

14-0957

IN THE CIRCUIT COURT OF KANAWHA COUNTY

LUIS PEREZ, ANTHONY MAWING,
DALE WHITAKER, LAWRENCE
REYNOLDS, JESUS SANCHEZ,
ALEXIS RIOS-CONDE, and TONY
MARAGH,

Petitioners,

v.

WEST VIRGINIA RACING
COMMISSION,

Respondent.

Case No. 09-C-688

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ORDER

This matter is before the Court upon the Petition for Appeal of Petitioners Luis Perez, Anthony Mawing, Dale Whitaker, Lawrence Reynolds, Jesus Sanchez, Alexis Rios-Conde, and Tony Maragh (collectively, "the Jockeys" or "Petitioners") pursuant to West Virginia Code § 29A-5-4. The Court has reviewed the entire record in this matter, reviewed the written and oral arguments of the parties, and finds this matter ripe for decision.

Upon review, the Court is persuaded that the Commission's final order constitutes unlawful rulemaking retroactively applied and that the record below is insufficient to support the findings of the Commission. Accordingly, for the reasons set forth in detail below, the Court GRANTS the Jockeys' appeal and REVERSES and VACATES the final Order of the West Virginia Racing Commission.

II. Procedural History

On April 8, 2009, the Jockeys, who hold occupational permits from the West Virginia Board of Racing, individually appeared before the Board of Stewards at Charles Town Race Track pursuant to notices that alleged that the Jockeys had violated certain "Rules of Racing"

These appearances resulted in orders from the Board of Stewards as to each of the Jockeys, ruling that the Jockeys had “been found guilty of dishonest acts in relation to conspiring along with the Clerk of Scales and on [their] own account failing to report proper and correct overweight and fraudulently doing [their] assigned weight, (doing overweights).” On this finding, the Board of Stewards suspended each of the Jockeys’ occupational permits for thirty days and fined each of the Jockeys \$1,000. However, the notice and procedure resulting in these orders were issued were significantly flawed and, on April 16, 2009, this Court issued a temporary restraining order which stayed the imposition of the suspension until the Jockeys could be afforded a *de novo* hearing of the charges against them before the West Virginia Racing Commission.

Based on this Court’s direction, the Commission began the process of remedying the initial procedural errors committed by the Charles Town Board of Stewards by issuing a detailed statement of charges against and notice of hearing for each of the Jockeys on June 4, 2009. The notices of hearing set a *de novo* administrative hearing before the Commission on June 16 and 17, 2009. This hearing was continued to August 5, 6, and 7, 2009, by Order of the Commission dated June 12, 2009, and the Commission reissued detailed statements of charges against and notices of hearing for the Jockeys on June 17, 2009. The Commission conducted three days of hearings on these charges as scheduled, utilizing Jack McClung as a hearing examiner with the full agreement of the parties. The three days of hearing were insufficient for complete presentation of the evidence, and the Commission reconvened for additional hearings on September 21 and 22, 2009.

On December 11, 2009, the Commission’s counsel and the Jockeys’ counsel submitted their proposed findings of fact and conclusions of law to Mr. McClung. On April 22, 2010, Mr.

McClung submitted his Hearing Examiner's Findings of Fact, Conclusions of Law, and Recommended Order to the Commission for review. The Commission placed the review of this recommended decision on its agenda for its April 30, 2010, meeting.

On April 28, 2010, the Jockeys transmitted their written objections to Mr. McClung's recommended decision to the Commission. The Commission's counsel responded to these objections on April 29, 2010. At its April 30 meeting, the Commission noted the Jockeys' objections and set a hearing on May 7, 2010, for oral argument on those objections. On May 7, 2010, the Commission heard the Jockeys' objections and the Commission's counsel's response to them.

On May 21, 2010, the Commission issued its Order finally resolving the Jockeys' appeal of the Stewards' ruling. In that Order, the Commission affirmed the Stewards' rulings in part, reversed them in part, granted the Jockeys' appeal in part, and denied the Jockeys' appeal in part. *Id.* At the May 21, 2010, hearing at which the Commission's ruling was announced, counsel for the Jockeys moved for and was granted a stay of the penalties imposed by the Commission's final order through the completion of this appeal. Shortly thereafter, the Commission revoked this ruling and, by Order dated May 25, 2010, instead ruled that the sanctions set forth in the May 21 Order would have no force and effect until June 1, 2010.

On June 1, 2010, the Jockeys filed their Petition for Appeal in this matter, accompanied by a motion to stay enforcement of the penalty set forth in the Commission's final order. The Court, by Order of June 3, 2010, granted the Jockeys' motion to stay any further enforcement of the Commission's penalty through the pendency of this Appeal.

On August 30, 2010, the Court heard the parties' oral arguments on the respective merits of their positions and now issues its ruling upon the issues raised in this appeal.

III. Standard of Review

Pursuant to West Virginia Code § 29A-5-4, this Court

shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are: (1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

While it is true that review of agency action under the Administrative Procedure Act is limited, judicial review must be “careful, thorough and probing.” *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W.Va. 286, 292, 517 S.E.2d 763, 769 (1999). Further, the court must give no deference to rules which result from flawed process, are fundamentally unfair or are arbitrary. *Frymier-Halloran v. Paige*, 193 W.Va. 687, 694, 458 S.E.2d 780, 787 (1995). Similarly, it is well settled that the Commission’s conclusions of law are entitled to no deference whatsoever and are reviewed *de novo*. *Mayflower Vehicle Systems, Inc. v. Cheeks*, 629 S.E.2d 762, 218 W.Va. 703 (2006).

IV. Factual Background and Evidence Below

In the summer of 2008, Charles Town Races & Slots installed a new electronic scale, replacing the old Toledo mechanical scale. The new scale includes a digital readout, displaying weight to the tenth of a pound. Several indicator lights and buttons are on the display, including a standstill light on the lower left corner of the readout, which illuminates when the reading is stable enough to be accurate. A reading taken without the standstill light illuminated is not a valid reading. The scale is programmable to filter the readout, to accommodate different uses of

the scale. The scale can be attached to a printer to create a permanent record of an item's weight, but no printer is involved in the scale's use at the track.¹

The scale was installed by Albert Felicio, who calibrated it and gave a brief presentation on its use on the day it was installed. Mr. Garrison never received any training on the use of the scale. Neither the Clerk of Scales nor anyone else at the track received training on the use and significance of the standstill light. The scale's readout could have been filtered better, to account for its specific use weighing jockeys who are subject to a fine if they are late getting to the paddock, and who climb on and off the scale in rapid succession.²

From the time the scale was installed through March of 2009, the regular Clerk of Scales and substitutes in his absence performed their work as Clerk of Scales using the electronic scale and without waiting for the standstill light to come on before determining whether jockeys met their announced weight.³

In order to perform properly, the scale and weight display unit must be properly installed, maintained, and calibrated consistent with the instructions contained in each product's manual and in accordance with industry standards. The evidence is uncontradicted that the scale was not balanced.⁴

Throughout the fall and winter of 2008-2009, the weigh-out process was conducted at Charles Town with different rules arbitrarily applied at different times regarding what clothes could be worn on the scale and what allowances would be made for weights. For example, it was common practice in cold and wet weather to allow jockeys to wear appropriate and

¹ Kirk testimony on 8/5/09, pp. 206 and 221; Felicio testimony pp. 35-36; Hakakian testimony, pp. 206-207.

² Felicio testimony, p. 37; Garrison testimony on 9/21/09, p. 295; Garrison testimony on 9/22/09, p. 12; Hakakian testimony p. 221.

³ Garrison testimony on 9/22/09, p. 12.

⁴ Garrison testimony on 9/22/09, p. 11.

protective clothing without suffering penalties for the extra weight.⁵ At the same time, because of pressures from HRTV and demands from the wagering public, Charles Town insisted that races run on schedule and pressured the Clerk of Scales and jockeys for speed in the weigh-out process.⁶

Jockeys are required to report their estimated weight at 5:30 p.m. on the day of a race, with the first post time at 7:15 p.m. After reporting, jockeys that need to lose weight for their lightest horse of the day have to “pull their weight”. They can pull weight various ways, including jogging, sitting in a steam room or sitting in the “hot box”. Jockeys can and do pull several pounds in a matter of hours. The custom and practice at Charles Town included rounding down – that is, a jockey weighing 116.9 pounds was considered to weigh 116 pounds.⁷

Almost every racing day during the relevant time period, one or more of the track’s stewards, including Chief Steward Danny Wright, observed the weigh-out process in the jockey’s room, and none of them noticed anything inappropriate about the Clerk of Scales’ conduct or that of his substitutes.⁸

Sometime in early March of 2009, management of the track received unsubstantiated rumors that certain jockeys were being permitted to ride in excess of their stated weights. There is no evidence in the record as to the source of these rumors. Management did not refer those rumors to the stewards for investigation, but decided to conduct an investigation on their own.⁹

Without informing the stewards or those involved in the weigh-out process, the track installed two hidden surveillance cameras in the jockey’s room. Those involved in setting up the

⁵ Reynolds testimony, pp. 31-33; Mawing testimony, pp. 221-224.

⁶ Reynolds testimony, pp. 34-35.

⁷ Mawing testimony, pp. 215-216, Sanchez testimony, p. 74, Rios-Conde testimony, p. 125, Mawing testimony, pp. 245-247, Kirk testimony on 8/5/09, p. 221.

⁸ Wright testimony on 9/21/09, pp. 37-41; Lotts testimony, pp. 148-150; Dupuy testimony, pp. 225, 230.

⁹ Zimny testimony on 8/5/09, pp. 80-83, 93-94.

surveillance did not know how the weigh-out process was supposed to occur and were unaware of how the scale operated. In particular, they were unaware of the function or significance of the standstill light.¹⁰

Although Mr. Zimny testified that the investigation was initiated as a “personnel matter” involving the Clerk of Scales, neither of the cameras focused on Mr. Garrison. None of the video recordings show the Clerk of Scales at any point during the weigh-outs on March 25 and 26 which were recorded by the cameras. Nor were any audio recordings made to capture any verbal communications between Mr. Garrison and the jockeys, ringing of deadline bells, or the other noises occurring during the events on the video tapes. The recordings do capture the jockeys in various states of undress.¹¹

The day after the video recordings on March 25 and 26, the Clerk of Scales was relieved of his duties and removed from the track by Charles Town. Shortly thereafter, the jockeys were summoned to hearings on allegations that they had engaged in corrupt activities and ridden at weights in excess of their reported weights. No evidence of the allegedly corrupt activities was ever produced. Despite this lack of evidence, the Jockeys were ultimately suspended by the Stewards, fined \$1,000.00, and were forced to obtain an injunction to have those sanctions suspended until a proper hearing could be held.¹²

The videos taken by the track, reviewed in slow motion, show multiple weights being displayed for every rider in every race. Further, these video tapes, using the Stewards’ method of selecting the highest weight displayed for each of the Jockeys, reveal other jockeys riding both underweight and overweight. Not one of the other jockeys whose weights were displayed as

¹⁰ Zimny testimony on 8/5/09, pp. 82-83, Zimny testimony on 8/6/09, pp. 118, 136-137.

