BEFORE THE CALIFORNIA HORSE RACING BOARD

OF THE STATE OF CALIFORNIA

In the Matter of: Fitness for Licensure RAYMOND BURT Applicant	Case No. SAC 09-0050 Case No. OAH 2009070865

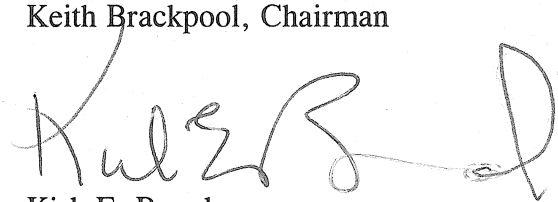
DECISION

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 January 21, 2010.

IT IS SO ORDERED ON January 15, 2010.

CALIFORNIA HORSE RACING BOARD
Keith Brackpool, Chairman



Kirk E. Breed
Executive Director

BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

In the Matter of the Notice of Refusal of License Against:	Case No. 09SW-0059
RAYMOND ANDREW BURT,	OAH No. 2009070865
Appellant.	

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PROPOSED DECISION

This matter was heard before Rebecca M. Westmore, Administrative Law Judge, Office of Administrative Hearings, State of California, on December 1, 2009, in Sacramento, California.

Martin J. Snezek, II, Senior Special Investigator, represented complainant, the California Horse Racing Board (CHRB or board).

Raymond Andrew Burt (appellant) appeared and was assisted by David C. Seigel.

Evidence was received, the record was closed, and the matter was submitted on December 1, 2009.

FACTUAL FINDINGS

1. On April 15, 2009, appellant submitted to the board an application to renew his trainer and driver license. Appellant disclosed on his application a criminal conviction, and prior disciplinary action against his license to participate in racing. At hearing, appellant amended his application to request a groom's license. Complainant objected to this amendment, but stipulated that any application submitted by appellant would be denied on the same grounds as the denial for his trainer and driver license.

2. On July 23, 2009, the board filed a Notice of Refusal of License in its official capacity. The board seeks to deny appellant's application based upon his criminal conviction involving moral turpitude, and based upon his lack of qualifications as a trainer and driver; his exclusion from a California racing enclosure; and aiding, abetting or conspiring with a person to violate the rules of the Horse Racing Law.

3. Appellant timely filed an appeal of the board's notice, pursuant to CHRB Rule 1473. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Respondent's Criminal Conviction

4. On January 16, 2007, in Sacramento Superior Court, in the matter entitled *People of the State of California v. Raymond Andrew Burt* (Case No. 06F10923), appellant, upon a plea of guilty, was convicted of violating Penal Code section 337, subdivision (c), accepting a bribe at a sporting event, a felony. Imposition of sentence was suspended, and appellant was placed on three years probation. The court sentenced appellant to serve six days in county jail, and ordered him to pay $3,049.87 in fines and fees. On April 10, 2009, appellant's probation was terminated and his conviction was dismissed pursuant to Penal Code section 1203.4.

The conduct leading to appellant's conviction arose on May 5, 2006, when he accepted a $1,200 bribe from a participant in a horse race, and agreed to hold back a horse in the race.

Factors in Aggravation, Mitigation and Rehabilitation

5. Appellant has been working in the horse racing industry for 31 years. He started at the age of 13, and at 17 years old, he became a trainer and driver. Appellant admitted that he made a mistake when he accepted a monetary bribe to hold back a horse in a race, and stated that he "was looking for an easy score to make easy money." He asserted that after his misconduct he cooperated fully with the Attorney General's Office in exchange for a plea bargain. Appellant's probation ended on April 10, 2009.

6. In May 2006, appellant started working on his friend Al Anderson's horse farm in Willows, California earning $500 a week. He also held a part-time job as a parking attendant at the ARCO Arena in Sacramento, California. However, after his friend was diagnosed with cancer, appellant started working in Canada in September 2009, for his friend, Ed Hensley. Appellant admitted that "I took my license for granted," and "screwed up," but stated that "I've been trying to work harder and get everything back in order." He currently receives financial support from his girlfriend. Appellant believes that if he is permitted to obtain his groom's license, in lieu of a trainer and driver license, he can shod and rig horses for his friend, Nathalie Tremblay, at CalExpo in Sacramento, California. He is unsure of his plans if he is not granted a groom's license, but knows he has to find work in the horse business because "it's all I know."

7. Maggy Krell testified in appellant's behalf at hearing. Ms. Krell was the Deputy Attorney General in charge of prosecuting appellant for race fixing and grand theft. She confirmed that appellant cooperated fully with her office, attended all his appointments, "made a pre-text call to a co-defendant," and provided testimony in exchange for a plea bargain. She described him as honest and "very regretful of what he did."

8. Nathalie Tremblay testified in appellant's behalf at hearing. Ms. Tremblay is a horse trainer[1] at CalExpo Race Track in Sacramento, California, and has known appellant over 20 years. She described appellant as someone who "always wanted to make a quick buck." However, she believes that since his misconduct, he has been "working hard at trying to make a living, and is working harder than he did beforehand." Ms. Tremblay indicated that during the horse racing season, which runs from November through March/April, they race horses four nights a week at the racetrack. Between April and June they race horses three nights a week at the racetrack, before taking a two to three week holiday beginning in late June. Ms. Tremblay asserted that having a license would enable appellant to deliver horses to the track, live rent-free in a tack room[2] at the racetrack, and earn supplemental income for racing horses at night[3] and getting them ready for the trainer. However, if appellant remains unlicensed, he can only qualify to train horses at a horse farm. Ms. Tremblay is aware of appellant's misconduct leading to his criminal conviction. She believes that appellant "knew he made a big mistake," and "felt pretty bad about what he did." She asserted that if appellant received his groom's license,[4] and if her situation warranted it, she would hire appellant to work for her at the racetrack.

9. Appellant submitted four letters of recommendation that were received in evidence and considered to the extent permitted by Government Code section 11513, subdivision (d).[5] Alan Anderson has known appellant for 15 years. He described appellant as a "hard working individual" who was "always there at the time I needed him." Mr. Anderson was unable to hire appellant on a full-time basis because appellant did not hold a license and therefore "was unable to paddock or ship horses to the track." Rick Mowles is a senior management executive, experienced business owner, and horse owner. He has known appellant "for many years," and described him as "honest, sincere and hard working." Mr. Mowles believes that appellant "made a serious error in judgment," but because he cooperated fully with authorities and accepted responsibility for his guilt, he "deserves the opportunity to move on with his chosen career." Ed Hensley, Jim Marino and Wally Slopianka are licensed horse trainers, and have collectively known appellant for "many years." They describe appellant as a "very knowledgeable, experienced and professional individual" who "is dedicated to his profession and treats horses with respect and thoughtful

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[1] Ms. Tremblay testified that a horse trainer is responsible for making sure the horse is equipped, ready and fit for a race.

[2] Ms. Tremblay defined a "tack room" as a 15' x 15' room in the stable with four cement walls in which you can live or store tack.

[3] Ms. Tremblay indicated that a licensed groom can train two horses at the racetrack at night and earn up to $40 per horse. In addition, training a horse at the racetrack enabled the horse to go fast and go behind a starting gate, which cannot be accomplished at small horse farms.

[4] Ms. Tremblay testified that a "groom" is responsible for taking care of and getting a horse ready, jogging or training a horse, and cleaning the stalls.

[5] Government Code section 11513, subdivision (d), provides, in pertinent part, that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions ...."

care." Messrs. Hensley, Marino and Slopianka are aware of appellant's past misconduct, for which appellant has apologized. They believe that appellant has suffered as a result of his mistake, but "has learned from his mistake and has become a better individual." Kenneth Scott U'Ren has known appellant for over 20 years, and described him as "a very hard working and dedicated horseman." Mr. U'Ren believes that appellant understands the severity of his mistake and is remorseful, and "deserves a second chance."

LEGAL CONCLUSIONS

1. The board seeks to deny appellant's application on the grounds the he violated Business and Professions Code section 480,which provides, in pertinent part, that a board "may deny a license regulated by this code on the grounds that the applicant has ... been convicted of a crime. A conviction within the meaning of this section means a plea or verdict of guilty .... Any action which a board is permitted to take following the establishment of a conviction may be taken ... *irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.* The board may deny a license pursuant to this subdivision only if the crime or act is substantially related to the qualifications, functions, or duties of the business or profession for which application is made." [Emphasis added.]

As set forth in Factual Finding 4, appellant was convicted on January 16, 2007 for accepting a bribe to hold back a horse in a race. This crime is substantially related to the functions, duties and responsibilities of a licensee because it took place during the course of his employment. Therefore, cause exists to deny appellant's application based on Business and Professions Code section 480, subdivision (a)(1).

2. The board also seeks to deny appellant's application on the grounds that he violated California Code of Regulations, title 4, section 1489, subdivisions (a) and (g), which provide, in pertinent part, that the board may deny a license to any person:

> (a) Who has been convicted of a crime punishable by imprisonment in a California state prison or a federal prison, or who has been convicted of a crime involving moral turpitude.
>
> [¶] ... [¶]
>
> (g) Who has committed an act involving moral turpitude, or intemperate acts which have exposed others to danger, or acts in connection with horse racing and/or a legalized gaming business which were fraudulent or in violation of a trust or duty.

Moral turpitude has been defined as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Higbie* (1972) 6 Cal.3d 562, 569, citing *In re Craig* (1938) 12 Cal.2d 93, 97.) Criminal

conduct reveals moral turpitude for the purpose of professional licensure "if it shows a deficiency in any character trait necessary for the practice of [the profession], (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties) or if it involves such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the... conduct would be likely to undermine public confidence in and respect for the... profession." (*In re Lesansky* (2001) 25 Cal.4th 11, 16, citing *In re Johnson* (1992) 1 Cal.4th 689, 698.)

As set forth in Factual Findings 4 and 5, appellant's act and conviction for accepting a bribe to hold back a horse in a race, involved moral turpitude within the meaning of California Code of Regulations, title 4, section 1489, subdivisions (a) and (g), because it involved honesty and integrity. Crimes which reveal an applicant's dishonesty involve moral turpitude. (*Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1027.) Lack of honesty or integrity, such as intentional dishonesty demonstrates a lack of moral character and satisfies a finding of unfitness to practice a profession. (*Matanky v. Board of Medical Examiners* (1978) 79 Cal.App.3d 293, 305; see also *People v. Williams* (1999) 72 Cal.App.4th 1460, 1465). Moreover, as the court stated in *Morrison v. California Horse Racing Board* (1988) 205 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." Therefore, cause exists to deny appellant's application based on California Code of Regulations, title 4, section 1489, subdivisions (a) and (g).

3. The board also seeks to deny appellant's application on the grounds that he violated California Code of Regulations, title 4, section 1489, subdivision (j), which provides, in pertinent part, that the board may deny a license to any person "[w]ho has violated, or who aids, abets or conspires with any person to violate any provision of the rules or the Horse Racing Law."

As set forth in Factual Findings 4, 5, 7, and 8, appellant violated the law, and aided, abetted and conspired with another person to hold back a horse in a race for monetary gain. Therefore, cause exists to deny appellant's application based on California Code of Regulations, title 4, section 1489, subdivision (j).

4. Finally, the board seeks to deny appellant's application on the grounds that he violated California Code of Regulations, title 4, section 1489, subdivisions (d) and (f), which provide that the board may deny a license to any person:

> (d) Who is unqualified to engage in the activities for which a license is required.
>
> [¶] ... [¶]
>
> (f) Who is subject to exclusion or ejection from the racing inclosure or is within the classes of persons prohibited from participating in pari-mutuel wagering.

No evidence was presented to establish that appellant is unqualified to engage in the activities of a trainer and driver, or that he is subject to exclusion or ejection from the racing inclosure. Therefore, cause does not exist to deny appellant's application based on California Code of Regulations, title 4, section 1489, subdivisions (d) and (f).

Fitness for Licensure

5. The determination whether a person is presently fit for licensure should be made only after consideration of the conduct of the applicant and consideration of any factors introduced in justification, aggravation or mitigation. The burden of proof is on the applicant for a license. (*Martin v. Alcohol Beverage Control Appeals Bd.* (1959) 52 Cal.2d 265.) In addition, rehabilitation is akin to an affirmative defense; the burden of proof of establishing an affirmative defense is on the proponent of that defense. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156, 164.) It has been almost four years since appellant was convicted of misdemeanor bribery, and he is to be commended for the insight he has gained into the seriousness of his misconduct. The letters of recommendation submitted by appellant are positive. He enjoys an excellent reputation for honesty, integrity and a strong work ethic among his friends. Pivotal to this case is whether appellant has demonstrated a change in attitude from that which existed at the time of his misconduct. However, it has only been eight months since appellant successfully completed the terms and conditions of his probation. Therefore, insufficient time has elapsed to determine if appellant has been fully rehabilitated. (See *In Re Gossage* (2000) 23 Cal.4th 1080, 1104-1005). Given the seriousness of his offense, a longer history of activities that would indicate changed behavior is needed to provide adequate assurances that appellant is sufficiently rehabilitated. In light of these factors, it would be contrary to the public interest and welfare to issue appellant a trainer, driver or groom's license at this time.

ORDER

The application of Raymond Andrew Burt, for a trainer, driver or groom's license is hereby DENIED.

DATED: December 16, 2009

REBECCA M. WESTMORE
Administrative Law Judge
Office of Administrative Hearings