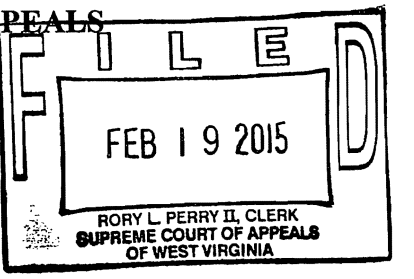
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



No. 14-0957

WEST VIRGINIA RACING COMMISSION,

Respondent Below, Petitioner,

v.

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

Petitioners Below, Respondents.

RESPONDENTS' BRIEF

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Contents

I. Introduction 1

II. Questions Presented 2

III. Statement of the Case 3

IV. Summary of Argument 10

V. Statement Regarding Oral Argument and Decision 11

VI. Argument 11

A. Standard of Review 11

B. The Circuit Court did not err in determining that the Commission's quasi-judicial promulgation of a regulation providing a previously nonexistent definition of the regulatory terms "connive" and "corrupt" violated Article 3 of Chapter 29A of the West Virginia Code 11

1. The Circuit Court properly found that the Commission engaged in rule making by providing new definitions of "connive" and "corrupt." 12

2. The Circuit Court properly rejected the Commission's argument that its new definitions of terms of art was nothing more than the application of ordinary meaning to ordinary words 14

C. The Circuit Court did not err in determining that the Commission's retroactive application of its new and improperly promulgated regulations defining the terms "connive" and "corrupt" was an error of law and violated the constitutional rights of the Jockeys. 17

1. The Commission's retroactive application of its new rules defining "connive" and "corrupt" was an error of law, and the Circuit Court properly so found. 18

2. The Commission's retroactive application of its new rules defining "connive" and "corrupt" was a constitutionally impermissible ex post facto law, and the Circuit Court properly so found. 20

3. Even were the Circuit Court incorrect in determining that the retroactive application of the new regulations to the Jockeys constituted an ex post facto violation, the Commission has waived the issue by failing to raise it before the Circuit Court below. 21

D. The Circuit Court did not abuse its discretion in finding that the Commission was clearly wrong when it found that the Jockeys "connived" in a "corrupt" practice, given the reliable, probative, and substantial evidence in the record. 22

E. The Circuit Court did not abuse its discretion in finding that the Commission's determination to punish only the Jockeys for behavior (a) engaged in by many other riders who were not charged or punished and (b) witnessed by the Commission's Stewards was arbitrary and capricious. 26

F. No compelling public policy reason supports overturning the Circuit Court's Judgment. 29

1. The Circuit Court properly performed its job as a reviewing court within the strictures of the APA, and second-guessing the ruling below in the manner requested by the Commission would create judicial waste. 29
2. The regulations at issue in this appeal have been abolished by the Commission, and neither the Commission nor the public requires any further guidance on these defunct rules. 30

VII. Conclusion 31

TABLE OF AUTHORITIES

Cases

Apollo Civic Theatre, Inc. v. State Tax Com'r, 223 W.Va. 79, 85 (2008) 17

Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-286 (1974) 26

CNG Transmission Corp. v. Craig, 211 W.Va. 170, 175 (2002) 17

Consumer Advocate Div. of Pub. Serv. Comm'n v. Public Serv. Comm'n of West Virginia, 182 W.Va. 152 (1989) 17

Cookman Realty Group, Inc. v. Taylor, 211 W. Va. 407, 411 (2002) 16

Coordinating Council for Indep. Living, Inc. v. Palmer, 209 W. Va. 274, 284 (2001) 14

Expedited Transp. Sys., Inc. v. Vieweg, 207 W. Va. 90, 92 (2000) 11

Haislop v. Edgell, 215 W. Va. 88, 94 (2003) 20

Harrison v. Ginsberg, 169 W. Va. 162, 174 (1982) 26

Hensley v. West Virginia Dep't of Health & Human Resources, 203 W.Va. 456, 461 (1998) 22

Konchesky v. S.J. Groves & Sons Co., Inc., 148 W.Va. 411, 414 (1964) 22

Muscatell v. Cline, 196 W.Va. 588 (1996) 11

Noble v. W. Virginia Dep't of Motor Vehicles, 223 W. Va. 818, 821 (2009) 21

Richmond v. Levin, 219 W.Va. 512, 516 (2006) 20

Shaffer v. Acme Limestone Co., Inc., 206 W.Va. 333, 349 n. 20 (1999) 21

State ex rel. Richardson v. McCompton & Son Lumber Co., Inc., 192 W.Va. 10, 12 (1994) 18

State v. Allen, 208 W. Va. 144, 155 (1999) 22

Subcarrier Communications, Inc. v. Nield, 218 W.Va. 292, 299 (2005) 17

Syncor Intern. Corp. v. Palmer, 208 W.Va. 658, 662 (2001) 17

Wellington Power Corp. v. CNA Sur. Corp., 217 W. Va. 33, 39 (2005) 29

Whitlow v. Board of Education, 190 W.Va. 223, 226 (1993) 21

Other Authorities

Black's Law Dictionary 19, 21
Brief Summary of Proposal, Thoroughbred Racing 178 CSR 1 31
Dictionary.com Unabridged. Random House, Inc 15

Statutes and Rules

27 W.V. Reg. 963-64 9
Article 3 of Chapter 29A of the West Virginia Code 2, 9, 11
W. Va. C.S.R. § 178-1-1 ..... 9, 31
W. Va. C.S.R. § 178-1-10.8 21
W. Va. C.S.R. § 178-1-60.5 ..... passim
W. Va. Code § 29A-5-4 ..... 9, 29
W. Va. Code § 29A-6-1 29

W. Va. Code 29A-1-2 ..... 12, 13
West Virginia Rule of Appellate Procedure 10(b)(7) 11

I. INTRODUCTION

Luis Perez, Anthony Mawing, Dale Whittaker, Lawrence Reynolds, Jesus Sanchez, Alexis Rios-Conde, and Tony Maragh (the Jockeys) appear before this Court after a years-long saga in which their rights have been ignored, in which they have had to fight tooth and nail to obtain fair and impartial hearings, and in which they have, at every step, shown that they did nothing wrong.

The Jockeys were initially charged with thirty-three separate violations of the Thoroughbred Racing Rule, all related to the weighout procedure at the Charles Town racetrack. The initial theory of prosecution was that the Jockeys had engaged in a conspiracy with the Clerk of Scales, who weighs the jockeys before and after every race, to disguise their true weights. However, it soon became clear to all involved, including the Commission, that there had been no conspiracy between the Jockeys and the Clerk of Scales, and that the only problem with the weighouts at the Charles Town track was the manner in which the Clerk of Scales, supervised by the Commission's Stewards, had conducted them.