¹¹ Erhardt testimony, pp. 163, 166-167; Zimny testimony on 8/5/09, pp. 91, 148; Zimny testimony on 8/6/09, p. 120.

¹² Zimny testimony on 8/5/09, p. 90-91; Wright testimony on 9/21/09, pp. 109-111; Jockey Exhibit #2, Hearing Transcript on 4/8/09.

either over or under their assigned weights were subjected to hearings or discipline. Most importantly, the standstill light did not come on at any time during any of the weigh-outs for which the Jockeys were punished.¹³

The videotapes show significant inconsistencies in the weigh-out standards applied. Some jockeys weighed out with little clothing on, and others were fully clad in cold-weather or rain gear. One jockey weighed out carrying a can of Red Bull. Some jockeys stood on the scale for only a moment; others stood on the scale and moved around for larger periods of time. The readout displayed between two and fourteen weights for each jockey, depending on the amount of time they stood on the scales.¹⁴

The record shows that certain of the Jockeys did get on and off the scale quickly and did so in various states of dress. However, a review of the complete record shows that many other jockeys in addition to these seven engaged in similar conduct, identical conduct, or even more egregious conduct regarding weighouts. The following chart shows representative examples where jockeys other than the Petitioners engaged in similar or worse weighout behavior than that deemed sanctionable by the Commission, and show the process to have been the same for all jockeys:

Jockey	Video Time	Scale Readings ("S" denotes standstill light)	Reported Weight
Perez, Xavier	18:57:34	110.5 119.8 119.7 119.2 121.1 118.8 120.0 119.6	118

¹³ Link testimony, pp. 187-188, 190; Zimny testimony on 8/6/09, pp. 115-116; Jockey Exhibit #6, detailed chart; Dupuy testimony on 9/21/09, p. 199; Videos of March 25 and 26, 2009.

¹⁴ Videos of March 25 and 26, 2009; Jockey Exhibit #6, detailed chart; Wright testimony on 9/21/09, p. 47.

		120.4 120.1 122.0 120.2 115.7	
Acosta, J.	18:59:40	107.8 119.2 119.4 117.6	118
Foley, Tom	18:55:21	106.8 121.4 S 121.6 121.2 122.2 120.6	119
Castro, Carlos	19:51:04	120.2 121.2 S 120.0	122
Ramirez, Erick	20:24:29	116.4 119.0 S 120.2	117
Arboleda, Aldo	22:16:26	113.4 117.8 117.7 113.9	119
Acosta, J.	22:44:25	109.0 115.0 117.6 119.3 119.0 121.5 110.1	117

One of the more startling examples of loose weighout procedure is shown in the videotapes at 21:47:09 on March 26, 2009, Race 7. This footage shows jockey Emanuel Ramirez weighing out with, among other things, a can of Red Bull energy drink in hand. Even more inexplicably and, as far as the Court's review shows, uniquely, Ramirez actually weighs in at a lower weight than he weighed out, which is odd given the amount of dirt and mud on most riders weighing in on this evening. See video at 22:09:12. Additionally, the Court has excerpted from the video record the complete weighout procedure applied in the second race on March 25, 2009, and

attached it hereto as Exhibit A. This exhibit is illustrative, showing several of the Jockeys being weighed out as well as other riders; this exhibit shows no meaningful difference in the behavior of the Jockeys as opposed to the other riders weighing out for the race.

At the hearing, every Jockey testified that he checked his weight on the mechanical Toledo scale in the jockey's room before officially weighing out on the electronic scale on the evenings of March 25 and 26. Every Jockey testified that he met his reported weight for each of the races in question. Indeed, one Jockey, Mr. Mawing, had never been sanctioned for riding overweight in his twenty-one years of racing before this event and has not been sanctioned since this event.¹⁵

For each of the races for which the Jockeys were charged, the Jockeys looked at the Clerk of Scales and waited for Mr. Garrison to give them his approval before they proceeded to the paddock to mount their horses for racing. The video shows that none of the Jockeys even looked at the display while weighing out, except for one glance by Mr. Sanchez.¹⁶

The Clerk of Scales testified below that it was his duty to report any overweights and not the jockeys' duty, specifically stating:

Q. What's your understanding? Did they [the Jockeys] have any other duties at that point once you've told them okay?

A. They finished getting ready. That's all I know.

Q. And if they were a pound over and you told them to go out then it's your job to report that to somebody else?

A. Right.

¹⁵ Reynolds testimony, pp. 37-39, 51, 70; Sanchez testimony, pp. 75-76, 83; Rios-Conde testimony, p. 129-131; Perez testimony, pp. 140-141, 143; Maragh testimony, pp. 160-161, 165, 170-171; Whittaker testimony, pp. 196, 198, 201; Mawing testimony, pp. 216, 219, 232, 235.

¹⁶ Videos of March 25 and 26, 2009; Reynolds testimony, pp. 46-49; Sanchez testimony, pp. 80-81; Rios-Conde testimony, pp. 119-120; Perez testimony, p. 142; Perez, pp. 167-169, Whittaker testimony, p. 201; Mawing testimony, p. 230.

Q. Not theirs?

A. Or if they could make the adjustment to make the adjustment.

Garrison testimony on 9/21/09, p. 313.

Stan Bowker, who was qualified as an expert at the hearing below, testified that no racing official could reasonably conclude what the Jockeys weighed to a tenth of a pound on March 25th and 26th:

Q. I want to focus your attention on the issues in this case. Based on what you have – what you’ve seen at the hearing and what you – the last time and what you’ve seen and heard here today, okay, in your opinion as a racing official, can any racing official reasonably conclude what these jockeys weigh to a tenth of a pound on the 25th and 26th of March?

A. No.

Bowker testimony on 9/22/09, pp. 271-272. The record makes abundantly clear that there was no reliable evidence before the Commission of the actual weight to the tenth of a pound of any of the Jockeys on March 25 and 26. The record further makes abundantly clear that practically all other jockeys racing on March 25 and 26 engaged in the same weighout procedure as the Jockeys and did so in substantially the same manner.

V. The Commission’s Decision and the Assignments of Error

The Court notes that the Jockeys’ appeal of the Stewards’ initial ruling and the additional, clarified charges brought by the Commission’s counsel was successful as to every charge but one. The hearing examiner recommended, and the Commission ruled, that the charges that the Jockeys rode overweight and failed to report overweight could not be sustained. Recommended Decision, p. 24, Concl. of Law 16. The hearing examiner recommended, and the Commission ruled, that the charges that the Jockeys conspired with the Clerk of Scales for the commission of a corrupt or fraudulent act or practice could not be sustained. *Id.* at p. 25, Concl. of Law 18.

The Commission did find, however, that the charges that the Jockeys connived in the commission of a corrupt act or practice in violation of West Virginia Code of State Regulations §178-1-60.5 had been proved. The Commission's analysis on this point is short enough to be set forth here verbatim:

The earlier referenced hearings revealed that on March 25 and 26, 2009 virtually none of the protocols recognized to verify jockey weight were complied with at the weigh-outs.

The process of reporting and determining jockey weights varies somewhat from the rules of this Commission. Whereas § 178-1-17.2 requires jockeys to report their weights one hour before each race, the practice has been that jockeys report their weights to the Clerk of Scales by 5:30 p.m. or an hour before the first race with weigh-outs occurring before each race. There is approximately thirty (30) minutes between races. This short time frame is further complicated by the fact that jockeys often ride in multiple, sometimes successive races in a day.

W. Va. Code R. § 178-1-17.3 requires that the Clerk of Scales "[v]erify the correct weight of each jockey at the time of weighing out . . . and report any discrepancies to the Stewards immediately." The record, in particular the video tapes reflects that this did not occur and in fact could not have occurred due to the behavior of Mr. Garrison and the appellants.

The Commission finds that the facts in these cases and that of Mr. Garrison raise issues of first impression which require clarification. W. Va. Code R. § 178-1-60.5 states "[n]o person shall conspire with any other person for the Commission of a corrupt or fraudulent act or practice, or connive with any other person in any corrupt or fraudulent practice in relation to racing nor commit an act on his or her own part."

The Hearing Examiner found no conspiracy to exist among the appellants or between the appellants and Mr. Garrison based upon the lack of any "prior agreement" between them. The Commission finds this to be the case. As to the Stewards' Rulings and the Hearing Examiner's findings as to "connivance" in a "corrupt" practice the Commission hereby finds that to have occurred, but would adopt different interpretations of these terms of art than have been used in this case, to date. Whereas much discussion has been had regarding the intent or mens rea required to connive it is incumbent upon this Commission to clarify the level of intent or agreement necessary for a violation to occur.

The Commission hereby finds that "connivance", as that term is used in this Commission's rule, W. Va. Code R. § 178-1-60.5, includes acquiescence by a licensee in the behavior of others. Further, the Commission finds that "corrupt" as that term is used in the aforementioned rules includes the diminution or

adulteration of procedures necessary for thoroughbred racing and pari-mutual wagering to work in such a way as to ensure confidence in the integrity of the process by the wagering public.

Hence, while review of the evidence shows no conspiracy between appellants or the appellants and Mr. Garrison, nor does it show action intent to defraud or violate laws, it does show an acquiescence by the appellants in the diminution and adulteration of the weigh-out process of a level sufficient as to injure confidence in the integrity of that process. It is axiomatic that confidence in the process is a, if not the, necessary component in assuring continued public participation in the pari-mutual wagering that allows thoroughbred racing to maintain its viability.

Accordingly, the Commission, with the modifications noted herein, finds that the appellants did, in fact violate the provisions of W. Va. Code R. § 178-1-60.5 in that they "connived" with Mr. Garrison in the commission of a "corrupt" practice. The Commission would again note that the appellants as licensees acquiesced in Mr. Garrison's allowing the weigh-out procedure to be made meaningless if not misleading, and that constitutes a "corrupt" act or practice.

Final Order, pp. 3-5.

In regard to this Final Order, the Jockeys have raised several assignments of error, both of law and of fact:

- That the Commission has, by providing a previously nonexistent and unknown definition for the terms of art "connive" and "corrupt," engaged in improper rulemaking in violation of Article 3 of Chapter 29A;
- That the Commission has improperly retroactively applied its definitions of these terms of art and in doing so has erred as matter of law and in violation of the constitutional rights of the Jockeys;
- That the Commission's determination that the Jockeys "connived" in "corrupt" practices is clearly wrong based on the reliable, probative, and substantial evidence in the record;
- That the Commission's application of its new standards to the Jockeys only and not all others who participated in or oversaw the weighout process is arbitrary and capricious; and
- That the Commission's suspension of the Jockeys' privileges to race for thirty days based on the record before it and through application of improperly promulgated rules violates the Jockeys' constitutional rights.

The Court addresses each of these assignments of error below.

VI. Analysis

Applying the standard of review set forth in West Virginia Code § 29A-5-4, the Court rules upon the Petitioners' assignments of error as follows.

- A. *The Commission's quasi-judicial promulgation of a regulation providing a previously nonexistent definition of the regulatory terms "connive" and "corrupt" is a violation of Article 3 of Chapter 29A of the West Virginia Code, which governs the promulgation of rules by state agencies such as the Commission.*

When an agency is empowered with both rulemaking and adjudicatory powers, use of the adjudicatory forum to make new prospective rules circumvents the prescribed rulemaking procedure. *Chenery v. Securities and Exchange Commission*, 332 U.S. 194 (1947); *NLRB v. Wyman-Gordon*, 394 U.S. 759 (1961); *NLRB v. Bell Aerospace*, 416 U.S. 267 (1974). The West Virginia Administrative Procedures Act provides that, "every rule and regulation . . . shall be promulgated by an agency only in accordance with this article and shall be and remain effective only to the extent that it has been or is promulgated in accordance with this article." W. Va. Code § 29A-3-1 (emphasis added).

Against this backdrop, the Jockeys argue that the Commission's final order constitutes inappropriate quasi-judicial rulemaking outside the strictures of the West Virginia Code. In response, the Commission argues that its definition of the terms "connive" and "corrupt" constitutes nothing more than permissible interpretation of its own regulations.

1. *The Racing Commission's definitions of "connive" and "corrupt" are rules as defined by the Administrative Procedures Act.*

For the purposes of the Administrative Procedures Act, "'Rule' includes every regulation, standard or statement of policy or interpretation of general application and future effect . . . adopted by an agency to . . . interpret or make specific the law enforced or administered by it . . .

.” W. Va. Code § 29A-1-2(i) (emphasis added). The Commission’s final order on its face interprets and makes specific the law enforced and administered by it:

The Commission hereby finds that "connivance", as that term is used in this Commission's rule, W. Va. Code R. § 178-1-60.5, includes acquiescence by a licensee in the behavior of others. Further, the Commission finds that "corrupt" as that term is used in the aforementioned rules includes the diminution or adulteration of procedures necessary for thoroughbred racing and pari-mutual wagering to work in such a way as to ensure confidence in the integrity of the process by the wagering public.

Final Order, p. 5. In addition to interpreting these terms for this case and these parties, the Commission makes clear that this interpretation is to have general application and future effect: “It is intended that this Order be considered precedential . . . as to defining of terms” Final Order, p. 6 (emphasis added). Because the Commission expressly orders that its definitions be applied in the future—i.e., be considered precedential—the Commission is openly and obviously presenting an interpretation of general application and future effect designed to make specific the law the Commission enforces and administers. This act, by statutory definition, is rule making.

The Court is not persuaded by the Commission’s argument that its definition of the terms “connive” and “corrupt” is merely the proper interpretation of its own preexisting regulation by applying the common and ordinary meaning of these two words.

First, in its Appeal Brief, the Commission spends significant space discussing various dictionary definitions of the terms “connive” and “corrupt.” The Court notes, however, that these definitions were not part of the Commission’s final order, nor is there any indication in the record that the Commission considered these common, ordinary meanings of the terms when crafting the definitions applied to the Jockeys.

Second, the Commission itself identifies the words “connive” and “corrupt” as “terms of art,” not common and ordinary words. Final Order, p. 4. While the Commission does indicate that it “adopt[s] different interpretations of these terms of art than have been used in this case, to

date,” the Commission goes on to indicate that, by adopting these “different interpretations,” it will identify “the intent or *mens rea* required to connive.” *Id.* (emphasis added). When an administrative body identifies the standard of intent necessary to be found guilty of violating a rule, and when it does so admitting that the issue before it involves defining not common and ordinary words but legal terms of art, that administrative body is creating and promulgating rules, not interpreting words in a rule according to their common everyday meaning. Just as a court cannot redefine the intent necessary for a crime to be committed, this Commission cannot create a whole new standard — connivance by acquiescence instead of affirmative conduct — and claim that it is a mere interpretation.

2. *Improperly promulgated rules, such as the Commission’s definitions of “connive” and “corrupt,” are a nullity and may not be enforced.*

Rules and regulations promulgated outside the strictures of the Administrative Procedures Act are a nullity and may not be enforced. *Coordinating Council for Independent Living, Inc. v. Palmer*, 209 W.Va. 274, 284, 546 S.E.2d 454, 464 (2001); Syl. Pt. 1, *Wheeling Barber College v. Roush*, 174 W.Va. 43, 44, 321 S.E.2d 694, 695 (1984) (“Until the statutory mechanisms set forth in the Administrative Procedures Act for the promulgation of an agency rule are complied with, any resolution of a regulatory agency governed by the Act remains a nullity . . .”). Accordingly, the Racing Commission’s definitions of these terms, being promulgated outside the strictures of the Administrative Procedures act, are void and ineffective. Further, because these rules result from demonstrably flawed process, the Court must give them no deference. *Frymier-Halloran v. Paige*, 193 W.Va. 687, 694, 458 S.E.2d 780, 787 (1995).

Because these regulations are void and ineffective, the Commission’s application of them to the Jockeys is in excess of the Commission’s statutory authority, procedurally unlawful, erroneous as a matter of law, and arbitrary and capricious. Because the Court can give these

rules no deference, the Court may not uphold the Commission's application of them to the Jockeys. Accordingly, the Court finds and rules that the Commission's Final Order is, insofar as it seeks to apply the Commission's definition of the terms "connive" and "corrupt" to the Jockeys, void.

B. The Commission's retroactive application of its new and improperly promulgated regulations defining the terms "connive" and "corrupt" is in error as a matter of law and violates the constitutional rights of the Jockeys.

1. The Commission's retroactive application of its new rules defining "connive" and "corrupt" is an error of law.

The Court has above found and ruled that the Commission's new definitions of the terms "connive" and "corrupt" constitute regulation. The West Virginia Supreme Court has made clear that, when regulations change and in so doing affect the substantive rights those governed by the regulation, the changed regulation will not be given retroactive application. *State ex rel. Richardson v. McCompton & Son Lumber Co., Inc.*, 192 W.Va. 10, 12, 449 S.E.2d 71, 73 (1994). In the instant matter, the Racing Commission created and issued new rules defining "connive" and "corrupt" on May 21, 2010, the date it entered its final order in this matter. However, assuming for the sake of discussion that the Jockeys' earlier conduct is proscribed by the new rules, the conduct that the new rules proscribes took place on March 25 and 26, 2009, fourteen months prior to the issuance of the Commission's new rules. In March 2009, neither the Jockeys nor any other person governed by the Rules of Racing knew or had reason to know that the Commission would later define the terms "connive" and "corrupt" so as to proscribe the acquiescence by a licensee in the behavior of others. Final Order, p. 4. Patently, therefore, the Commission applied new substantive administrative rules to prior conduct in a scenario where the Jockeys and all other licensees and permitholders had reason to rely on the longstanding rules which did not include these new definitions. This retroactive application violates West Virginia

law, and, in so doing, the Commission committed reversible error. Accordingly, the Court must vacate the Commission's final order.

2. *This retroactive application of a new rule constitutes an ex post facto law, which is void as a matter of West Virginia constitutional law.*

The West Virginia Constitution is clear and direct: "No bill of attainder, *ex post facto* law, or law impairing the obligation of a contract, shall be passed." W. Va. Const. Art. III, § 4. Under *ex post facto* principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which operates to the detriment of the accused cannot be applied to him. *Adkins v. Bordenkircher*, 164 W. Va. 292, 262 S.E.2d 885 (1980); *Hasan v. Holland*, 176 W. Va. 179, 342 S.E.2d 144, (1986). Administrative rules fall under the same proscription. *Adkins v. Bordenkircher*, 164 W. Va. 292, 262 S.E.2d 885 (1980) (holding that a superseding law or administrative rule cannot change the conditions of parole eligibility to the detriment of an imprisoned offender without running afoul of the *ex post facto* clause). Here, the Commission's factual findings establish that the Jockeys did not violate the rules in effect as of March 25 and 26, 2009, but the Commission created a new rule designed which, in the Commission's view, the Jockeys had violated. Specifically, the Commission considered the alleged "acquiescence" of the Jockeys in the weighout process conducted by the Clerk of Scales and determined that their alleged acquiescence in some way diminished or adulterated those procedures necessary for the wagering public to have confidence in the racing and wagering process. Final Order, p. 4.

It does not appear to the Court, however, that this "acquiescence" was proscribed by the Rules of Racing prior to the Commission's final order. The plain language of the Rules in effect on March 25 and 26, 2009, placed the entire duty to properly conduct the weighout procedure on the Clerk of Scales, not the Jockeys: "The Clerk of scales shall: . . . verify the correct weigh of

each jockey at the time of weighing out . . . and report any discrepancies to the stewards immediately.” W. Va. C.S.R. §178-1-17.1 (emphasis added). There are no other rules which tell the Jockeys that they have any duty at the time of weighing out to police the Clerk of Scales. Nor would such a rule make sense in this context – the Clerk of Scales is the final check on weights all jockeys report at least an hour before race time.

Despite this absence, the Commission’s final order effectively creates just such a rule. Accordingly, the Commission promulgated a rule which operated to the detriment of the Jockeys after the alleged behavior at issue. Such a rule is an *ex post facto* law, and the West Virginia Constitution forbids its application to the Jockeys. Accordingly, the Court must vacate the Commission’s final order.

C. The Commission’s determination that the Jockeys “connived” in “corrupt” practices is clearly wrong based on the reliable, probative, and substantial evidence in the whole record.

In its Final Order, the Racing Commission states that while

the evidence shows no conspiracy between appellants [Jockeys] or the appellants and Mr. Garrison, nor does it show action intent to defraud or violate laws, it does show an acquiescence by the appellants in the diminution and adulteration of the weigh-out process of a level sufficient to injure confidence in the integrity of that process.

Final Order, p. 4. After review, the Court finds that the record in this matter is devoid of any evidence which would tend to show the weighout procedures described in the record actually caused any loss of confidence in the integrity of the processes associated with thoroughbred racing. No bettor testified that he or she knew of the weighout procedures described in the record, much less testified that those procedures caused a loss of confidence in the integrity of the process. No evidence was proffered by the Track or the Commission which showed that the

handle¹⁷ declined at Charles Town Race Track after news of these charges became public. Further, there is no evidence whatsoever that the Jockeys were in fact overweight or rode at an inappropriate weight despite the alleged laxity of weighout procedures in which the Jockeys allegedly acquiesced. What the record does show, based on the testimony of the Jockeys themselves and which testimony the hearing examiner found credible, was that every Jockey made his assigned weight.

The Commission argues primarily that all the Court needs do to see the reliable and probative evidence in support of the Commission's finding that the Jockeys "connived" by acquiescing in "corrupt" practices is to watch the many hours of videotape collected on the nights in question. The Commission makes this argument without citation to the record, and the Court's own review of the material has not developed any substantive evidence which shows that the Jockeys' behavior was such as to diminish or adulterate the weigh-out process in such a manner to injure confidence in the integrity of the weighout procedures. This is all the more evident when the Court compares the behavior of the Jockeys with the behavior of the other riders on the night in question.

The Court wishes to make clear that it is not weighing the evidence below, making credibility determinations, or doing anything other than searching the record for evidence sufficient to support the Commission's finding on this point. The Court's search has resulted in no such evidence.

Since the record is devoid of reliable evidence that the Jockeys rode at an inappropriate weight (making it impossible to determine their actual weight, as found by Mr. McClung) and since the record is devoid of evidence that there was in fact any loss of confidence in the

¹⁷ The total amount of money wagered in the pari-mutuels on a race, a program, or during a meeting at a race establishment.

integrity of the process by the wagering public, the Commission's determination that the Jockeys "connived" in a "corrupt" practice is clearly wrong, even under the Commission's new and improperly promulgated rules.

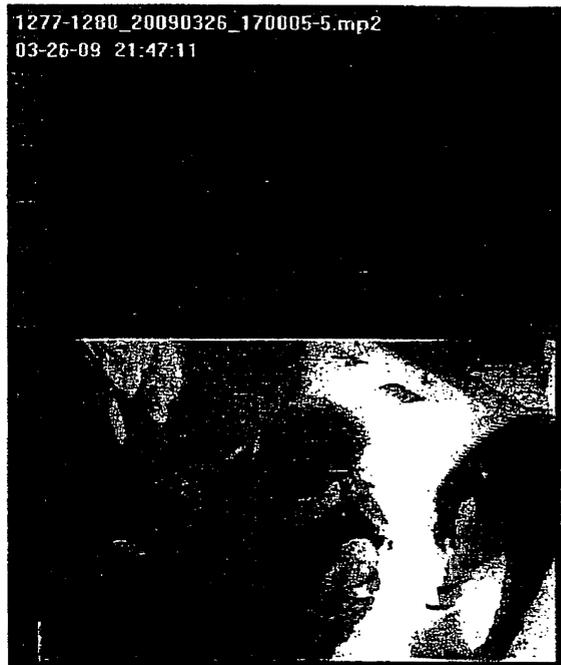
D. The Commission's determination to punish the Jockeys for behavior engaged in by all other jockeys who weighed out on the days in question and observed by the Stewards themselves is arbitrary and capricious.

An arbitrary and capricious ruling is one where the decision is not based on a consideration of relevant factors, where there has been a clear error of judgment, where there is no rational connection between the facts found and the decision made, or where there is no reasoned basis for the agency's decision. See *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-286 (1974); *Harrison v. Ginsberg*, 169 W. Va. 162, 174 (1982) (emphasis added). The Racing Commission's determination to punish the Jockeys but not the other riders who "acquiesced" in the same allegedly flawed weighout procedure as the Petitioners represents just such an arbitrary and capricious decision.

The record before the Commission included video evidence and documentary evidence that made it abundantly clear that "virtually none of the protocols recognized to verify jockey weight were complied with at the weigh-outs" on March 25 and 26, 2009. Final Order, p. 3. The Commission also notes that "the process of reporting and determining jockey weights" at Charles Town Race track "varies somewhat from the rules of this Commission."¹⁸ *Id.* The Commission found that the Petitioners had "acquiesced in Mr. Garrison's [the Clerk of Scales, whose job it was to determine all riders' weights prior to races] allowing the weigh-out procedure to be made meaningless if not misleading." *Id.* at p. 5. The total record before the Commission makes clear that the weighout process described in the Commission's final order was applied to each and

¹⁸ Despite the Commission's acknowledgement that the procedures in place at Charles Town are not compliant with the Rules of Racing, the Commission makes no further comment regarding the propriety of Charles Town's failure to comply with the Rules.

every rider who mounted a horse on March 25 and 26, 2009—many more jockeys than the Petitioners in this action. Further, the record shows unequivocally that other jockeys riding on these nights were weighed out in a manner even less likely to provide an indication of their true weights than any of the Petitioners. The Court finds illuminating the seventh race on March 26, 2009. Rider Emanuel Ramirez is shown on the video submitted to the Commission weighing out at 21:47:11. The video shows that Mr. Ramirez climbed on the scale to be weighed out with his saddle, his safety vest, and, among other things, a can of Red Bull. Accordingly, Mr. Ramirez, using the Commission’s new rule, necessarily “acquiesced” in an adulterated or diminished weighout procedure. However, Mr. Ramirez was not charged with conniving to engage in a corrupt practice. Nor was Xavier Perez, whom the video for March 25, 2009, at or about 18:57:34 shows a highest weight of 122.0 lbs, when his allowed weight was 120.0 lbs. Nor



was Carlos Castro, whom the video for March 25, 2009, at 19:51:04 shows as riding at a highest possible weight of 121.2 lbs, when his weight reported to the public was 122—meaning that he may have ridden underweight, a more serious racing infraction than riding overweight where the betting public is concerned. Other examples of riders engaging in the same process as the Jockeys but were uncharged are set forth in the table above. The record before the Commission shows other riders going through the exact procedure that the Jockeys participated in and getting on and off the scales before the standstill light ever came on, yet these other jockeys were not

charged and have not been punished in any way for acquiescing in the adulterated and diminished weighout process that the Commission found.

Further, the record before the Commission shows that the Stewards, who are tasked with enforcing the Rules of Racing, were in a position for weeks if not months to observe the very weighout procedure in which the Jockeys have been found to have “acquiesced.” Transcript, August 6, 2009, p. 237, ll. 1-8; Transcript, September 21, 2009, pp. 39, ll. 12-16 (“A: Was I in a position to observe? Absolutely.”). In fact, the Chief Steward for Charles Town testified that, despite his observation of the weighout process leading up to and including March 26 and 27, he failed to observe anything that made him think there was any problem with the weight-out process. Transcript, September 21, 2009, p.40, l. 18 – p. 41, l. 8. Yet neither the Chief Steward nor any of the other Stewards at Charles Town have been disciplined in any way for their failure to correct the weighout procedure at issue.

Additionally, the record in this matter makes clear that, regardless of what procedure was applied during the weighout process, the scale utilized could not be relied upon to provide an accurate weight. Specifically, the record shows that the scale in use at Charles Town was not balanced, had not been accurately calibrated, was not being used properly with sufficient time to activate the standstill light, and hence could not be trusted to provide an accurate weight. *See* Transcript, August 6, 2009, p. 213, l. 15 – p. 217, l. 16.

Given the record as a whole, there is no clear connection between the facts found by the Commission—that the entire weighout process was faulty and that acquiescing in the process constituted a violation of a heretofore unknown rule—and the Commission’s determination that the Petitioners violated of the Rules of Racing but no other jockey who participated in that process did so. Further, when the entities charged with enforcing these Rules were present and

acquiesced in this diminished and adulterated weighout procedure, there can be no reasoned basis for holding only these seven Jockeys accountable for this purported violation. Finally, when the record shows that, regardless of the process applied, the scale used could not be expected to provide an accurate weight because it had not been properly calibrated, there is no reasoned basis upon which the Jockeys could be deemed to have connived in a corrupt practice. For each and all of these reasons, the Commission's decision is arbitrary and capricious, and the Court must vacate the Commission's final order.

E. The Commission's suspension of the Jockeys' privileges to race for thirty days based on these improperly promulgated regulations and upon insufficient evidence violates the Jockeys' constitutional right to procedural due process.

While due process is a flexible concept and not reducible to a static formula, it is clear that the process at issue must offer meaningful protection dictated by the circumstances, provide a fair opportunity to be heard, and offer respect to an individual's right to fairness. *Hutchinson v. City of Huntington*, 198 W.Va. 139, 155, 479 S.E.2d 649, 665, n. 21 (1996). The entirety of the record before the Court shows that many errors have occurred over the course of the Jockeys' appeal of the initial Stewards' ruling. Perhaps most significant of these errors is that the body trying them drafted a new rule after the evidence in their hearing was complete and then determined that the Jockeys violated it. Essentially, the tribunal has, by improperly promulgating a new rule and applying it to the Jockeys after the conclusion of their *de novo* hearing, changed the rules of the game after the Jockeys have played their hand. The Jockeys did not have a chance to meet charges of "acquiescence" and this new standard for mens rea; the standard was adopted after the hearing. This practice does not offer meaningful protection dictated by the circumstances, does not provide a fair opportunity to be heard, and does not offer respect to the Jockey's right to fairness; thus their constitutionally protected property right in

their occupational licenses has been inappropriately restricted. Accordingly, the Court finds that the Commission's final order violates the Jockeys' constitutional right to due process and must be vacated.

VII. Conclusion and Order

For all the foregoing reasons, the Court hereby ORDERS as follows:

1. The Commission's Final Order is hereby REVERSED; and
2. The Commission is directed to cause the return of the fine levied upon the Jockeys within fourteen days of the entry of this Order, with interest at the legal rate from the day upon which the fine was taken from their paychecks.

It is SO ORDERED this 29th day of [REDACTED] Aug., 2014

By

Paul Zakaib, Jr.

Paul Zakaib, Jr.

Circuit Judge

Prepared at the Court's direction by

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. PATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND OF THE SHIRE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 2
DAY OF September, 2014
Cathy S. Patson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CERTIFICATE OF SERVICE

I, Kelli D. Talbott, Senior Deputy Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing **Notice of Appeal** was served by depositing the same postage prepaid in the United States Mail, this 17th day of September, 2014, addressed as follows:

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