

BEFORE THE HORSE RACING BOARD

STATE OF CALIFORNIA

In the Matter of the Appeal from the Board
of Stewards Official Ruling #112, Los
Alamitos Quarter Horse Racing Association,
dated May 26, 2018

Case No. SAC 18-0022

JOAN KULIFAY
CHRB License #320994
Appellant

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 25, 2019.

IT IS SO ORDERED ON January 24, 2019.

CALIFORNIA HORSE RACING BOARD
Chuck Winner, Chairman



Rick Baedeker
Executive Director

BEFORE THE
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STATE OF CALIFORNIA

In the Matter of:)	
Appeal of the Board of Stewards Official)	
Rulings #112 and #113, Los Alamitos)	
Quarter Horse Racing Association, dated)	Case No. SAC 18-0021
May 26, 2018)	Case No. SAC 18-0022
)	
JOAN KULIFAY)	
CHRB License #320994)	
)	
DR. SAMUEL WITTLIN)	
CHRB License #262981)	
Appellants)	
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PROPOSED DECISION

This matter was heard on November 8, 2018 by C. Scott Chaney, a Hearing Officer designated under California Horse Racing Board rule 1414 (Appointment of Referee) at Los Alamitos Race Course in Cypress, California.

The Appellants, Joan Kulifay (hereinafter "Kulifay") and Dr. Samuel Wittlin (hereinafter "Wittlin") were represented by Attorney William Cole.

The California Horse Racing Board (hereinafter "CHRB" or "Respondent") was represented by CHRB Staff Counsel Robert Brodnik.

The proceedings were recorded by court reporter Michelle Derieg.

PROCEDURAL BACKGROUND

On May 17, 2018, the Board of Stewards at Los Alamitos Race Track held a formal hearing into case numbers 18LA0075 and 18LA0076 which were complaints filed against Owner Joan Kulifay and Veterinarian Dr. Samuel Wittlin respectively. These complaints were combined because they involved common issues of law and facts. In fact, both Respondents (now Appellants) were represented by the same attorney, William Cole, who continued his representation through the appeal hearing. Case number 18LA0075 alleged violation of CHRB Rule 1890 (Possession of Contraband). Case number 18LA0076 originally alleged violation of CHRB Rule 1864 (Labeling of Medication) but was amended (over the objection of counsel) at hearing to also allege violation of CHRB Rule 1856 (Clean and Sterile Equipment Required). The result of that

hearing was a Statement of Decision and two rulings by the Board of Stewards. On May 26, 2018 Ms. Kulifay was fined two hundred dollars in Ruling #112 and Dr. Samuel Wittlin was fined five hundred dollars in Ruling #113. Both filed timely appeals of those rulings which gave rise to the matter at hand. Appellants were noticed and the hearing was scheduled for November 8, 2018 at Los Alamitos Race Track. Both the CHRB and Appellants submitted briefs prior to the hearing. The hearing was called to order at approximately 10:00 am in accordance with the notice supplied to all parties. Neither party called witnesses, but rather relied on the hearing briefs, the existing record and oral arguments. The record was closed and the matter deemed submitted that same morning.

LIST OF EXHIBITS

Appellant Exhibit #1 – Brief of Appellants.

CHRB Exhibit #1 – Notice of Hearing and Administrative Record (Appeal Letter, Board of Stewards Official Ruling #112, Board of Stewards Official Ruling #113, Board of Stewards Minutes 6/15-6/20, Board of Stewards Minutes 5/22-5/27, Statement of Decision, Stewards' Hearing Transcript, CHRB Complaint 18LA0075, CHRB Complaint 18LA0076, Text Message dated 3/30).

CHRB Exhibit #2 – California Horse Racing Board's Response to Appellant's Brief.

FACTUAL FINDINGS

I

At all times herein mentioned, Joan Kulifay was licensed by the CHRB in the license category of owner.

II

At all times herein mentioned, Dr. Samuel Wittlin was licensed by the CHRB in the license category of veterinarian.

III

Case numbers 18LA0075 and 18LA0076 filed by the CHRB against Kuliay and Wittlin respectively were heard in a formal hearing by the Board of Stewards at Los Alamitos on May 17, 2018.

IV

At hearing, Wittlin objected to the CHRB amending the complaint on the day of the hearing to allege an additional rule violation.

V

After considering the evidence, the Board of Stewards issued a Statement of Decision and a rulings: (1) #112 issued on May 26, 2018 fining Kulifay two hundred dollars and (2) #113 issued on May 26, 2018 fining Wittlin five hundred dollars.

VI

Kulifay and Wittlin filed timely appeals of the aforementioned rulings with the CHRB.

APPLICABLE LAWS AND REGULATIONS

California Horse Racing Board Rule 1856. Clean and Sterile Equipment Required.

Veterinarians shall use new, single-use disposable hypodermic needles for parenteral administrations. All other instruments used for injections or skin penetration, must be cleaned and sterilized. The official veterinarian shall provide a secure place for the disposal of needles, syringes, injectable medications, and their containers, and veterinarians on the grounds shall not dispose of such materials on the grounds other than in such secure place.

California Horse Racing Board Rule 1864. Labeling of Medications.

No veterinarian or vendor shall dispense, sell or furnish any feed supplement, tonic, veterinary preparation, medication, or any substance containing a prohibited drug to any person within the inclosure unless there is a label specifying the name of the dispensing veterinarian, the name of the horse or the purpose for which the said preparation or medication is dispensed, and the name of the person to which dispensed, or is otherwise labeled as required by law. Any substance containing a prohibited drug shall be labeled, "Caution. Contains Prohibited Drug. Not to be used on race day."

California Horse Racing Board Rule 1890. Possession of Contraband.

- (a) No person other than a veterinarian licensed by the Board, shall have in his possession at a facility under the jurisdiction of the Board any drug, which is a narcotic, stimulant, or depressant, or any other substance or medication that has been prepared or packaged for injection by a hypodermic syringe or hypodermic needle, or any hypodermic syringe or hypodermic needle or similar instrument which may be used for injection.
- (b) No person other than a veterinarian licensed by the Board, shall have in his possession at a facility under the jurisdiction of the Board any veterinary treatment or any medicine, medication, or other substance recognized as a medication, which has not been prescribed in accordance with Rule 1864 of this division.

- (c) No person shall have in his possession on the premises during any recognized meeting any electrical stimulating or shocking device commonly known as a battery, or any mechanical stimulating device, or any other appliance, which might affect the speed or actions of a horse.
- (d) The stewards may permit the possession of drugs or appliances by a licensee for personal medical needs under such conditions as the stewards may impose.

DISCUSSION OF ISSUES

California Business & Professions code section 19517 states that a stewards' decision may be overruled by the Board on appeal "if a preponderance of the evidence indicates any of the following: (1) The steward mistakenly interpreted the law. (2) New evidence of a convincing nature is produced. (3) The best interest of racing and the state may be served." Initially, in their request for appeal, Appellants alleged all three of these grounds for the appeal. However, in their Hearing Brief those grounds were narrowed to (1) and (3). To wit, in reality there was no new evidence of a convincing nature that came to light between hearing and appeal. Therefore, the findings of fact by the Board of Stewards are incorporated here. Those findings showed that Kulifay and Wittlin are friends and work together in the horse racing business. Kulifay owned a truck and trailer that she allowed Wittlin to use. Los Alamitos security discovered said truck in the parking lot and because of its location required that it be moved. This request was relayed to Kulifay and the truck was moved. Incident to this interaction, Security reported possible contraband in the truck. The CHRB confirmed that there was an unopened bottle of injectable banamine, and approximately fifty needles and syringes, eight of which had been used. Appellants averred that Kulifay knew nothing of the contraband in the truck, had nothing to do with it, and was only owner of the truck, giving total custody and control to Dr. Wittlin. The Board of Stewards, in their Statement of Decision, determined that Kulifay "had to be aware of the items in the truck" and therefore violated CHRB Rule 1890 which prohibits "possession" of these items. With respect to Wittlin, Appellants averred that the items in the truck were his and therefore did not need to be labeled and that the used syringes were safe in the truck. Appellant further claimed that the Official Veterinarian had not provided a disposal method as required by rule 1856. The Board of Stewards, however, found violations of rule 1856, which requires veterinarians to dispose of syringes properly, and rule 1864, which requires dispensed medication to be properly labeled. The intellectual tension between these two somewhat divergent violations is obvious: either Wittlin was in possession of these items and therefore violated the disposal rule or he had dispensed these items to Kulifay without labels, but logically it cannot be both. Trying to square the Wittlin ruling with the ruling against Kulifay leads one to believe that the set of facts as determined by the stewards, is that these items were dispensed improperly, relieving Wittlin of the duty to dispose of them. A proper course of action at this point would be to remand the matter back to the stewards for a fuller determination of the facts. However, given the record, it is not clear that any additional evidence would clarify this matter. What is definitely true, as the Board of Stewards pointed out, is that "Dr. Wittlin is responsible for the extremely

irresponsible handling of his medications and needles and syringes...[and] [b]oth individuals must be held accountable for their extremely poor judgment and total lack of respect for protocol while on racetrack property.” What is unclear is whether this behavior constitutes any rule violations.

While there is no evidence of a convincing nature presented in this case, the “best of interest of racing and the state” are not served by disturbing the Board of Stewards decision. If anything, the opposite is the case. The CHRB has an important interest in the labeling, dispensing, use, possession, and disposal of medications in the stable area and on track property. Therefore, to base an appeal on this CHRB interest seems unreasonable at best. The remaining condition for appeal – “the steward[s] mistakenly interpreted the law” seems the appropriate standard under which to examine this appeal.

The Board of Stewards considered three rules in this matter. Two potential rule violations by Dr. Wittlin – CHRB rules 1856 and 1864; and one alleged violation by Kulifay – rule 1890. Rule 1856 (Clean and Sterile Equipment Required) will be considered first. This is the rule that was added to the complaint on the morning of the hearing and in essence accused Dr. Wittlin of failing to dispose of the used syringes in the proper manner. The CHRB moved to amend the complaint on the morning of hearing, and the Board of Stewards allowed the change over the objection of counsel, who explained that Wittlin did not have notice of this alleged violation and therefore lacked time to prepare a defense. While inconvenient, proper courses of action would have been to disallow the amendment to the complaint or continue the matter to give Wittlin enough time to prepare a defense. Not only were there potential facts that may have indicated that the Official Veterinarian did provide a secure place for disposal of these items as required by the very rule that Dr. Wittlin had allegedly violated. Furthermore, by adding this rule, the CHRB added a competing theory to the case (that the items still belonged to Dr. Wittlin) or at least was arguing in the alternative. From a technical standpoint, this put counsel for the two Respondents in a potential conflict with his clients. Allowing this addition on the day of hearing not only violates basic tenets of due process, it also violates the CHRB’s ten day notice requirement. Therefore the appeal of the ruling against Dr. Wittlin for violation of CHRB rule 1865 should be granted on procedural grounds.

Next it is necessary to examine whether the stewards mistakenly interpreted the law in finding that Wittlin violated CHRB Rule 1864 (Labeling of Medications). It seems clear that they did. Rule 1864 applies to “any feed supplement, tonic, veterinary preparation, medication, or any substance containing a prohibited drug.” In this case that item is the bottle of injectable banamine—Rule 1864 does not apply to needles or syringes. It also applies if this banamine was “dispense[d], s[old] or furnish[ed].” The record is not clear whether these actions took place and the Board of Stewards did not make a determination on this question. However, they did specifically determine that “the medication had not been prescribed for a specific purpose so it was not required to be labeled.” Hence, to then determine that Wittlin violated the rule requiring the banamine to be labeled is a misinterpretation of the law.

Lastly, Appellant argues that the stewards mistakenly interpreted the law in finding that Kulifay violated CHRB Rule 1890 (Possession of Contraband). The syringes, needles and injectable medication are undoubtedly prohibited under the rule. Appellant makes the argument that Kulifay did not “possess” the contraband, citing case

law regarding what constitutes and does not constitute possession. Appellant argues that while Kulifay was the legal owner of the vehicle, she did not have custody and control over it, did not know those items were in the truck and that they simply did not belong to her. Fortunately, there was evidence heard at the original hearing on this issue and the Board of Stewards specifically cited facts – Kulifay is the owner of the truck and relayed to security and investigators that she had moved the truck when requested to do so—that supported its finding that Kulifay possessed the contraband as required to find a violation of 1890. Therefore, the Board of Stewards appropriately found that Kulifay violated the rule.

In summary, the Board of Stewards found that Wittlin had violated two CHRB rules and that Kulifay had violated one rule. A careful analysis indicates that one of the rules that Wittlin was found to have violated – CHRB Rule 1856 (Clean and Sterile Equipment Required) cannot be sustained because of significant procedure infirmities. Of course, this does not preclude the CHRB from filing another properly noticed complaint alleging violation of this rule. Therefore this part of the ruling should be overturned without prejudice. The second rule that the Wittlin was found to have violated – CHRB Rule 1864 (Labeling of Medications) should be overturned because the Board of Stewards mistakenly interpreted the law. With respect to Kulifay, the Board of Stewards properly found a violation of CHRB rules. Of course, this result seems rather unsatisfying because the CHRB clearly has the goal of both keeping injectable materials only in the possession of veterinarians and in having veterinarians dispose of their used syringes and needles in a safe, controlled manner. In general, the rules work fairly well, however in this specific case, and the facts that surround it, it is not lost on this hearing officer that it seems somewhat unfair that Kulifay, rather than Wittlin, is the responsible party under an objective application of the rules. This apparent unfairness does not rise to the level of “best of interests of racing or the state” required for appeal and ultimately does satisfy the goal of preventing such actions in the future.

CONCLUSION/PROPOSED DECISION

Given all of the foregoing, it is recommended that the appeal of Ruling #113 against Dr. Samuel Wittlin dated May 26, 2018 at Los Alamitos be sustained and the stewards’ decision be overruled without prejudice with respect to the part pertaining to Rule #1856. It further recommended that the appeal of Ruling #112 against Joan Kulifay dated May 2018 at Los Alamitos be denied and the Stewards’ decision upheld.

DATED: January 9, 2019.


C. Scott Chaney, Hearing Officer

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