The Clerk of Scales was properly disciplined for his errors and did not appeal the decision of the Commission. But the Jockeys, having shown themselves to be innocent of the charges levied against them, presented a special problem for the Commission. They had been part of a process that everyone recognized was flawed, and they had been held out to the racing community as malefactors, but they had not violated the Commission's rules. Because the Jockeys had not conspired, agreed, or done any act in concert with the Clerk of Scales, the Commission rewrote its rules to make the Jockeys guilty of "conniving" by virtue of their "tacit consent" in the Clerk's misconduct. The Circuit Court recognized this Procrustean exercise for what it was and properly granted the Jockeys complete relief, vacating the Commission's Order that found them guilty and punished them.

The Commission, however, appears determined to fight to the last to punish the Jockeys—so determined that it raises arguments in this appeal that are specifically contradicted by its own Order below. In its misguided attempt to punish the Jockeys for the violation of a rule that did not exist at the time of the conduct it seeks to sanction, the Commission seeks this Court's aid in revivifying charges that have been refuted and rejected in a fair, thorough, appropriately deferential, and, above all, correctly decided appeal. This Court should reject the Commission's request and uphold the decision below exonerating the Jockeys of any wrongdoing.

II. QUESTIONS PRESENTED

The appeal of the Petitioner West Virginia Racing Commission ("the Commission") raises four questions for disposition by this Court:

1. Did the Circuit Court err in determining that the Commission's quasi-judicial promulgation of a regulation providing a previously nonexistent definition of the regulatory terms "connive" and "corrupt" constituted rulemaking and hence violated Article 3 of Chapter 29A of the West Virginia Code?
2. Did the Circuit Court err in determining that the Commission's retroactive application of its new and improperly promulgated regulations defining the terms "connive" and "corrupt" was an error of law and violated the constitutional rights of the Jockeys?
3. Did the Circuit Court abuse its discretion in finding that the Commission was clearly wrong when it found that the Respondents "connived" in a "corrupt" practice, given the reliable, probative, and substantial evidence in the record?
4. Did the Circuit Court abuse its discretion in finding that the Commission's determination to punish only the Respondents for behavior (a) engaged in by many other riders who were not charged or punished and (b) witnessed by the Commission's Stewards constituted an arbitrary and capricious decision?

The Respondents (hereinafter "the Jockeys") respectfully request that the Court answer each of these questions in the negative.

III. STATEMENT OF THE CASE

The genesis of this case was a suspicion in the minds of nonparty track managers at the Charles Town Races and Slots that the Clerk of Scales, whose job it is to weigh the jockeys about to ride in horse races, was conspiring with certain jockeys to allow them to ride overweight. J.A.849-50. These rumors were completely unsubstantiated, and no evidence as to their source was ever placed in the record below. Without informing the Commission's representatives at the track—the Stewards—the track installed two hidden surveillance cameras in the jockey's room to record the weighout procedure. *Id.* at 759, 761.

Although track management testified below that the investigation was initiated as a personnel matter involving the Clerk of Scales, neither of the cameras focused on him. J.A. 759; video recordings of March 25 and 26. The recordings cover two days of racing and, because they were installed in the jockey room, capture the jockeys in various states of undress. Video recordings of March 25 and 26. 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 management. J.A. 761.

On April 8, 2009, the Jockeys were summoned to hearings on allegations that they had engaged in "alleged detrimental conduct in regards to weighing out and weighing in." J.A. 1-7. No evidence of any "corrupt" activities was produced at these hearings, and the Jockeys' request to have a lawyer present was denied on the grounds that the lawyer their Guild had made available to them was not licensed in West Virginia; the Jockeys request for an extension of time in which to obtain a West Virginia licensed lawyer was met with the answer that the hearing could be continued, but the Jockeys would be summarily suspended in the interim. *Id.* at 12-15. De-

spite this lack of evidence and representation, the Jockeys were ultimately suspended by the Stewards for 30 days and fined $1,000 each. *Id.* at 50-63.

As a result of the unfair and defective procedures applied by the Stewards, the Jockeys were forced to obtain a temporary restraining order in the Circuit Court of Kanawha County to have those sanctions suspended until a proper hearing could be held. J.A. 221-23. The Circuit Court found that the notices to the Jockeys regarding their alleged rule violations were "facially and constitutionally insufficient" and that "the manner in which [the Commission] conducted proceedings against [the Jockeys] appear[ed] to have violated [their] constitutional rights to due process in multiple ways." *Id.* at 221. The fine and suspension levied by the Stewards was then, by agreement with the Commission, held in abeyance and the TRO extended while the Commission developed proper statements of charges and held proper hearings regarding those charges at which the Jockeys could be represented by counsel.

The Commission then formally charged the Jockeys in detailed notices with riding overweight in various races, failing to report their overweights, and conspiring and conniving with the Clerk of Scales to commit acts which were dishonest, corrupt, fraudulent and detrimental to racing; in total, thirty-three individual charges were levied against the Jockeys. *See variously* J.A. 250-383 (First Detailed Statements of Charges by Commission); *Id.* at 400-533 (Second Detailed Statements of Charges by Commission). The Jockeys were given discovery by the Commission and, after requesting a continuance of the first scheduled hearing, sufficient time to prepare their defenses.

The Commission convened hearings on the charges against the Jockeys on August 5, 2009, before its chosen hearing examiner, Jack McClung, and Commissioners Smith, McDermott, and Rossi. J.A. 739-40. Initial hearings continued for three days, concluding on August 7, 2009. *See*

generally id. at 830-1187. The hearings were then reconvened on September 21-22, 2009. *Id.* at 1188-89, 1216-1686.

Highlights from the evidence adduced at these hearings include the following:

- The surveillance videotapes, reviewed in slow motion, show multiple weights being displayed for every rider in every race and suggest that many jockeys may have ridden either underweight or overweight. However, none but the Jockeys were subjected to hearings or discipline by the Stewards. The standstill light, a key feature of the scale that identified when a reading had become accurate, did not come on at any time during any of the weigh-outs for which the Jockeys were punished. J.A.1265; video recordings of March 25 and 26, 2009.
- 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 made his reported weight for each of the races in question. J.A. 1326, 1329, 1334 (Reynolds); *Id.* at 1335, 1337, 1338 (Sanchez)[2]; *Id.* at 1349 (Rios-Conde); *Id.* at 1351-52 (Perez); *Id.* at 1356-58 (Maragh); *Id.* at 1365-67 (Whittaker); *Id.* at 1374-75 (Mawing).
- The Stewards were present at all disputed weighouts and failed to observe any behavior that they viewed as problematic. J.A. 1225-26 ("A: Was I in a position to observe? Absolutely.")

After these hearings, the Jockeys and the Commission's counsel exchanged proposed findings of fact and conclusions of law. J.A. 1703-89.

[2] It is worth noting that Jesus Sanchez, at the time he decided to become a jockey, weighed 165 pounds. Over the course of a year, he lost 55 pounds so that he could become a rider. J.A. 1335. It is more than a little insulting to Mr. Sanchez to suggest that he would engage in any underhanded behavior to hide a few pounds when he has exhibited the ability to lose a third of his total body weight at will.

On April 22, 2010, the hearing examiner issued his Recommended Decision and Order. After a hearing on the parties' objections to the Recommended Decision and Order, J.A. 1873-1928, the Commission adopted the Recommended Decision and Order except as noted in its own Final Order, issued May 21, 2010. J.A. 1929-63. The Commission's Final Order held that "virtually none of the protocols recognized to verify jockey weight were complied with at the weigh-outs" and that "the process of reporting and determining jockey weights [at Charles Town] varies somewhat from the rules of this Commission." *Id.* at 1931. The Commission further identified the case before it as "rais[ing] issues of first impression." *Id.*

Among the factual findings of the hearing examiner adopted by the Commission, a number are relevant here. Both the hearing examiner and the Commission found no conspiracy to exist among the appellants or between the appellants and the Clerk of Scales. The Commission found no "action[,] intent to defraud or violate laws" on the part of the Jockeys. J.A. 1932. The hearing examiner found, and the Commission adopted the finding, that "the witnesses brought on by the parties were credible and truthful except as noted." *Id.* at 1938. Among these witnesses and their testimony was each of the Jockeys' own testimony 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 overweigh in his twenty-one years of racing before this event and has not been sanctioned since this event.

Id. at 1952, ¶ 50. The hearing examiner found, and the Commission adopted the finding, that the "video evidence reflected obvious inconsistencies," that the scale's readout "seldom stabilized in any manner that would suggest a determinate weight reading," and that the process supervised by the Clerk of Scales and witnessed by the Stewards was "hurried, disorganized, and chaotic." *Id.* at 1954. Ultimately, the hearing examiner and the Commission found that the "weigh-out data as

to the Jockeys ... was inaccurate and wholly inadequate for the purpose of disclosing the true weights of jockeys for the purpose of determining over or under weight jockeys." *Id.* at 1955.

On these key findings, the hearing examiner concluded as a matter of law that it was "impossible to determine the weight for any jockey at those weigh-outs by a preponderance of the evidence." J.A. 1958. Given this finding, the examiner concluded and the Commission adopted the conclusion that the "attempt to infer a weight for each jockey ... cannot meet the required standard of proof" and so none of the allegations that the Jockeys rode overweight could be sustained. *Id.* at 1959. This finding disposed of most of the thirty-three charges against the Jockeys.

The hearing examiner went on to suggest the conclusion that the Jockeys had been shown to have "connived" in the "corrupt and fraudulent practice of failing to obtain accurate weights at the weigh-outs." J.A. 1960. In reaching this conclusion, the hearing examiner obtained the Black's Law Dictionary definition of "connivance" and utilized that definition as the authority upon which his conclusion rested. *Id.* at 1959-60. On this point, the Commission adopted the hearing examiner's proposed conclusion that the Jockeys had "connived" in a "corrupt" practice, but rejected the hearing examiner's proposed authority for and definition of these terms in W. Va. C.S.R. § 178-1-60.5. Instead, the Commission made the following key findings and conclusions:

> 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. C. S. 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.
>
> * * *
>
> It is intended that this Order be considered precedential only as to defining of terms and not punishment.

Id. at 1931-33. On this analysis, the Commission ordered that the Jockeys be determined guilty of conniving in a corrupt practice and upheld the original Stewards' punishment of a thirty-day suspension and a $1000 fine per Jockey. *Id.* at 1933.

The Jockeys timely filed their Notice of Appeal of this decision, and obtained first from the Commission and later from the Circuit Court a stay of imposition of the penalty imposed. J.A. 1964-65, 1994-95.

While the Jockeys were perfecting their appeal and obtaining the necessary stay, the Commission began to move forward to abolish Rule 178-1-60.5, the very rule under which the Jockeys were punished. On June 7, 2010, less than thirty days after issuing its Final Order against the Jockeys, the Commission filed with the West Virginia Secretary of State a Notice of a Comment Period, proposing a complete revamp of the Thoroughbred Racing rule and abolishing the provi-

sion found to have been violated by the Jockeys. 27 W.V. Reg. 963-64 (June 11, 2010).[3] According to the Commission, the new rules were required because the former rule was "outdated, poorly organized, and, in some instances, poorly worded." One of the "outdated" and "poorly worded" regulations abolished by the Commission was W. Va. C.S.R. § 178-1-60.5. The term "connive" does not appear anywhere in the new Rule. *See* W. Va. C.S.R. § 178-1-1 *et seq.* (2011).

In the Circuit Court, after briefing, argument, submission of proposed orders, and a period of some delay, the Court granted the Jockeys' appeal and vacated the Commission's Final Order. J.A. 2055-69 (Jockeys' Brief);*id.* at 2071-90 (Commission's Brief); *id.* at 2092-2100 (Jockeys' Reply Brief); *id.* at 2101-51 (Proposed Orders); *id.* at 2152-76 (Circuit Court's Final Order). During this briefing and argument process, while the Commission had already moved to abolish the outdated and poorly worded rule under which it had punished the Jockeys, the Commission through its "prosecutor" ridiculed the Jockeys' efforts on appeal, describing their positions as "spurious," "absurd," and resembling a "five-week old, unrefrigerated, dead fish." *Id.* at 2078, 2082, 2088.

In its Final Order, the Circuit Court expressly acknowledged the proper standard of review set forth in West Virginia Code § 29A-5-4. Applying that standard, the Court made five key rulings, *any one of which sustains the outcome below*. First, the Circuit Court concluded that the Commission's promulgation of new definitions of "connive" and "corrupt" constituted a violation of Article 3 of Chapter 29A of the West Virginia Code, and that such improperly promulgated rules could not be enforced as to the Jockeys. *Id.* at 2165-68. Second, the Circuit Court explained that the Commission's retroactive application of these new rules was error as a matter of

[3] The State Register includes only the Notice and initiation of public comment period. The complete notice, containing detailed proposed changes, is available at http://apps.sos.wv.gov/adlaw/csr/readfile.aspx?DocId=18509&Format=PDF (last accessed Feb. 19, 2015).

law and violated the constitutional rights of the Jockeys. *Id.* at 2168-70. Third, the Circuit Court held that, even if the new regulations had been proper, the Commission's was clearly wrong in its determination that the Jockeys had "connived" in a "corrupt" practice, based on the reliable, probative, and substantial evidence in the whole record. *Id.* at 2170-72. Fourth, the Circuit Court ruled that the Commission acted arbitrarily and capriciously by punishing only the Jockeys, where all other riders had behaved similarly. *Id.* at 2172-75. Finally, the Circuit Court explained that the penalty imposed by the Commission for violation of improperly promulgated regulations and upon insufficient evidence violated the Jockeys' constitutional right to due process. *Id.* at 2175-76.

