to be imposed. Ed Halpern, the executive director and general counsel for the California Thoroughbred Trainers and a founding director of Racing Medication and Testing Consortium, Inc., testified persuasively that the board has historically recognized mitigating circumstances in drug cases. While Dr. Arthur did not always agree with Halpern on what constitutes mitigation, Dr. Arthur agrees that the board encourages the consideration of mitigating circumstances.

15. Respondent argues that there have been no prior complaints against his license and no prior drug violations. At the time of the March 2005 violation, however, respondent had been licensed as a trainer for less than a year. Respondent's license history as a trainer is too short to give it any weight as a mitigating circumstance.

16. Respondent contends that fluphenazine is legally available. This is not a mitigating circumstance. It may be that administration of an illegal drug is an aggravating circumstance, because it would tend to show that the drug was not administered for a legitimate therapeutic purpose. But the fact that a drug, which has the potential to alter a race, is legally available is not entitled to any weight as a mitigating circumstance.

17. Respondent argues that he took appropriate steps to safeguard Speak The Language from tampering by third parties. This has no mitigating effect where it has been established that the drug was administered with respondent's knowledge and consent.

18. Respondent asserts that he relied on Dr. Allison's advice concerning a seven-day withdrawal time for fluphenazine. While respondent may have relied partly on Dr. Allison's advice, he did not do so exclusively. It was respondent who initially suggested the administration of fluphenazine to Dr. Allison, and respondent acknowledges that his decision to race Speak The Language on March 31 was based partly on his experience with Fuego Maximo.

19. Respondent asserts that his offense is mitigated by “laboratory variability.” He argues that the enhanced capabilities of the Maddy Lab over the Truesdail Lab had the effect of nullifying Dr. Allison’s recommendation of a seven-day withdrawal time for fluphenazine. Respondent claims that, in the “Horsemen’s Handbook,” published by the board, the board recognizes that changes in testing procedures will be recognized as mitigating circumstances.

Respondent’s argument is not persuasive. In its Horsemen’s Handbook, the board accepts responsibility to notify the racing community of changes in the levels specified for authorized drugs as a result of changes in testing methodology. The board does not accept responsibility to notify the racing community of the extent of its capabilities to detect the presence of prohibited drug substances, and no legal basis for imposing such an obligation on the board has been established. The Horsemen’s Handbook warns trainers that “regardless of the amount of time between the administration of a prohibited drug substance, and the race in which the horse runs and is tested, *the trainer is responsible* for a positive finding.” (Original emphasis.)

20. Respondent claims that the concentration of fluphenazine found in Speak The Language was the residue of a therapeutic medication, a mitigating factor under CHRB Directive 11-92. The evidence, however, failed to establish that the concentration of 1.0 ng/mL was mere residue.

21. Although some of respondent’s mitigation arguments are not persuasive, there are significant mitigating circumstances. Most importantly, the evidence establishes that fluphenazine was administered by a licensed veterinarian for a proper therapeutic purpose. Although respondent suggested fluphenazine to Dr. Allison, Dr. Allison determined that administration of that drug was appropriate. The evidence does not establish that respondent had any intent to affect Speak The Language’s race on March 31, and there is no evidence that the drug affected her race; she was favored to win and she did win. Dr. Allison completed a Confidential Veterinarian Report, which disclosed to the racetrack veterinarian the administration of fluphenazine. Both Dr. Allison and respondent believed, based on their past experience, that the drug would be clear of Speak The Language’s body when she raced two weeks later.

DISCIPLINE

22. Complainant recommends a 30-day suspension and a fine of \$5,000. In light of the evidence in mitigation, suspension of respondent’s trainer license is not warranted. There is no basis, however, to dismiss the proceeding without the imposition of discipline, as respondent requests. Using a Class 2 prohibited drug substance for treatment and then racing the horse shortly thereafter is a high-risk course of action that should be discouraged. A fine of \$1,000 will be imposed.

ORDER

1. Speak The Language is disqualified from the sixth race at Bay Meadows Racecourse on March 31, 2005, and any purse, award, prize or record awarded to her for that race shall be forfeited and she shall be deemed unplaced in that race.

2. Respondent Cristopher J. Vienna shall pay a fine of \$1,000 to the California Horse Racing Board.

DATED: February 7, 2008



DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings