

BEFORE THE CALIFORNIA HORSE RACING BOARD
OF THE STATE OF CALIFORNIA

In the Matter of:

Appeal of the Board of Stewards Official Ruling
#05, Cal-Expo Racing Association, dated
March 13, 2008

Case No. SAC 08-0015

GREGG PISTOCHINI
Appellant

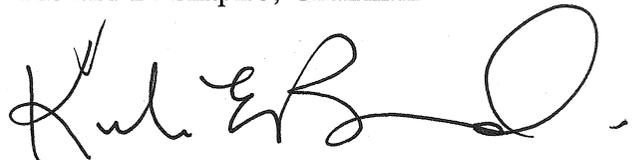
DECISION

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

The Decision shall become effective on August 22, 2008.

IT IS SO ORDERED ON August 19, 2008.

CALIFORNIA HORSE RACING BOARD
Richard B. Shapiro, Chairman



Kirk E. Breed
Executive Director

BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

In the Matter of the Appeal of the Board of
Stewards' Ruling #05, dated March 13, 2008:

GREGG PISTOCHINI,

Appellant.

Case No. 08SW-0030

OAH No. 2008040591

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, in Sacramento, California on July 9, 2008.

Kristin M. Daily, Deputy Attorney General, represented the California Horse Racing Board (CHRB or Board).

Gregg Pistochini (appellant) was present and was represented by Carlo Fisco, Attorney at Law.

The matter was submitted on July 9, 2008.

ISSUE PRESENTED

Should Ruling #05, issued by the Board of Stewards (Stewards) on March 13, 2008, be affirmed?

BACKGROUND¹

Complaint

1. The CHRB filed a Complaint (Complaint) dated February 12, 2008, which charged that appellant violated CHRB Rules 1489, 1900, 1902, and 1530,² based upon the following allegations:

¹ The information set forth in the Background was taken from the administrative record before the Stewards. The administrative record that was filed in this matter did not include Ruling #05. The parties stipulated that Ruling #05, which was included under Tab 1 in Exhibit B submitted by appellant, should be included in the administrative record.

² CHRB Rules are found in title 4 of the California Code of Regulations.

[Appellant], a licensed horse owner, was arrested by Placer County Sheriff's Department for conspiracy, grand theft and burglary. He was subsequently convicted of Penal Code section 496(a), buying or receiving stolen property (Golf Balls). This conviction is a violation of section[s] 1489(a) and 1900 in that being arrested on several felonies and convicted of a misdemeanor is contrary to community standards of justice, honesty or good morals. In addition, [appellant] appeared before the Board of Stewards on Thursday, November 29th, 2007, at Cal-Expo and made several false statements while under oath.

2. Rule 1489, in relevant part, provides:

The Board, in addition to any other valid reason, may refuse to issue a license or deny a license to any person:

(a) Who has been ... convicted of a crime involving moral turpitude.

3. Rule 1900 provides:

Any provision of any rule which is a ground for denial of a license is also a ground for suspension or revocation of a license.

4. Rule 1902, in relevant part, provides:

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:

[¶] ... [¶]

(b) indictment or arrest for a crime involving moral turpitude or which is punishable by imprisonment in the state or federal prison, 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.

Hearing Before the Stewards and Ruling #05

5. On March 7, 2008, the Stewards, consisting of Will Myers, Brent McLaren, and Wayne Oke, held a hearing on the Complaint. At that hearing, appellant was present and was represented by Roger Licht, Attorney at Law.

6. On March 13, 2008, the Stewards issued Ruling #05. In Ruling #05, the Stewards made the following Findings of Fact:

I

[Appellant] is a licensed horse owner in the State of California.

II

[Appellant] was arrested on September 04, 2007 for felony conspiracy, grand theft and burglary.

III

On January 10, 2008, [appellant] entered a nolo contendere plea and was convicted of a misdemeanor violation of penal code section 496(A) – Buying or Receiving Stolen Property (golf balls).

IV

[Appellant] was sentenced to 60 days in jail (commencing March 19, 2008) and 3 years probation. Also included in the sentence is 120 hours of community service through any non-profit organization.

