BEFORE THE CALIFORNIA HORSE RACING BOARD

OF THE STATE OF CALIFORNIA

In the Matter of: Appeal of the Board of Stewards Official Ruling #209, Los Angeles Turf Club, Inc., dated April 18, 2008 GARY FOLGNER Appellant	Case No. SAC 08-0024

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 16, 2009.

IT IS SO ORDERED ON January 15, 2009.

CALIFORNIA HORSE RACING BOARD
John C. Harris, Vice Chairman

Kirk E. Breed
Executive Director

BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

In the Matter of the Appeal from the Board of Stewards Official Ruling LATS #209, Los Angeles Turf Club, Inc., Order of Purse Forfeiture, dated April 18, 2008, of: GARY FOLGNER, Appellant.	Agency Case No. 07DM023 OAH No. 2008070289

PROPOSED DECISION

This administrative appeal was heard on November 24, 2008, in Los Angeles, California, before Janis S. Rovner, Administrative Law Judge of the Office of Administrative Hearings. Dana Cartozian, Deputy Attorney General, represented the California Horse Racing Board (CHRB or Board). Stephen Spiegel, Attorney at Law, represented appellant Gary Folgner (Appellant), who was present during the entire hearing.

Oral and documentary evidence was received, argument was heard, and the matter was submitted for decision on November 24, 2008.

SUMMARY OF THE CASE

This matter involves an appeal from a Board of Stewards' (Stewards) Decision and Official Ruling disqualifying Appellant's horse as the first place finisher in the eighth race on July 25, 2007, at Del Mar Race Track and requiring Appellant to return all purse monies from the race. The Statement of Decision and Official Ruling were issued as a result of a post-race urine sample taken from the horse on the day of the race that was found to have contained guanabenz, a prohibited substance. Appellant appealed on several grounds claiming, among other things, that the Board's laboratory test of the horse's urine sample was incorrect, the Board deprived Appellant of his right to obtain a split sample test, and proper procedure was not followed in obtaining the urine sample.

FACTUAL FINDINGS

Background and Procedural History

1. At all relevant times, Appellant owned the horse named "Queen of the Derby," and held an owner's license issued by the CHRB.[1]

2. On July 25, 2007, Queen of the Derby (Queen) won the eighth race at the Del Mar Race Track.

3. (A) On July 25, 2007, after the race, a urine sample was taken from Queen in accordance with California Code of Regulations, title 4, section 1858,[2] which requires blood and urine samples to be taken from the winner of every horse race.

(B) On July 27, 2007, the urine sample was delivered to the University of California Davis Kenneth L. Maddy Equine Analytical Chemistry Laboratory (UCD Lab) for testing and analysis. The Board contracts with the UCD Lab for testing and analysis of urine samples. On August 1, 2007, Dr. Scott Stanley, Chief Chemist of the UCD Lab notified the Board that the urine sample (#DM00914) taken from Queen on July 25, 2007, tested positive for the presence of guanabenz, which is presently classified as a Class 3 prohibited drug substance pursuant to Rule 1843.2.[3]

4. No split sample was tested that might confirm or fail to confirm the presence of guanabenz in Queen's system immediately following the race.

5. On August 2, 2007, the Board notified Appellant of the positive drug test results.

---

[1] See Business and Professions Code section 19520 and California Code of Regulations, title 4, section 1505.

[2] The regulations in California Code of Regulations, title 4, as adopted by Board, are commonly referred to as "Rules," and will be referred to hereafter as Rules.

[3] Official notice is taken that guanabenz, sold under the trade name Wytensin, is used to treat hypertension in people. It also produces sedative and analgesic effects in horses. According to Rule 1843.2, which was amended effective May 23, 2008, Class 3 drugs are those that may or may not have generally accepted medical use in the racing horse, but the pharmacology of which suggests less potential to affect performance than drugs in Class 2. The existing record in this matter, which was created before Rule 1843.2 was amended, suggested that guanabenz was a Class 2 drug. It is assumed that it was classified as Class 2 under the previous version of Rule 1843.2. The classification of guanabenz as a Class 2 or Class 3 drug for purposes of this matter is of little consequence.

6. On April 12, 2008, a formal hearing was held before the Stewards to address the Board's complaint requesting Queen's disqualification and the purse forfeiture based on the positive drug test results.[4] Appellant was present at the hearing and was represented by his attorney, Mr. Spiegel.

7. On April 18, 2008, the Stewards issued its Statement of Decision and Official Ruling LATS #209 (ruling),[5] in the case. The ruling was based, in substance, on Factual Findings 1 through 4, above. In the ruling, the Stewards found that the post-race urine sample contained a prohibited substance known as guanabenz, disqualified Queen from the race, and ordered Appellant to forfeit the purse, in accordance with Rule 1859.5.[6]

8. Appellant appealed the Stewards' Decision and Official Ruling, when he filed a Notice of Appeal of the Stewards' Decision and Request for Stay of Penalty Pending Appeal with the Board on April 21, 2008. On April 24, 2008, he filed an Amended Notice of Appeal and Request for Stay. On April 25, 2004, the Board denied Appellant's request for a stay of the Stewards' Decision. This administrative appeal hearing ensued.

9. In his Amended Notice of Appeal, and his hearing brief filed in the instant matter, Appellant enumerated several grounds for appeal, the substance of which included the following:

(a) The UCD Lab finding of guanabenz in Queen's post-race urine sample was incorrect and without foundation. The Board presented the lab analysis for the first time on the day of the Stewards' hearing without giving Appellant the right to view, review and challenge the UCD Lab's analysis, thereby denying him rights accorded him by Board rules and Constitutional due process.

(b) Appellant was given improper notice of the right to a split sample in violation of Rule 1859.5 and the findings of the Stewards regarding the split sample were in error.

(c) The Stewards erred in admitting all evidence and overruling Appellant's hearsay and lack of foundation objections.

---

[4]The Stewards continued a previous hearing date of January 12, 2008, on Appellant's motion, because Appellant had just retained counsel and counsel needed additional time to prepare for the hearing.

[5] The Statement of Decision includes the Stewards' factual findings, applicable rules, reasoning, and an order that is referred to as Official Ruling LATS #209. Throughout this proposed decision, the term "ruling" will be used to refer collectively to both the Statement of Decision and Official Ruling LATS #209.

[6] See Legal Conclusion 8, below, for the text of Rule 1859.5.

(d) The Stewards improperly interpreted and applied the law, their factual determinations are not supported by substantial evidence, and the best interests of racing in the State are better served by reversal of the Stewards' Decision and Official Ruling.

Findings Regarding Procedure for Taking Test Sample

10. Jesus Ruano testified at the administrative appeal hearing in this matter. Mr. Ruano is the licensed veterinary assistant who took the urine sample from Queen on July 25, 2007, just after the horse placed first in the eighth race at Del Mar Race Track. Mr. Ruano was working as an assistant to the track veterinarian, Dr. Beck. Mr. Ruano is very experienced in obtaining urine samples, having collected some 1000 samples in his career. The Board issued a license to him in 1984 and he has been continuously licensed since then. After the race, Mr. Ruano led the horse to the test barn. Dr. Beck, the veterinarian, took a blood sample from the horse. Mr. Ruano attempted to take a urine sample, but the horse would not urinate. After trying for about 30 minutes, he walked the horse back to her stall and again took steps to encourage the horse to urinate by walking the horse and giving water to her. About an hour later, he was able to obtain the urine sample. A witness was present when the urine sample was obtained, in compliance with the Board's rules.

11. Appellant did not establish that Mr. Ruano or anyone else deviated in any manner from proper and legal procedures in obtaining Queen's post-race urine sample on July 25, 2007. Nor did Appellant establish that the urine sample was tainted. The procedure Mr. Ruano used to collect the sample did not compromise its integrity. Appellant attempted to show impropriety in the process, but he failed to do so. Mr. Ruano testified credibly and without hesitation in establishing that he used the proper procedures to obtain the urine sample.

Findings Regarding Integrity of Laboratory Test

12. At both the Steward's hearing and this administrative appeal hearing, Appellant asserted that the UCD Lab analysis of the urine sample lacked integrity and was incorrect. This assertion is based on a mistake that occurred in the UCD Lab documents the Board originally gave to Appellant well in advance of the Stewards' hearing. The original UCD Lab documents given to Appellant included several pages that appear to have been derived from the lab analysis of another horse's urine. The pages for the other horse reflect a reference number of DM00865. The urine sample number in Queen's case is DM00914. The cover memorandum from UCD Lab Chief Chemist Dr. Scott Stanley accompanying the original packet with the incorrect pages refers to Queen's case and is dated August 7, 2007.[7]

---

[7] The packet with the incorrect documents is included in the record of the Stewards' hearing as Exhibit B (which is a part of the record of the Steward's hearing that was received at the administrative appeal hearing as Exhibit Z).

