

BEFORE THE CALIFORNIA HORSE RACING BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation Against:

MIKE MITCHELL
Respondent

CHRB No. 05SA246

OAH No. L 2006090412

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 March 15, 2007, and failed to act on the proposed decision within 100 days of said receipt. The proposed decision was therefore "deemed adopted" on June 23, 2007, as provided in Government Code section 11517, subdivision (c) (2).



Sharyn S. Jolly
Senior Investigator
Administrative Hearings Unit

Dated: June 26, 2007

BEFORE THE CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

MIKE MITCHELL,

Trainer,

Respondent.

CHRB No. 05SA246

OAH No. L2006090412

PROPOSED DECISION

Daniel Juárez, Administrative Law Judge, Office of Administrative Hearings, heard this matter on February 14, 2007, in Los Angeles, California.

Brian D. Vaughan and Nicholas S. Swertlow, Deputies Attorney General, represented Frank Moore, Chief Investigator, California Horse Racing Board (CHRB) (Complainant).

Neil Papiano, Esq., Iverson, Yoakum, Papiano & Hatch, represented Mike Mitchell (Respondent).

FACTUAL FINDINGS

1. Complainant signed the Accusation on August 16, 2006. Respondent's attorney signed the Notice of Defense on September 5, 2006. This action then ensued.

2. At all times relevant to this matter, Respondent held a trainer license, number 067616, issued by the CHRB. The license expires on April 30, 2008, unless renewed.

3. Complainant contends Respondent's trainer license is subject to discipline because a horse under his training, named Kool Suggestion, was found to have a prohibited drug (known as promazine¹) in its system, on October 12, 2005, after it ran and finished second in a race at the Santa Anita Race Track.

4. Respondent contends his license should not be disciplined because he did not administer promazine to the horse, and he took reasonable steps in an attempt to ensure the horse's drug-free condition before the race.

¹ At hearing, the parties used the word "promazine" to refer to acepromazine, and to refer to 2-Hydroxyethyl-Promazine, a metabolite of acepromazine. Acepromazine is commonly referred to as "ace."

5. On February 13, 2007, the parties entered into the following written stipulations of fact (Factual Findings 5(a) through 5(j)) as uncontroverted and not requiring of further evidence to establish:

5(a). On October 12, 2005, Kool Suggestion ran in the seventh race at the Oak Tree Association, Santa Anita Race Track, finished second, and won a \$10,000 purse.

5(b). At the time of the race in which “Kool Suggestion” was entered, the receiving barn at the Santa Anita Race Track was secure, and its security was not breached.

5(c). The chain of custody of the urine sample (identification number R15943) remained unbroken from the time of the collection of the urine sample and remained uninterrupted until the time that it was received at the official laboratory at the UC-Davis Maddy Laboratory.

5(d). The affidavits of the Veterinarian’s Assistant (Larry Schacht) who collected the urine sample and the Evidence Clerk (Christine Beer) who maintained and shipped the sample [were] admitted as evidence

5(e). On or about October 25, 2005, the official laboratory reported the presence of class 2 drug substance 2-hydroxyethyl-promazine, a metabolite of acepromazine, in urine sample R15943 at an amount of 80 ng/mL. The CHRB authorized decision level for said drug substance is 25 ng/mL.

5(f). On or about November 23, 2005, the split sample analysis requested by Respondent and conducted by Truesdail Laboratories confirmed the finding of 2-hydroxyethyl-promazine at an amount greater than the CHRB authorized decision level.

5(g). Two days prior to the day of the subject race, (i.e. on October 10, 2005, “Entry Day”) the Assistant Racing Secretary, at Santa Anita – Oak Tree, Rick Hammerle, contacted [Respondent] by phone and requested that he enter the thoroughbred “Kool Suggestion” in the seventh (7th) race on October 12, 2005. Hammerle told [Respondent] he needed the horse to “fill the field” (since only four (4) horses had been entered). Hammerle knew “Kool Suggestion” was eligible because he had been nominated for the race, but had not been entered. [Respondent] told Hammerle that he believed the horse was scheduled to have “tranq,” (given medication), “ace” for training purposes only. It is common training practice for trainers to give horses, which are difficult to train, “ace” (a tranquilizer) to calm them down for training and workouts. [Respondent] said he would immediately check with his foreman to determine if, in fact, the horse had been given the tranquilizer since entries for

the race were to close within approximately an hour after the conversation between [Respondent] and Hammerle and time was of the essence.

5(h). [Respondent] then spoke with his Foreman at Hollywood Park, Miguel Gonzalez, and asked if "Kool Suggestion" had been "tranqed." Miguel said, "No." Mitchell asked him: "Are you sure?" Miguel said[,] "Let me check with Joel" (Larios). Miguel asked Joel: ["Did you give 'Kool Suggestion' any ace before his workout?"] Joel responded: "No." (Joel also works for [Respondent] at his Hollywood Barn.) Miguel reported to [Respondent]: "Joel said he had not given any ace to the horse." [Respondent] told Miguel: "Do not give the horse any ace. I have been requested to run him on October 12th in the 7th race at Oak Tree."

5(i). [Respondent] then called Hammerle and informed him that: "My Foreman tells me the horse was not 'tranq.' I was not there on the scheduled workout, so I cannot be absolutely sure the horse is clear, but I believe he is. If you need the horse to fill the field, I will enter him." Hammerle told [Respondent] he needed the horse and requested that he be entered. Mitchell entered the horse in the 7th race. "Kool Suggestion" ran second, convincingly beaten by 8 lengths in the race.

5(j). After the horse tested positive, the CHRB conducted a thorough search of [Respondent's] [b]arn. No illegal substance was found during the search of [Respondent's] barns either at Hollywood Park or Santa Anita.

(Exhibit 1.)

6. According to an investigation report by the CHRB, Respondent fired his foreman as a result of the foreman's actions in this matter.

7. On March 31, 2004, pursuant to a CHRB ruling, dated March 27, 2004, Respondent paid a \$5,000 penalty for a finding of promazine in a horse named, "Sweet Stepper," that raced on or about September 7, 2003.

LEGAL CONCLUSIONS

1. Cause exists to suspend or revoke Respondent's trainer license, for the finding of promazine in Kool Suggestion, pursuant to Business and Professions Code section 19461, as set forth in Factual Findings 1-2, 5-7, and Legal Conclusions 2-11.

2. Business and Professions Code section 19461 states in pertinent part:

Every license granted under this chapter is subject to suspension or revocation by the board in any case where the board has reason to believe that any condition regarding it has not been complied with, or that any law . . . or

any rule or regulation of the board affecting it has been broken or violated. All proceedings to revoke a license shall be conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code.

3. Business and Professions Code section 19581 states:

No substance of any kind shall be administered by any means to a horse after it has been entered to race in a horse race, unless the board has, by regulation, specifically authorized the use of the substance and the quantity and composition thereof. The board may require that the official veterinarian approve, in writing, the administration of those substances in accordance with the regulations of the board. Any medication or equipment used to dispense medication that is located within the inclosure is subject to search and inspection at the request of any board official.

4. Business and Professions Code section 19582 states in pertinent part:

(a)(1) Violations of Section 19581, as determined by the board, are punishable as set forth in regulations adopted by the board.

(2) The board may classify violations of Section 19581 based upon each class of prohibited drugs substances, prior violations within the previous three years, and prior violations within the violator's lifetime.

(3)(A) The board may provide for the suspension of a license for not more than three yeas, except as provided in subdivision (b), or a monetary penalty of not more than fifty thousand dollars (\$50,000), or both, and disqualification from purses, for a violation of Section 19581.

(B) The actual amount of the monetary penalty imposed pursuant to this paragraph shall be determined only after due consideration has been given to all the facts, circumstances, acts, and intent of the licensee, and shall not be solely based on the trainer-insurer rule, as established in Sections 1843 and 1887 of Title 4 of the California Code of Regulations.

(4) The punishment for second and subsequent violations of Section 19581 shall be greater than the punishment for a first violation of Section 19581 with respect to each class of prohibited drug substances, unless the administrative law judge, in findings of fact and conclusions of law filed with the board, concludes that a deviation from this general rule is justified.

5. California Code of Regulations, title 4, section 1843 states in pertinent part:

It shall be the intent of these rules to protect the integrity of horse racing, to guard the health of the horse, and to safeguard the interests of the public and the racing participants through the prohibition or control of all drugs, medications and drug substances foreign to the horse. In this context:

(a) No 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.

(b) No drug substance shall be administered to a horse which is entered to compete in a race to be run in this State except for approved and authorized drug substances as provided in these rules.

(c) No person other than a licensed veterinarian or animal health technician shall have in his/her possession any drug substance which can be administered to a horse, except such drug substance prescribed by a licensed veterinarian for a specific existing condition of a horse and which is properly labelled [sic].

(d) A finding by an official chemist that a test sample taken from a horse contains a drug substance or its metabolites or analogues which has not been approved by the Board, or a finding of more than one approved non-steroidal, anti-inflammatory drug substance, or a finding of a drug substance in excess of the limit established by the Board for its use shall be prima facie evidence that the trainer and his/her agents responsible for the care of the horse has/have been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered to the horse.

6. California Code of Regulations, title 4, section 1887 states in pertinent part:

(a) 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 of this division, the trainer of the horse may be fined, his/her license suspended or revoked, or be ruled off. In addition, the owner of the horses, foreman in charge of the horse, groom, and any other person shown to have had the care or attendance of the horse, may be fined, his/her license suspended, revoked, or be ruled off.

7. California Code of Regulations, title 4, section 1888 states in pertinent part:

A trainer or other person charged with a violation of Rule 1887 of this division may defend, mitigate or appeal the charge if:

[¶] . . . [¶]

(c) He shows, by a preponderance of the evidence, that he made every reasonable effort to protect the horses in his care from tampering by unauthorized persons.

8. California Code of Regulations, title 4, section 1859.5 states in pertinent part:

A finding by the stewards that an official test sample from a horse participating in any race contained a prohibited drug substance as defined in this article, which is determined to be in class levels 1-3 under rule 1843.2 of this division, unless a split sample tested by the owner or trainer under Rule 1859.25 of this division fails to confirm the presence of the prohibited drug substance determined to be in class levels 1-3 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 and the horse shall be deemed unplaced in that race. Disqualification shall occur regardless of culpability for the condition of the horse.

9. The finding of promazine on October 25, 2005, and through the split sample on November 23, 2005, established a violation of law. (Bus. & Prof. Code, § 19581; Cal. Code Regs., tit. 4, § 1843.) Complainant argued the CHRB's 2004 ruling against Respondent, regarding promazine for a horse named "Sweet Stepper," should also be taken into consideration when fashioning a penalty for the instant violation. (Bus. & Prof. Code, § 19582.) While the established violation provides cause to discipline Respondent's trainer license (Bus. & Prof. Code, § 19461; Cal. Code Regs., tit. 4, § 1859.5), the facts stipulated to by the parties provide sufficient basis to conclude such discipline does not serve the public interest. Respondent was not culpable of administering (or directing his foreman or another to administer) promazine to the horse in question. Someone other than Respondent administered promazine to Kool Suggestion. Nonetheless, argued Complainant, as the trainer, Respondent was the "absolute insurer of[,] and responsible for[,] the condition of the horse . . . regardless of the acts of third parties.²" (Cal. Code Regs., tit. 4, § 1887, subd. (a).) The Legislature, however, made violative punishments permissive, not mandatory, and specifically directs such determinations to be made according to the CHRB's regulations. (Bus. & Prof. Code, § 19582, subd. (a).) Those regulations pertaining to license discipline retain the permissive language. (Cal. Code Regs., tit. 4, § 1887, subd. (a).) The established facts show no actions by Respondent that merit license discipline.

² This provision is known as the trainer-insurer rule.

10. Respondent made reasonable efforts to inquire about the condition of Kool Suggestion, when requested to enter the horse. Respondent asked his foreman whether the horse had been administered drugs. Respondent twice received the same unequivocal answer, "no," when Respondent plainly asked if the horse had been tranquilized, even after his foreman inquired of another individual. Respondent then directed his foreman not to administer drugs to the horse, informing his foreman of when the horse was expected to race. It was reasonable for Respondent to presume that at anytime during this interaction, his foreman would have divulged any knowledge of drugs in the horse's system, particularly once the foreman was informed of the race date. Still thereafter, Respondent qualified his personal knowledge to the racing secretary, making clear he was not present at the horse's workout. Respondent reasonably trusted his foreman, who responded without hesitation, and who gave him no indication that the horse's condition was unclear or questionable. It would, therefore, not serve the public interest, or serve to protect the integrity of horse racing, to discipline Respondent's license under these circumstances. Furthermore, the Legislature mandates that any monetary penalty pursuant to a violation of Business and Professions Code section 19582 "shall be determined only after due consideration has been given to all the facts, circumstances, acts, and intent of the licensee, and *shall not be solely based* on the trainer-insurer rule." (Bus. & Prof. Code, § 19582, subd. (a)(3)(B), italics added.) As license discipline is not appropriate in this case, a monetary penalty is similarly not appropriate here.

11. However, the regulations mandate disqualification from the race, forfeiture of the purse, and to be deemed unplaced in that race, "regardless of culpability for the condition of the horse." (Cal. Code Regs., tit. 4, § 1859.5.) Therefore, the CHRB's regulations, and fairness to the racing participants, compel disqualification and forfeiture. (*Ibid.*)

ORDER

1. Kool Suggestion is disqualified from, and deemed unplaced in, the seventh race at the Oak Tree Association, Santa Anita Race Track, held on October 12, 2005.
2. The \$10,000 purse is forfeited.
3. Respondent Mike Mitchell's trainer license, number 067616, shall not suffer discipline, as prayed for in the Accusation.

DATE: March 12, 2007



DANIEL JUAREZ
Administrative Law Judge
Office of Administrative Hearings