7. In the Discussion section of Ruling #05, the Stewards found that appellant was convicted of “dealing in stolen golf balls.” They also found that: (1) appellant is a “prominent horse owner in the harness racing industry across the country”; (2) he has “appeared as a regular on simulcast and radio programs as a personality and handicapper for former harness operator Sacramento Harness Association”; (3) his arrest and conviction were “well known across the nation in the harness industry”; and (4) there were “numerous web and newspaper articles concerning the arrest.” Relying upon the definition of moral turpitude set forth in Wikipedia,³ the Stewards found the appellant had been convicted of a crime involving moral turpitude and there was widespread publicity about that conviction that was detrimental to horseracing. The Stewards also found that it “was apparent” in Rules

³ The Stewards relied upon the following definition of moral turpitude set forth in Wikipedia:

Moral turpitude is a legal concept in the USA which refers to “conduct that is considered contrary to community standards of justice, honesty or good morals.

The Stewards also noted that Wikipedia listed “receiving stolen goods (with guilty knowledge)” as a crime of moral turpitude.

1489 and 1902, that the CHRB “considers that any crime involving moral turpitude [and/or] widespread publicity is detrimental to horse racing....”

8. In Ruling #05, the Stewards concluded that appellant had violated Rule 1902 (conduct detrimental to horse racing – crime involving moral turpitude and widespread publicity), and Rule 1489 (grounds for denial or refusal of license – moral turpitude) pursuant to Rule 1900 (grounds for suspension or revocation). The Stewards suspended appellant for the term of his license (March 31, 2008) and recommended that he not be eligible to apply for relicensing until April 1, 2009. In addition, pursuant to Rule 1528, they suspended all of appellant’s license privileges and denied him access to all premises under their jurisdiction.⁴

9. The administrative record of the proceedings before the Stewards includes a Press Release from the Placer County Sheriff’s Office, dated September 5, 2007, which described appellant’s arrest for grand theft of golf balls exceeding \$19,000, and stated that its investigation revealed that appellant had been selling stolen high-end golf balls on E-Bay. The record also includes a copy of an article in the Sacramento Bee dated January 12, 2008, which reported appellant’s plea to a misdemeanor charge of receiving stole property in a case involving shoplifted golf balls. The Bee article described appellant as an owner of harness racehorses, who had “provided commentary for Cal Expo simulcasts to other racetracks across the country.”

SUPPLEMENTAL FINDINGS OF FACTS

At the hearing on July 9, 2008, appellant submitted the following new evidence:

1. E. Ken Tokutomi, a certified public accountant, wrote a letter dated May 21, 2008, which states that, based upon the personal income tax returns Mr. Tokutomi prepared for appellant, since July 2006, appellant’s sole sources of self-employment income has been from owning standard bred race horses and working as a horse racing analyst in the industry. Because Mr. Tokutomi states in his letter that he relied upon information provided by appellant in preparing appellant’s tax returns and did not audit or review any of that information, Mr. Tokutomi’s letter cannot be given any weight in this matter. In any event, even if appellant may earn all his income from owning race horses and analyzing races, this fact does not justify appellant’s criminal conduct nor support mitigation of the penalty imposed.

⁴ Rule 1528 provides:

The stewards’ jurisdiction in any matter commences at such time as entries are taken for the first day of racing at the meeting and extends until thirty (30) days after the close of such meeting. However, the Executive Director or the Board may delegate the authority to adjudicate any matter occurring at any racing meeting to another Board of Stewards at any time. The stewards may suspend the license of anyone whom they have the authority to supervise or they may impose a fine or they may exclude from all inclosures in this State or they may suspend, exclude and fine. All such suspensions, fines or exclusions shall be reported immediately to the Board.

2. Appellant submitted a declaration in which he describes various communications he had with Steward Wayne Oke through Gene Vallandingham about settling this matter after Ruling #05 was issued. According to appellant's declaration, during these settlement discussions, he was informed that Mr. Oke would not consider settlement unless appellant fired his attorney and dropped his appeal. Appellant asserts that these discussions show that the Stewards did not provide him a fair hearing and were biased against him when they issued Ruling #05. Appellant's assertion is not persuasive.