A corrected packet was given to Appellant on April 12, 2008, at the outset of the Stewards' hearing. The cover memorandum accompanying the corrected packet from the UCD Lab Chief Chemist Dr. Scott Stanley reflects a revision date of August 11, 2007, in addition to the original date of August 7, 2007.

13. While Appellant is correct in pointing out that he received two different packets containing UCD Lab analysis documents, and that the first packet he received included documents from another case, Appellant failed to show how this apparent clerical error was anything other than a minor immaterial mistake. He pointed out the mistake at the April 12, 2008 Stewards' hearing; and he objected to the Stewards admitting the corrected packet into evidence. At no time during the Stewards' hearing did Appellant ask the Stewards for a continuance to enable him to fully review the corrected packet and prepare a defense to it. He simply attempted to attack the entire UCD Lab analysis' validity based on the apparent mistake. He made the same argument at this administrative appeal hearing. Yet, Appellant had the opportunity to call an expert or any other witness to testify whether the UCD Lab analysis was valid, and he failed to do so. At the Stewards' hearing and this administrative appeal hearing, Appellant failed to show that the UCD Lab analysis of Queen's sample was invalid or reflected an analysis of another horse's urine.

Findings Regarding Notice of Right to Split Sample

14. On August 2, 2007, the Board sent notice of Queen's positive test results to both Appellant and Michael Pender, who was Queen's trainer.[8] Pursuant to Rule 1859.25, subdivision (b),[9] the notice informed Appellant and the trainer that each could request a split sample analysis[10] to be conducted by any laboratory on the Board's approved list, within 72 hours from the date of the notice. Appellant's notice stated that he could request a split sample "provided your trainer has not already done so."

15. On or about August 6, 2007, Mr. Pender asked for a split sample. At some point between July 25, 2007, and early August 2007, Mr. Pender told Appellant he intended to ask, or had asked, the Board for a split sample analysis. Appellant did not ask the Board for a split sample analysis. Subsequently, Mr. Pender did not timely file his verification of

---

[8] Queen of the Derby's trainer of record on July 25, 2007, was Michael Pender. The Board also charged Mr. Pender in this matter. On December 8, 2007, he reached a settlement with the Board thereby obviating the need for a hearing before the Stewards.

[9] See Legal Conclusion 7, for the full text of Rule 1859.25.

[10] When a race horse's urine specimen is obtained, a portion of the specimen is set aside and the remainder of the sample is analyzed by a laboratory. When a split sample analysis is requested, the portion of the specimen that was set aside is separately tested by an approved laboratory chosen by the owner or trainer of the race horse. The results of the two tested samples are then compared.

payment for costs incurred in transporting and testing the split sample to the chosen laboratory with the Board as required by Rule 1859.25, subdivision (c)(3). The Board notified Mr. Pender on September 8, 2007, that he had failed to comply with the time restrictions for verifying payment of costs and had therefore waived his right to a split sample analysis. The Board did not send a similar notice to Appellant telling him that Mr. Pender was not timely in verifying his payment of the costs of transporting and testing and had therefore waived his right to a split sample test. No split sample analysis was ever conducted.

16. At no time did Appellant ask the Board for a split sample. Appellant knew that Mr. Pender was going to ask or had asked for a split sample analysis. He claims that the Board should have notified him that it had not permitted Mr. Pender to pursue the split sample analysis, and that the Board's failure to send him such a notice deprived him of his right to seek a split sample. However, there is no requirement under the law for the Board to notify Appellant after sending the initial notice informing the trainer and owner of the right to request a split sample pursuant to Rule 1859.25.[11] Moreover, there was no evidence that Appellant attempted in any way to inquire about the results of his trainer's request for a split sample analysis with Mr. Pender or the Board. Even after Appellant learned that the Board had not permitted Mr. Pender to pursue his request a split sample analysis, the evidence does not show that he made any effort to rectify the problem with the Board.

17. The Board's notice to the Appellant of the right to request a split sample was incorrectly worded in one respect: It informed Appellant that he had a right to request a split sample provided his "trainer has not already done so." In this respect, Rule 1859.25, subdivision (b), provides the opposite of the language in the Board's notice in that it states that the owner and trainer "each" have the right to request a split sample. The Rule contains no limitation on the owner's right to request a split sample similar to the language in the Board's notice. Still, this incorrect language in the Board's notice does not absolve Appellant of his personal responsibility to coordinate and communicate with the trainer when he is relying on the trainer to obtain the split sample and have it tested.

LEGAL CONCLUSIONS

1. Business and Professions Code section 19460 states that all licenses issued by the Board are subject to all rules, regulations, and conditions from time to time prescribed by the Board.

2. Rule 1761 provides that every decision of the Stewards may be appealed to the Board, except a decision concerning disqualification of a horse due to a foul or a riding or driving infraction. However, an appeal does not affect a Stewards' decision until the appeal has either been sustained or dismissed, or the Board's chairman issues an order staying the decision.

---

[11] See Legal Conclusion 7, for the full text of this Rule.

3. Rule 1764 states, in pertinent part: "The burden shall be on the appellant to prove the facts necessary to sustain the appeal."

4. Business and Professions Code section 19517, subdivision (a), states: "The board, upon due consideration, may overrule any steward's decision other than a decision to disqualify a horse due to a foul or a riding or a driving infraction in a race, 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 interests of racing and the state may be better served."

5. Based on Legal Conclusions 3 and 4, Appellant has the burden to establish by a preponderance of the evidence that grounds exist to overrule the Stewards' decision.

6. Rule 1859 states:

> (a) Urine, blood or other official test samples shall be taken under the direction of the official veterinarian or their designee. All samples shall be taken in a detention area approved by the Board, unless the official veterinarian approves otherwise. The taking of any test sample shall be witnessed, confirmed or acknowledged by the trainer of the horse being tested or their agent or employee, and may be witnessed by the owner, trainer or other person designated by them. All official test samples shall be sent to the official laboratory approved and designated by the Board, in such manner as the Board may direct. All required samples shall be in the custody of the official veterinarian, their assistants or other persons approved by them, from the time they are taken until they are delivered to the custody of the official laboratory.
>
> (b) If the official laboratory fails to detect in the official test samples, a prohibited drug substance, as defined in this article, the official sample shall be discarded immediately.
>
> (c) The Executive Director and the Equine Medical Director shall immediately be notified by the official laboratory of each finding that an official test sample contains a prohibited drug substance, as defined in this article. The official laboratory shall further provide all information and data on which the finding is based to the Equine Medical Director, and shall transmit its official report of the finding to the Executive Director within five (5) working days after the initial notification is made.
>
> (d) The Board has the authority to direct the official laboratory to retain and preserve by freezing samples for future analysis.

(e) The fact that purse money has been distributed prior to the issuance of a laboratory report shall not be deemed a finding that no drug substance prohibited by this article has been administered, in violation of these rules, to the horse earning such purse money.

7. Rule 1859.25 provides, in part:

(a) In addition to the blood and urine official test samples transmitted to the official laboratory for testing as provided in Rule 1859 of this Article, the Board shall maintain a portion of the official test sample for each horse tested if sufficient sample is available after the official test samples are taken. That portion shall be designated the split sample. The Board makes no guarantee as to the amount of sample which will be available for the split sample. All samples taken by representatives of the Board are under the jurisdiction of and shall remain the property of the Board at all times. The Board shall ensure the security and storage of the split sample.

(b) When the Executive Director or the Executive Director's designee is notified of a finding by the official laboratory that a test sample from a horse participating in any race contained a prohibited drug substance as defined in this Article, the Executive Director, after consulting with the Equine Medical Director or the Equine Medical Director's designee as to the presence of the prohibited drug substance shall notify a Supervising Investigator. The owner and the trainer shall be confidentially notified of the finding by a Supervising Investigator or his/her designee and the owner and trainer shall each have 72 hours from the date he or she is notified to request that the split sample of the official test sample that was found to contain the prohibited drug substance(s) be tested by an independent Board-approved laboratory.

(c) If the owner or trainer wishes to have the split sample tested, he or she shall comply with the following procedures: (1) The request shall be made on CHRB-56, (Rev. 5/97), Request to Release Evidence, which is hereby incorporated by reference. CHRB-56 shall be made available at all CHRB offices. (2) The owner or trainer requesting to have the split sample tested shall be responsible for all charges and costs incurred in transporting and testing the split sample. By signing CHRB-56, the owner or trainer certifies he or she has made arrangements for payment to the designated Board-approved laboratory for laboratory testing services. (3) Verification of payment for costs incurred in transporting and testing the split sample must be received by the CHRB within five (5) working days from the CHRB receipt of CHRB-56. If such verification of payment is not received, the split sample will not be released or shipped to the Board-approved laboratory designated by the owner

or trainer to test the split sample and the owner and trainer will have relinquished his/her right to have the split sample tested. If a complaint issues, the only test results that will be considered will be the results from the Board's official laboratory.

[¶] . . . [¶]

(e) If the owner or trainer fails to request the testing of the split sample in accordance with the procedures specified in this rule, they shall be deemed to have waived their rights to have the split sample tested.

8. Rule 1859.5 provides as follows:

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. (A) In his hearing brief, Appellant articulated many reasons why the Stewards' Decision and ruling was incorrect. Yet, he offered little evidence at hearing in support of his position.

(B) At the Stewards' hearing, the record reflects that Appellant objected to the introduction of the Board's evidence, including the UCD Lab analysis. His objections were based on hearsay and lack of foundation. Appellant raised these objections anew at the administrative appeal as a basis for overturning the Stewards' ruling. Although the Board called no witnesses at the Stewards' hearing, the documents were prepared by "public employees," as defined in Evidence Code section 195.[12] Government Code section 11513, subdivision (c), provides, in pertinent part, as follows:

An administrative hearing need not be conducted according to the technical rules relating to evidence and witnesses . . . . Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

---

[12] Evidence Code section 195 defines a public employee as an officer, agent, or employee of a public entity.

Appellant's objections to the Board's evidence on the basis that it lacked foundation are not well taken in an administrative hearing in accordance with Government Code section 11513, subdivision (c). Appellant's hearsay objections to the Board's evidence were also properly overruled. The Board's evidence consists of records of public employees, which are properly admitted pursuant to Evidence Code section 1280. The Stewards acted properly in admitting the Board's documents.

(C) Neither did Appellant show by a preponderance of the evidence that the Board's employees and agents failed to follow proper procedures in collecting the urine specimen and testing it. As public employees, the Board's agents who carried out these procedures are entitled to the presumption that they regularly performed their official duty. (Evid. Code, § 664.) Appellant did not offer sufficient evidence to rebut the presumption (Factual Findings 1 through 13). As to the UCD Lab testing in particular, Appellant primarily offered conjecture. He did not call any witnesses at the Stewards' hearing, and called only Mr. Ruano at the administrative appeal hearing, to support his position that the lab results were invalid. As provided in Factual Findings 1 through 13, and Legal Conclusion 6, the Board complied with Rule 1859, in following proper procedure for collecting and testing the urine sample.

(D) As set forth in Factual Findings 14 through 17, the Board did not deprive Appellant of his right to request a split sample. Appellant received notice of his right and chose not to request a split sample, choosing instead to defer to his trainer. It was Appellant who did not thereafter communicate with his trainer about the status of the split sample testing.

10. Based on Factual Findings 1 through 17 and Legal Conclusions 1 through 9, Appellant has not provided a basis to overrule the Stewards' ruling pursuant to Business and Professions Code section 19517.

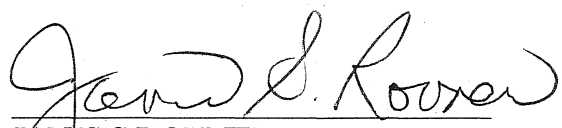
11. Pursuant to Rules 1859 and 1859.5, the Stewards acted properly in disqualifying Appellant's horse as the first place finisher in the eighth race on July 25, 2007, at Del Mar Race Track and requiring Appellant to return all purse monies from the race.

12. Cause does not exist to overrule the April 18, 2008, Statement of Decision and Official Ruling LATS #209 of the Board of Stewards in the matter against Appellant, pursuant to Business and Professions Code section 19517 and California Code of Regulations, title 4, section 1859.5, based on Factual Findings 1 through 17 and Legal Conclusions 1 through 11.

ORDER

Appellant Gary Folgner's appeal of the Statement of Decision and Official Ruling LATS # 209 of the Board of Stewards, Los Angeles Turf Club, Inc., Case No. 07DM023, dated April 18, 2008, is denied.

DATED: December 26, 2008



JANIS S.ROVNER
Administrative Law Judge
Office of Administrative Hearings