The Commission then timely appealed to this Court, raising the four questions presented for decision.

IV. SUMMARY OF ARGUMENT

The Circuit Court correctly decided the Jockeys' appeal from the Racing Commission. The Circuit Court applied the correct legal standard, and paid due deference to both the Commission's findings and to the *complete* record placed before it.

When the Circuit Court reviewed the record before the Commission, along with the Commission's rulings based on that record, the Court properly found that the Commission had engaged in illegal rulemaking, had impermissibly given retroactive application to its new rules, had arrived at a clearly wrong result, and had issued an arbitrary and capricious decision. The Circuit Court's final order below cannot, given the depth and breadth of its review, constitute an abuse of its discretion, and the final order contains no errors of law. For these reasons, this Court should reject the Commission's appeal, and affirm the reasoned Judgment of the Circuit Court.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for Rule 19 argument and decision.

VI. ARGUMENT

A. Standard of Review

"In cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*." Syl. Pt. 1, *Expedited Transp. Sys., Inc. v. Vieweg*, 207 W. Va. 90, 92 (2000); Syl. Pt. 2, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). The first and second questions presented by the Commission are questions of law, and hence this Court's review is *de novo*. The third and fourth questions concern the Circuit Court's determination to amend the result before the Commission, and must be upheld absent an abuse of discretion. The Commission's Petition fails to identify any standard of review,[4] and instead proceeds as if this Court's review were entirely *de novo*. Omission of this detail may be convenient for the Commission, but the distinction is important.

B. The Circuit Court did not err in determining that the Commission's quasi-judicial promulgation of a regulation providing a previously nonexistent definition of the regulatory terms "connive" and "corrupt" violated Article 3 of Chapter 29A of the West Virginia Code.

The Circuit Court's analysis of this issue included three significant premises: (1) that it would constitute unlawful rule making for the Commission to identify and promulgate in a quasi-judicial setting new definitions of key terms of art in its regulations, (2) that the Commission had done so in regard to the terms "corrupt" and "connive," and (3) that unlawful rulemaking would require the vacatur of the Commission's Order regarding the Jockeys. Importantly, the Commis-

[4] In violation, it would appear, of West Virginia Rule of Appellate Procedure 10(b)(7).

sion finds fault with only the second of these three premises. The Circuit Court, however, properly found that the Commission engaged in rulemaking when adopting and promulgating previously unknown definition of key terms of art.

1. The Circuit Court properly found that the Commission engaged in rule making by providing new definitions of "connive" and "corrupt."

As the Circuit Court pointed out, the West Virginia Code defines a "Rule" for the purposes of administrative law:

> "*Rule" includes every regulation, standard or statement of* policy or *interpretation of general application and future effect*, including the amendment or repeal thereof, *affecting private rights, privileges or interests*, or the procedures available to the public, *adopted by an agency to* implement, extend, apply, *interpret or make specific the law enforced or administered by it* or to govern its organization or procedure ....

W. Va. Code § 29A-1-2 (emphasis added). If, then, the Commission provided in its final ruling on the Jockeys' case a statement of interpretation of general application and future effect that affected private rights, privileges, or interests and adopted that statement to interpret or make specific the rules the Commission enforces or administers, the Commission made a "Rule." The record indisputably demonstrates that the Commission did so.

The Commission's final Order regarding the Jockeys provides the following key analysis regarding the terms "corrupt" and "connive" as found in W. Va. C.S.R. § 178-1-60.5:

> 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.
>
> * * *
>
> It is intended that this Order be considered precedential only as to defining of terms and not punishment.

J.A. 1931-33. This analysis exhibits all of the hallmarks of a new rule, as defined by W. Va. Code 29A-1-2.

Firstly, after explaining the need for a "different interpretation of these terms of art than have been used in this case, to date," the Commission unequivocally set forth new standards for the terms "connive" and "corrupt," explaining that these new standards are to be of general application and future effect by directing that the new definitions "be considered precedential ... as to defining of terms ...." J.A. 1933. Because the new definitions are precedential, they are necessarily of general application and future effect, and so constitute rules under W. Va. Code § 29A-1-2.

Secondly, the Commission expressly provides that its new definitions are presented to interpret and make specific the law it administers. As the Commission put it, given the uncertainty regarding the necessary "*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." J.A. 1932. Plainly, a previously unannounced definition of the terms "connive" and "corrupt," offered to explain to licenseholders the necessary *mens rea* to be guilty of an offense, is an act of interpretation making specific the law administered by the Commission.

Thirdly, the Commission's new definitions of "connive" and "corrupt," applied to the Jockeys and to all licenseholders going forward, necessarily affect private rights, privileges and interests because the Commission would use these definitions as the basis to levy a $1000 fine on each of the Jockeys, bar them from racing for thirty days, and do the same or worse to future violators. *See Coordinating Council for Indep. Living, Inc. v. Palmer*, 209 W. Va. 274, 284 (2001) (the imposition of previously uncollected tax "'affect[ed] private rights, privileges or interests' and involved the Tax Department's 'implement[ation], exten[sion], appl[ication], [or] interpret[ation]' of the laws which it was charged to execute," and so constituted unlawful rulemaking). Given that the Commission's establishment of new definitions of the terms "connive" and "corrupt" exhibit all the statutory hallmarks of rulemaking, the Circuit Court did not err in concluding that the Commission engaged in unlawful rulemaking by promulgating these new definitions.

2. *The Circuit Court properly rejected the Commission's argument that its new definitions of terms of art was nothing more than the application of ordinary meaning to ordinary words.*

Because the terms "connive" and "corrupt" are regulatory terms, the Commission's analysis constituted conclusions of law to which the Circuit Court owed no deference. The Commission makes now the same argument that it did below: "connive" and "corrupt" were simply applied by the Commission in their ordinary sense and meaning. The Circuit Court quite correctly rejected this argument.

First, the Commission's assertion is belied by the Commission's own Order, where it recognized that "connive" and "corrupt" are "terms of art." J.A. 1932. A "term of art" is "a word or phrase that has a specific or precise meaning within a given discipline or field and might have a different meaning in common usage."[5] Necessarily, the Commission was not providing the ordinary and common definitions of ordinary words; instead, it was providing a specific and precise meaning to terms of art in the field that the Commission regulates.

Second, the record demonstrates that the Commission never considered the myriad definitions it now offers[6] to support the newly-minted "plain meaning" argument. As the Circuit Court observed, the extensive list of definitions of "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." J.A. 2166. Instead, the Commission's ruling observes that the two words are key "terms of art," then adopts different interpretations of these terms than had been used to date. J.A. 1931-33. Manifestly then, the Circuit Court was correct in determining as a matter of law that the Commission did not apply common ordinary meaning to the text of the regulation, but instead applied new and technical definitions to terms of art.

Third, the Commission expressly acknowledged below that West Virginia law provided no clear guidance on the key issue of connivance:

> Commissioner McDermott: ... I did want to give you an opportunity to respond to the question that I asked about legal authority on the issue of tacit consent being the equivalent of connivance under West Virginia law.
>
> You heard me earlier say that I spent a little time looking myself. Have you guys had an opportunity to do that?

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[5] *Dictionary.com Unabridged. Random House, Inc.* http://dictionary.reference.com/browse/term of art *(accessed: February 09, 2015).*

[6] Petitioner's Brief, pp. 19-21.

> Mr. Bailey: Yes, and we couldn't find it.
>
> Mr. McDermott: That's the same result I had.
>
> Mr. Bailey: My folks and I looked for that and –
>
> Mr. McDermott: I didn't find anything that was even close to being helpful on that issue.

J.A. 1923-24. This exchange followed an earlier exchange on the same subject between Commissioner McDermott and the Commission's counsel:

> Mr. McDermott: One other quick question, and I'm asking you questions now because of the format which gives Mr. Bailey an opportunity at rebuttal and this is your one and only opportunity to speak.
>
> With respect to your position that tacit consent is equivalent to connivance, is there West Virginia case law on that issue?
>
> Ms. Talbott: Honestly, I'm not aware. There may very well be. But I'm just giving you --
>
> Mr. McDermott: Well, yeah, I ask that question for a reason as an attorney. I took a look-see myself, and I didn't lock myself up in a law library for ten hours or anything like that, or engage in an exhaustive lexis search, but in the half hour or 45 minutes I took to see what I could find, I didn't have any luck. So I just wondered.

J.A. 1910-11. Neither the Commission nor the litigants below were able to locate any useful guidance in the law of West Virginia as to the term of art "connive" and whether that term included tacit consent in the acts of others. In the opinion that followed, the Commission provided a new definition, and a new rule. Every lawyer in the room at the Commission's final argument had sought and failed to find legal authority on the key question, which prompted the Commission to adopt a new definition of the term of art "connive," so as to include tacit consent. This new legal authority (by the Commission's own Order) constituted a new rule.

Finally, this Court has made clear many times that an "administrative rule may not, under the guise of 'interpretation' be modified, revised, amended, or rewritten." *Cookman Realty Group, Inc. v. Taylor*, 211 W. Va. 407, 411 (2002), *citing* Syl. Pt. 1, *Consumer Advocate Div. of Pub.*

Serv. Comm'n v. Public Serv. Comm'n of West Virginia, 182 W.Va. 152 (1989); *see also CNG Transmission Corp. v. Craig*, 211 W.Va. 170, 175 (2002); *Syncor Intern. Corp. v. Palmer*, 208 W.Va. 658, 662 (2001); *Apollo Civic Theatre, Inc. v. State Tax Com'r*, 223 W.Va. 79, 85 (2008); *Subcarrier Communications, Inc. v. Nield*, 218 W.Va. 292, 299 (2005). By providing previously unknown definitions for terms of art in its regulations, the Commission rewrote its rule and now seeks to cloak that act in the guise of interpretation.

The Commission asserts that, in punishing the Jockeys, it did nothing more than apply a common meaning to common terms. That position simply will not withstand a review of the Commission's own Order and the record below, which show definitively that the Commission created new regulatory definitions for the terms of art "connive" and "corrupt," then applied them to the Jockeys. This rulemaking required the reversal and vacatur of the Commission's Order as to the Jockeys, and the Circuit Court properly did so.

C. The Circuit Court did not err in determining that the Commission's retroactive application of its new and improperly promulgated regulations defining the terms "connive" and "corrupt" was an error of law and violated the constitutional rights of the Jockeys.

As with the foregoing issue, the Circuit Court's analysis contains multiple premises: (1) that the definitions of "connive" and "corrupt" developed by the Commission for the Jockeys were new rules, (2) that applying new rules to past conduct constitutes retroactive application, (3) that applying new rules to past conduct would constitute an *ex post facto* law, and (4) that retroactive application and *ex post facto* issues required the vacatur of the Commission's Order as to the Jockeys. The Commission does not quarrel with all of these tenets. For example, the Commission does not dispute that retroactive application of new rules would be error, or that *ex post facto* laws are constitutionally barred. Instead, it appears from the Commission's Petition that only the first and fourth of these premises are presently in dispute. The first premise is adequately covered in Section VI.B. above. Turning to the fourth premise, the record shows that the Circuit

Court did not err in concluding that the application of new definitions of "connive" and "corrupt" to the Jockeys constituted an impermissible retroactive application of new rules, nor did the Circuit Court err in determining that these new definitions in a punitive rule constituted an impermissible *ex post facto* law.

1. The Commission's retroactive application of its new rules defining "connive" and "corrupt" was an error of law, and the Circuit Court properly so found.

The Circuit Court below accepted and applied the clear guidance of this Court: 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. *See* J.A. 2168, *citing State ex rel. Richardson v. McCompton & Son Lumber Co., Inc.*, 192 W.Va. 10, 12 (1994). Having identified this cardinal point of law (with which the Commission did not and does not disagree), the Circuit Court reasoned that the new rules defining "connive" and "corrupt" were created and issued on May 21, 2010, that the Jockeys' conduct took place on March 25 and 26, 2009, and that the Commission therefore retroactively applied new substantive administrative rules to prior conduct. J.A. 2168-69. If the Circuit Court was correct (and it was) that the Commission's new definitions of "connive" and "corrupt" constituted rulemaking, there can be no doubt that the Commission retroactively applied its new rules.

Rather than accept this simple point and rely on its earlier position that the new definitions do not constitute rulemaking, the Commission suggests that the parties were not from the outset arguing over the meanings of "connive" and "corrupt," and that therefore the Commission's ultimate adoption and application of new definitions for these terms was something other than retroactive application. *See* Petitioner's Brief, pp. 27-28. This argument is both wrong and misleading.

The argument is wrong because, once again, the Commission cannot escape its own Order, which states as follows:

> 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.

(emphasis added). J.A. 1932. Not only does the Commission itself state that there has been "much discussion" over what it meant to "connive," the Commission expressly "adopt[s] different interpretations of these terms of art than have been used in this case, to date." *Id.* The Order thus shows on its face that (1) the Commission gave new meanings to these terms and retroactively applied them, and (2) that the necessary *mens rea* to commit the violation of conniving in a corrupt practice *was* raised by the Jockeys below. Thus, when suggesting that the Jockeys never raised the issue of the new regulation defining "connive" and "corrupt," the Commission ignores its own statements and is simply wrong.

The Commission's argument is misleading because it omits a substantial amount of discussion between the Commission's prosecutor and the Jockeys once the Hearing Examiner recommended the adoption of a new, previously unknown definition of "connive." Prior to the Commission's final order, the Hearing Examiner recommended that the Commission adopt a definition of "connive" taken from the Black's Law Dictionary definition for "connivance." J.A. 1816-17. As the Jockeys pointed out, the referenced definition (1) was a term of art taken from Kentucky law, not West Virginia law, (2) was a term of art identifying a defense available in common law divorce cases, and (3) was taken from a 1935 case which is no longer good law even in Kentucky divorces. *Id.* at 1821-22. The Jockeys asserted that any reasonable definition of the term required cooperation or encouragement for the commission of a wrong. *Id.* at 1823. In re-

sponse, the Commission's prosecutor accused the Jockeys of engaging in "a pedantic, hair-splitting exercise," attempting "to shroud the issues ... in a cloud of overly academic debates about the meaning of the word 'connive,'" and promoting "an excessively narrow view of the law." J.A. 1828. This exchange, coupled with the Commission's focus on the meaning of the regulatory terms of art "connive" and "corrupt," makes it disingenuous to now suggest that there was no discussion below regarding the meaning of these key regulatory terms.[7] The record below is replete with evidence that, from the Hearing Examiner's recommendation forward, there was a serious disagreement about the essential elements of the Commission's charge, centered around the application of new, heretofore unknown, meanings to these regulatory terms of art. Thus, the Commission's argument that "[c]oncluding that the attribution of common meaning to words in a rule is in some manner the pronouncement of something new that suddenly changed what it meant to connive to commit a corrupt act in racing is simply untenable" is itself, given the record below and the Commission's own Order, untenable. Petitioner's Brief, p. 28.

2. *The Commission's retroactive application of its new rules defining "connive" and "corrupt" was a constitutionally impermissible ex post facto law, and the Circuit Court properly so found.*

While the general proposition that purely civil matters do not fall within the state and federal constitutions' prohibition of *ex post facto* laws is correct, this Court has made clear that "the due process concerns of the Ex Post Facto Clause have application ... to retroactivity of 'punitive' laws or rules." *Richmond v. Levin*, 219 W.Va. 512, 516 (2006); *Haislop v. Edgell*, 215 W. Va. 88, 94 (2003) (noting that punitive legislation implicates the *ex post facto* clause). In this in-

[7]It is further ironic that, after characterizing the Jockeys as hairsplitting pedants, the Commission devotes significant space in its brief to listing definitions of the term "connive," taken from various dictionaries to support its new definition. See Petitioner's Brief, pp. 20-21.

stance, the Commission's new definitions of the terms "connive" and "corrupt" take root in a regulation and in a context that is punitive.

First, and at the risk of engaging in hair-splitting pedantry, the common legal definition of the term "punitive" is "[i]nvolving or inflicting punishment." Black's Law Dictionary (9th ed. 2009). In this matter, the Commission, a government entity, seeks to punish the Jockeys by taking away their livelihoods for a period and taking a substantial sum of their money. Suspensions and fines are undoubtedly punitive. Second, the Deputy Attorney General bringing charges against the Jockeys has repeatedly referred to herself as a "prosecutor." *See, e.g.,* J.A. 1893 ("... you should hand me, as your prosecutor, my hat and let these jockeys go free.") Prosecutors bring criminal charges, not civil ones. Third, the regulations at issue define transgressions which lead to punishment. Specifically, W.Va. C.S.R. § 178-1-60.5 bars any person from engaging in certain enumerated "corrupt" practices, and W. Va. C.S.R. § 178-1-10.8 empowers the Stewards, as the Commission's representatives, to punish violations with suspensions and fines. This scheme is designed and intended to be punitive in nature. Thus, given all the punitive hallmarks of the proceedings below, the Circuit Court was correct to view the Commission's retroactive rulemaking as a violation of the *ex post facto* clause.

3. *Even were the Circuit Court incorrect in determining that the retroactive application of the new regulations to the Jockeys constituted an ex post facto violation, the Commission has waived the issue by failing to raise it before the Circuit Court below.*

As this Court has held many times, nonjurisdictional issues not raised below are waived on appeal. *Noble v. W. Virginia Dep't of Motor Vehicles*, 223 W. Va. 818, 821 (2009) ("Our general rule is that nonjurisdictional questions ... raised for the first time on appeal, will not be considered."); *Shaffer v. Acme Limestone Co., Inc.,* 206 W.Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999); *Whitlow v. Board of Education,* 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993) ("Our

general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal."); *Konchesky v. S.J. Groves & Sons Co., Inc.,* 148 W.Va. 411, 414, 135 S.E.2d 299, 302 (1964) ("[I]t has always been necessary for a party to object or except in some manner to the ruling of a trial court, in order to give said court an opportunity to rule on such objection before this Court will consider such matter on appeal."). The Commission simply failed below to raise the argument that the proceedings below were civil and hence *ex post facto* analysis should not be available. *See* J.A. 2084-85. This issue, having not been raised below, is waived.

D. The Circuit Court did not abuse its discretion in finding that the Commission was clearly wrong when it found that the Jockeys "connived" in a "corrupt" practice, given the reliable, probative, and substantial evidence in the record.

As noted above, review of this issue is for an abuse of discretion. "Typically, a grant of discretion to a lower court commands this Court to extend substantial deference to such discretionary decisions." *State v. Allen,* 208 W. Va. 144, 155 (1999). "Under the abuse of discretion standard, we will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances." *Hensley v. West Virginia Dep't of Health & Human Resources,* 203 W.Va. 456, 461, 508 S.E.2d 616, 621 (1998). Because the Circuit Court neither made a clear error of judgment nor exceeded the bounds of permissible outcomes, the Circuit Court's decision below should not be disturbed.

The Circuit Court's review of the reliable, probative, and substantial evidence in the record below was accurate and shows that the Commission lacked a legitimate basis for finding that the Jockeys "connived" in a "corrupt" practice. The Circuit Court closely considered the Commission's key finding 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.

J.A. 1932. The Court considered this finding—upon which punishment was based—and sought reliable, probative, substantial evidence in the record before it to support the finding. The Court, reviewing the record, noted three important absences: the absence of evidence that any bettor knew of the weighout procedures at issue or lost any confidence in the integrity of the process, the absence of any evidence that gambling volume (the "handle") at the track in question declined when news of the Jockeys' initial sanctions became public, and the absence of evidence that the Jockeys actually rode at a weight other than their posted weights. *Id.* at 2170-71. These absences led the Circuit Court to determine that the record below lacked reliable, probative, substantial evidence upon which the Commission could have relied in making its key finding. *Id.* at 2171-72.

The Commission now characterizes the Circuit Court's search as reweighing the evidence below and disregarding the evidence in the record. Petitioner's Brief, p. 32. The record itself shows that the Commission's characterization is incorrect.

Firstly, the Circuit Court specifically understood and announced its role in this review: "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." J.A. 2171. This statement militates against the Commission's charge that the Circuit Court engaged in fact finding and weighing the evidence.

Secondly, the Commission still fails to identify reliable, probative, and substantial evidence that the Circuit Court overlooked on these three points that could have supported the Commission's key finding. The Commission admits that there was no evidence in the record tending to suggest that any bettor knew of the weighout procedures at issue, lost any confidence in the in-

tegrity of the process, or that there was any general decline in wagering to suggest a loss of confidence. As the Commission puts it, "the finding of a rule violation is not dependent upon evidence that bettors were upset about the rule violation or that bettors placed less [sic] bets on horses because of the rule violation." Petitioner's Brief, p. 35. This argument tacitly admits that no such evidence exists, and thus supports the Circuit Court's analysis. More troubling, however, is the Commission's circularity of reasoning. The Commission presumes that a rule violation occurred and then argues that there is no need for the public to be informed of that violation for there to be any worry of a loss of confidence in the integrity of racing procedures. Unlike the Commission, the Circuit Court engaged in proper linear reasoning, asking first what evidence supported the premise that any diminution or adulteration of the weigh-out process was "of a level sufficient to injure confidence in the integrity of that process." This question was first, because such a factual finding would have to be made *before* the Commission could then determine that the Jockeys' conduct was "corrupt" under the Commission's new definition of that term. The Circuit Court found no such evidence, and the Commission now identifies none.

As to the third key absence of evidence, the Commission takes issue with the Circuit Court's analysis on the question of the Jockeys' actual weights. As the Court below analyzed the issue,

> 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.

J.A. 2171. The Commission effectively agrees with the first premise because it avers that the "evidence shows that it was impossible to determine what the jockeys' weights were due to the extremely disorderly weigh outs." Petitioner's Brief, p. 35. The Commission overlooks (or purposely ignores), however, the evidence in the record that shows that the Jockeys actually made their weights. Each of the Jockeys testified that they weighed themselves on the evenings in

question on the Toledo mechanical scale prior to riding and that this scale showed that they made their assigned weights. J.A. 2161, 1326, 1329, 1334 (Reynolds); *Id.* at 1335, 1337, 1338 (Sanchez); *Id.* at 1349 (Rios-Conde); *Id.* at 1351-52 (Perez); *Id.* at 1356-58 (Maragh); *Id.* at 1365-67 (Whittaker); *Id.* at 1374-75 (Mawing). The Commission's own hearing examiner found this testimony to be credible, because he did not specifically remark otherwise. *Id.* at 1842 ("The hearing examiner was and is satisfied that the witnesses brought on by the parties were credible and truthful except as noted below."); *Id.* at 1856 ("Every jockey testified that he met his reported weight for each of the races in question."). And the Commission adopted this credibility finding, because it did not expressly reject it or make findings inconsistent with it. *Id.* at 1933 ("The Hearing Examiner's Recommended Decision shall be attached hereto and insofar as it is consistent with the Commission's decision, it is incorporated herein by reference."). Far from being a finding made from "whole cloth," Petitioner's Brief, p. 35, the Circuit Court's finding that the Jockeys all made their weight flows directly from the Commission's own findings.

Given that the record before the Circuit Court lacked substantial, reliable, and probative evidence (1) that any bettor knew of the weighout procedures at issue or lost any confidence in the integrity of the process, (2) that gambling volume (the 'handle") at the track in question declined when news of the Jockeys' initial sanctions became public, or (3) that showed that the Jockeys actually rode at a weight other than their posted weights, it was not an abuse of discretion for the Circuit Court to reject the Commission's finding that the Jockeys "connived" in "corrupt" conduct.

E. The Circuit Court did not abuse its discretion in finding that the Commission's determination to punish only the Jockeys for behavior (a) engaged in by many other riders who were not charged or punished and (b) witnessed by the Commission's Stewards was arbitrary and capricious.

As the Circuit Court noted, 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, 285-86 (1974); *Harrison v. Ginsberg*, 169 W. Va. 162, 174 (1982); J.A. 2172. Given the Circuit Court's thorough review of the record below, the Commission cannot show that the Circuit Court committed a clear error of judgment or exceeded the bounds of permissible choices in rejecting the Commission's final ruling as arbitrary and capricious.

The Circuit Court found that where the Commission itself had found that (1) the entire weighout process was faulty, (2) the Commission's representatives charged with enforcing its rules were present at all weighouts at issue and saw no reason to correct the process, (3) the scale used to weigh the Jockeys could not be trusted to give an accurate weight regardless of procedure, and (4) many other jockeys engaged in the same or more egregious conduct, there was no rational connection between the facts in the record and the Commission's decision to sanction the Jockeys. *Id.* at 2172-75. The Commission's primary argument is that the Circuit Court ignored the proper standard of review as to this issue. Petitioner's Brief, p. 32. However, the Commission does not really quarrel at all with the Circuit Court's identification of the arbitrary and capricious standard set forth in *Bowman* and *Harrison*, *supra*. Instead, the Commission contends that the standard identified was not met. That determination by the Circuit Court cannot be disturbed absent an abuse of discretion.

The Commission does not disagree with the Circuit Court's conclusion that the entire weigh-out process was faulty. It could not, given the Commission's finding that "virtually none of the protocols recognized to verify jockey weight were complied with at the weigh-outs." J.A. 1931. Nor does the Commission disagree with the Circuit Court's conclusion that the Commission's representatives whose job it was to monitor and enforce rules compliance, the Stewards, were present at the weighouts and made no complaint. Again, the Commission could hardly do so considering the clarity of the record on this point: the Chief Steward for Charles Town testified that he observed the weighout process leading up to and including March 26 and 27 and failed to observe anything that made him think there was any problem. *Id.* at 1225-26 ("A: Was I in a position to observe? Absolutely.").

The Commission finds fault with the Circuit Court's determination that the scale used to weigh the Jockeys could not be trusted to give an accurate weight regardless of procedure. Petitioner's Brief, pp. 33-34. Yet the Circuit Court's conclusion is well supported by the Commission's own findings. The Commission adopted the hearing examiner's proposed finding that "weigh-out data as to the Jockeys ... was inaccurate and wholly inadequate for the purpose of disclosing the true weights of jockeys for the purpose of determining over or under weight jockeys." The hearing examiner provides that the data for *all* jockeys was inadequate, not just the Jockeys at issue, as shown by his shift in capitalization. The hearing examiner found that the scale at issue "was not exactly level and that to have 'a perfect weighing condition' the scale should be level." J.A. 1945. Further, the hearing examiner noted testimony that "a scale has to be level if it is going to weigh correctly" and made no finding that this testimony was not credible or not adopted. *Id.* at 1946. All these findings were adopted by the Commission and support

the Circuit Court's conclusion that the scale at issue did not provide accurate weights for any jockey racing on the dates in question.

The Commission claims that the Circuit Court "ignored the video footage." Petitioner's Brief, p. 33. While the Commission likely is arguing that the Court ignored the footage of the Jockeys, the Circuit Court's decision shows that it reviewed *all* the video footage and compared the Jockeys' behavior to that of all the other riders:

> 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.

J.A. 2159 (emphasis added). The Circuit Court engaged in a deep review of all the weighouts in the record, pointing out especially problematic weighouts by eight uncharged jockeys. *Id.* at 2159-61. Given the scope of the Circuit Court's review, the conclusion below that many other jockeys engaged in the same or more egregious weighout behavior than the Jockeys themselves can hardly be an abuse of discretion. Nor is this conclusion by the Circuit Court a "reweighing" of the evidence, for the Commission itself never made any findings on this issue—that is, the Commission never compared the activities of other riders to that of the Jockeys. This failure by the Commission is itself a significant factor supporting the Circuit Court's conclusion that the Commission's decision to punish the Jockeys was arbitrary and capricious.

The Circuit Court neither ignored substantial evidence nor reweighed the evidence in the record. Instead, the Circuit Court reviewed the *entire* record and the Commission's own findings, and compared that record and those findings with the Commission's final decision that the Jockeys had connived in a corrupt practice. That comparison revealed to the Circuit Court a clear error of judgment and no rational connection between the facts found and the decision made. Giv-

en the detail with which the Circuit Court examined the record and given the deferential standard of review to be applied to the Circuit Court's decision, the decision below should be upheld.

F. No compelling public policy reason supports overturning the Circuit Court's Judgment.

It is axiomatic that a Court of last resort should consider the public policy implications of its decisions. This Court has pointed out that "'public policy' is that principle of law which holds that 'no person can lawfully do that which has a tendency to be injurious to the public or against public good.'" *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 39 (2005). In the instant matter, the public good will best be supported by upholding the Circuit Court's ruling below.

1. The Circuit Court properly performed its job as a reviewing court within the strictures of the APA, and second-guessing the ruling below in the manner requested by the Commission would create judicial waste.

In regard to Administrative Procedures Act cases, the regime available to litigants differs from that in cases where original jurisdiction for the underlying cause lies in Circuit Court. Specifically, litigants below in APA cases are afforded a mandatory right of appeal to Circuit Court. W. Va. Code § 29A-5-4. This Court then functions as the second court to review not the underlying agency action, but the propriety of the review conducted by the Circuit Court below. W. Va. Code § 29A-6-1. This regime more closely resembles the federal two-tier appellate review process than the standard West Virginia single-tier review, and that difference is important when this Court accepts APA cases for review, for this Court can then, like the U.S. Supreme Court, give more rein to policy concerns and worry less about outcomes in particular cases.

There is little doubt that the Circuit Court below understood its role as an appellate court. The Circuit Court properly identified its statutorily imposed standard of review and noted decisions of this Court that amplify and explain that review. J.A. 2155. The Circuit Court then engaged in a thorough and probing review with due deference to the Commission's findings to

produce a reasoned, complete, and just ruling. The Commission now invites this Court to revisit all the work done by the Circuit Court, as evidenced by the Commission's continual quibbles with minute factual details from the record and a complete failure to acknowledge the deferential standard of review to be applied here on all issues save those of law. Engaging in the exercise requested by the Commission would both make the APA appellate procedure below a nullity and force this Court to do work that the Legislature has properly placed in the hands of the Circuit Court. The focus of this Court is and should be on whether the Circuit Court understood its role under the law and fulfilled that role. Any other exercise by this Court would do nothing but provide a full *de novo* appeal where the law does not afford it and waste the time and effort of both this Court and the Circuit Court. That waste does not support the public good.

2. *The regulations at issue in this appeal have been abolished by the Commission, and neither the Commission nor the public requires any further guidance on these defunct rules.*

In many appeals before this Court, a substantial public good that arises from the Court's decisions is guidance regarding the meaning and application of statutes, rules, and prior decisions. As the record below shows, a key question before the Commission was the meaning of the regulatory terms "connive" and "corrupt" expressed in W. Va. C.S.R. § 178-1-60.5. And the record below shows that neither the jockeys governed by this regulation nor the Commission charged with enforcing it had any guidance regarding the meaning of these terms until the Commission defined them in its final order. If this situation were still the case, there could be a public policy reason for this Court to weigh in on the regulations and their meaning.

But this is not the case. The Commission itself, with the full participation of its "prosecutor," has abolished these problematic regulations. "In November 2009, the Racing Commission ap-

pointed a committee[8] to work with its legal counsel from the Attorney General's Office to re-write this rule [Section 178]." Brief Summary of Proposal, Thoroughbred Racing 178 CSR 1, available at http://apps.sos.wv.gov/adlaw/csr/ruleview.aspx?document=7057. This Summary pointed out that the Rule required revision because it was "outdated, poorly organized, and, in some instances, poorly worded." *Id.* This public statement by the Commission regarding its own Rules was filed with the West Virginia Secretary of State's Office on June 7, 2010, less than thirty days after the Commission's final order regarding the Jockeys. One of the "outdated" and "poorly worded" regulations abolished by the Commission with the help of its Committee was W. Va. C.S.R. § 178-1-60.5; in the replacement rules, the term "connive" wisely does not appear at all. *See* W. Va. C.S.R. § 178-1-1 *et seq.* (2011).

Given that the regulation at issue has now been abolished, neither the Commission, the public, nor racing licenseholders need any guidance regarding the question of what it means to "connive" in a "corrupt" practice going forward. There is no substantial public policy to be advanced by delving into the Commission's claims.

VII. CONCLUSION

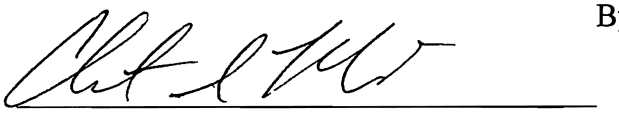
Based on all the foregoing, the Jockeys respectfully request that this Court allow the hard-won, appropriate, and just ruling from the Circuit Court below to stand. Any other outcome would simply reinstate and compound the many injustices levied upon these men over the recent years during which they struggled under the unfounded and inappropriate label of corruption.

[8] The committee revising the Rule included Kelli Talbott, Deputy Attorney General (the "prosecutor" below); Danny Wright, Chief Steward (witness below who had observed the weighouts at issue and seen nothing he considered a violation of the rules at the time); and Erich Zimney (fact witness in the hearing below).

Respectfully Submitted,

Lawrence Reynolds, Anthony Mawing, Alexis Rios-Conde, Jesus Sanchez, Dale Whittaker, Luis Perez, and Tony A. Maragh,

By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 2015, the foregoing RESPONDENTS' BRIEF was served via the US Mail upon the following individuals and entities:

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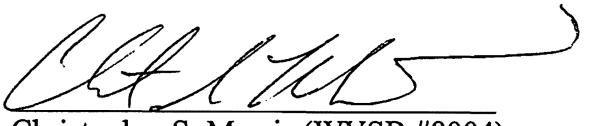

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