Appellant's indirect, post-ruling, settlement negotiations do not show that Mr. Oke was biased against appellant when Mr. Oke participated in Ruling #05. Moreover, there was no evidence that the other two Stewards who participated in Ruling #05 were involved in the post-ruling settlement discussions appellant indirectly had with Mr. Oke or were biased against appellant. As reflected in Ruling #05 and the administrative record, appellant was provided due process and a fair hearing. During the hearing before the Stewards, appellant was given an opportunity to present evidence in support of his position and to challenge the evidence against him. The Stewards made their decision based upon the evidence in the record. In sum, appellant failed to establish that the Stewards were biased against him or that he did not receive a fair hearing before the Stewards.

3. Thomas Leupp, the attorney who represented appellant in the criminal action, wrote a letter dated March 7, 2008. Mr. Leupp believes that appellant has learned "an indelible and painful lesson" and "is one of those clients least likely to run afoul of the law again." Mr. Leupp also believes that appellant could have raised good defenses to the criminal charges, but decided to plead no contest to avoid the pain and expense of a jury trial. Appellant cannot impeach his conviction. "Regardless of the various motives which may have impelled the plea, the conviction which was based thereon stands as conclusive evidence of appellant's guilt of the offense charged." (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449.)

4. Appellant submitted a memorandum of the Placer County Probation Department dated June 4, 2008, which confirms that appellant had been placed on formal probation for three years, and was ordered to complete a 60-day disciplinary sentence and 120 hours of community service. On March 17, 2008, appellant began serving his disciplinary sentence through participation in the Placer County Probation Department's Electronic Monitoring Program. He successfully completed his disciplinary sentence on May 14, 2008.

5. Appellant also submitted a Proof of Completion of Community Service Hours, which shows that he completed his court-ordered community service by working as a volunteer coach at Del Oro High School and a referee at basketball tournaments at Placer Elementary School.

6. Appellant submitted four letters of recommendation.

Karen Green, Peer Court Coordinator, wrote a letter dated May 13, 2008, complimenting appellant's participation in the Placer County Peer Court Program.

Appellant also submitted letters of recommendation from Fred Kuebler, dated November 28, 2007; David Elliott, Director of Racing Operations for Cal Expo, dated September 7, 2007; and Ivan Axelrod, District 3 Director of the United States Trotting Association, dated November 26, 2007. Appellant represented that these three letters had previously been submitted to the Stewards, but were not included in the administrative record.

7. The letters of recommendation submitted by appellant are positive. His compliance with his court-ordered disciplinary sentence and community service is commendable. But, even when viewed as a whole, the new evidence appellant submitted was not sufficiently convincing to warrant overturning Ruling #05 or reducing the penalty imposed by the Stewards. (See *In re Gossage* (2000) 23 Cal.4th 1080, 1099 ["Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a bar applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole."]) Appellant was convicted of violating Penal Code section 496, subdivision (a), buying or receiving stolen property. His conviction involved a crime of moral turpitude, which was contrary to community standards of justice, honesty and good morals. He was convicted on January 10, 2008. He is scheduled to remain on formal probation until 2011. His conviction received widespread publicity in the news media. These facts constitute substantial evidence to support Ruling #05.

8. The Stewards determined that the appropriate penalty was to suspend appellant's license for a period of approximately 12 months. Given appellant's conviction for a crime involving moral turpitude and its widespread publicity, the suspension imposed by the Stewards was reasonable and appropriate to protect the public interest and welfare.

DISCUSSION

Standard of Review

1. Pursuant to Rule 1761, every decision of the Stewards, except a decision concerning disqualification of a horse, may be appealed to the Board. Pursuant to Business and Professions Code section 19517, subdivision (a), the Board may overrule a Stewards' decision if a preponderance of the evidence shows the Stewards mistakenly interpreted the law, if new evidence of a convincing nature is produced, or if the best interests of racing and the state may be better served.

In an appeal following a Stewards' hearing, the standard of review to be applied is the substantial evidence test, akin to the role of the superior court when reviewing an administrative agency's decision under Code of Civil Procedure section 1094.5, subdivision (c). Under the substantial evidence test, the evidence is not reweighed, nor may the reviewing court substitute its findings or inferences for those of the administrative agency (or in this case, the Stewards); it is for the agency to determine the weight to be given the conflicting evidence.⁵ The issues to be determined are whether the record contains substantial evidence to support the Stewards' findings, and whether those findings support the Stewards' decision.⁶ "Courts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency."⁷

Applicable Law

9. Pursuant to Rules 1489 and 1900, an owner's license may be suspended when the licensee has been convicted of a crime of moral turpitude. Appellant's conviction for violating Penal Code section 496, subdivision (a), buying or receiving stolen property, involved a crime of moral turpitude. As the court in *People v. Rodriguez* (1986) 177 Cal.App.3d 174, 179, explained:

Although it is not a specific intent crime, a necessary element of the offense of receiving stolen property is actual knowledge of the stolen character of the property. [Citation.] One who unlawfully acts in disregard for the property rights of others, whether known or unknown, demonstrates moral laxity and to some degree a "readiness to do evil."

In *In re Plotner* (1971) 5 Cal.3d 714, 726, the California Supreme Court upheld the disbarment of an attorney who had been convicted of receiving stolen property, reasoning that:

Petitioner's conviction of receiving stolen property involved moral turpitude and was an extremely serious crime for an attorney. The crime of receiving stolen property has, in fact, been considered as even more serious than the theft itself. [Citation.] This offense alone clearly warrants disbarment. [Citation.]

(See also *In re Waisbren* (1975) 15 Cal.3d 553 [upholding a four-year suspension for an attorney convicted of violating Penal Code section 496 because "the crime involved moral turpitude."].)

⁵ *Sierra Club v. California Coastal Commission* (1993) 12 Cal.App.4th 602, 610.

⁶ Cf. *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 514-515.

⁷ *McMillian v. American General Finance Corp.* (1976) 60 Cal.App.3d 175, 186.

In sum, the Stewards, in Ruling #05, correctly determined that appellant's conviction involved moral turpitude. It is irrelevant that the stolen property that appellant received was golf balls. What is relevant is that appellant was convicted of a crime involving dishonesty for personal gain. (*People v. Castro* (1985) 38 Cal.3d 301, 306; *Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 400-401 [“...there is widespread agreement that convictions of crimes involving fraudulent intent and intentional dishonesty for personal gain establish moral turpitude as a matter of law.”].) The Stewards properly decided that appellant's conviction established cause to suspend his license under Rules 1489 and 1900.

10. The Stewards also found that appellant's license should be suspended under Rule 1902, which provides that a license may be suspended for an “arrest for a crime involving moral turpitude ... when such ... 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.” During the hearing before the Stewards, appellant argued that his license could not be disciplined based upon an arrest on charges that did not result in convictions. In Ruling #05, the Stewards based their finding that appellant's license should be suspended under Rule 1902 based not upon the felony charges against appellant which did not result in convictions but, instead, upon his arrest for receiving stolen property, which did result in a conviction. There was substantial evidence in the record to support the Stewards' finding that appellant's arrest and conviction for this crime resulted in widespread publicity that was detrimental to horse racing. Thus, the Stewards properly determined that appellant's conviction established cause to suspend his license under Rule 1902.

11. As appellant correctly argued, as set forth in Business and Professions Code section 490, in order for the Board to suspend appellant's license based upon his conviction, that conviction must be substantially related to the qualifications, functions or duties of a licensed horse owner.⁸ In *Harrington, supra*, 214 Cal.App.3d 394, 402, the court found that the defendant's convictions for contracting without a license and passing a worthless check

⁸ Business and Professions Code section 490, in relevant part, provides:

(a) In addition to any other action that a board is permitted to take against a licensee, a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

[¶] ... [¶]

(c) A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere....

(d) The Legislature hereby finds and declares that the application of this section has been made unclear by the holding in *Petropoulos v. Department of Real Estate* (2006) 142 Cal.App.4th 554, and that the holding in that case has placed a significant number of statutes and regulations in question, resulting in potential harm to the consumers of California from licensees who have been convicted of crimes. Therefore, the Legislature finds and declares that this section establishes an independent basis for a board to impose discipline upon a licensee, and that the amendments to this section made by Senate Bill 797 of the 2007 -08 Regular Session do not constitute a change to, but rather are declaratory of, existing law.

were both crimes that were substantially related to the qualifications, functions or duties of a licensed real estate salesperson, reasoning as follows:

Conviction alone will not support a denial of a license unless the crime substantially relates to the qualifications, functions, or duties of the business or profession in question. [Citations.] Honesty and truthfulness are two qualities deemed by the Legislature to bear on one's fitness and qualification to be a real estate licensee. If appellant's offenses reflect unfavorably on his honesty, it may be said he lacks the necessary qualifications to become a real estate salesperson. [Citation.] The Legislature intended to ensure that real estate brokers and salespersons will be honest, truthful and worthy of the fiduciary responsibilities which they will bear. [Citation.]

Appellant's convictions each involved crimes where appellant intentionally defrauded members of the public and willfully violated the law. They did not involve acts which reflect only on his personal morals or vices, such as those in *Brandt v. Fox*, *supra*, 98 Cal.App.3d 167, (a narcotic offense), but involve breach of professional promises, dishonesty in financial transactions, and disregard of the laws governing professional relationships. These are the types of misconduct which the Legislature intended to prevent when establishing the minimum licensing standards for professions possessing the public trust.

This reasoning also applies to the business of horse racing. As the court stated in *Morrison v. California Horse Racing Board* (2005) Cal.App.3d 211, 218, "the public's interest in legitimate horse racing and wagering requires its protection from individuals the Board rationally believes will threaten the honesty, fairness and safety of the activity." Appellant's conviction for receiving stolen property involved dishonesty in financial transactions. Consequently, his offense reflects unfavorably on his honesty. Given the reasoning of the court in *Morrison*, honesty is a necessary qualification for a license from the Board. Appellant's conviction for receiving stolen property is, therefore, substantially related to the qualifications, functions and duties of a licensed horse owner.

12. Business and Professions Code section 482, in relevant part, provides:

Each board under the provisions of this code shall develop criteria to evaluate the rehabilitation of a person when:

[¶] ... [¶]

(b) Considering suspension or revocation of a license under Section 490.

Each board shall take into account all competent evidence of

rehabilitation furnished by the applicant or licensee.

Appellant argued that the Board cannot suspend his license because it has not adopted rehabilitation criteria as required under Business and Professions Code section 482. In support of his argument, appellant relied upon dicta in *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1831, in which the court stated that it was “troubled by the failure of the Board to provide any guidelines determining rehabilitation” and that it “urge[d] the Board to consider this matter.” According to appellant, the Board’s failure to adopt rehabilitation criteria in the 13 years since *Opdyk* was issued mandates that the Stewards’ ruling be vacated. Appellant’s argument was not persuasive.

While the *Opdyk* court urged the Board to adopt rehabilitation criteria, it did not rule that, in the absence of such criteria, the Board would be prohibited from disciplining licensees who engaged in wrongdoing. To the contrary, the court upheld the Board’s exclusion of a gambler from all racetracks in California, even though his misdemeanor bookmaking conviction was by plea of nolo contendere and was expunged after a period of probation. The Board’s failure to comply with Business and Professions Code section 482 does not require the voiding of Ruling #05. (See *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133 [The State Personnel Board’s failure to comply with the statutory time limit set forth in Government Code section 18671.1 did not require the dismissal of adverse actions against employees.].)

13. As set forth in Supplemental Findings 3 through 7, appellant was permitted to submit evidence of rehabilitation at the hearing on July 9, 2008. While that evidence was positive, it was not sufficiently convincing to overturn the Stewards’ determination that appellant’s license should be suspended for a period of approximately 12 months. Appellant was convicted of a crime of moral turpitude, which adversely reflected on his honesty and integrity, and was the subject of widespread publicity. His conviction occurred less than one year ago. He is scheduled to remain on formal probation until 2011. Given appellant’s conviction for a crime involving moral turpitude and its widespread publicity, the suspension for approximately 12 months imposed by the Stewards was reasonable and appropriate to protect the public interest and welfare.

LEGAL CONCLUSIONS

The record contains substantial evidence to support the Stewards’ findings, and those findings support the Stewards’ decision. The Stewards did not mistakenly interpret the law. New evidence of a convincing nature was not produced. It would be in the best interests of racing to affirm Ruling #05. (Bus. & Prof. Code, § 19517, subd. (a).)

ORDER

The Board of Stewards' Ruling #05, dated March 13, 2008, against Gregg Pistochini is AFFIRMED.

DATED: July 17, 2008

A handwritten signature in black ink, appearing to read 'K. Brandt', written over a horizontal line.

KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings