

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

JEFFREY LIEBERMAN,	:	
	:	C.A. No. 03A-10-001 WLW
Appellant,	:	
	:	
v.	:	
	:	
DELAWARE HARNESS	:	
RACING COMMISSION,	:	
	:	
Appellee.	:	

Submitted: January 23, 2004  
Decided: April 7, 2004

**ORDER**

Upon Appeal of a Decision of the Delaware  
Harness Racing Commission. Affirmed.

William W. Erhart, Esquire, Wilmington, Delaware; Howard A. Taylor, Esquire, Law Office of Jerome Taylor, Philadelphia, Pennsylvania (of counsel); attorneys for the Appellant.

John W. Downs, Deputy Attorney General, State of Delaware, Department of Justice, Wilmington, Delaware; attorneys for Appellee.

WITHAM, J.

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**Introduction**

Jeffrey Lieberman is appealing the decision of the Delaware Harness Racing Commission (“ the Commission”) finding that Lieberman violated Commission Rules 8.5.1 and 8.5.2. The State has answered the appeal. Based upon the following, the Court finds that the decision of the Commission will be *affirmed*.

**Background**

Lieberman is a trainer of standard bred racehorses licensed by the Commission. This case arose after a horse trained by Lieberman, Storm Watch, tested positive for dexamethasone<sup>1</sup> after winning two races at Dover Downs and Harrington Raceway. On April 19, 2003, Storm Watch won the ninth race at Dover Downs. After the race, a urine sample was taken from Storm Watch to test for improper substances. The sample was identified as S-9409 and sent to Delare Associates to be tested. On April 30, 2003, Donald Harmon, the presiding judge at Dover Downs and Harrington Raceway, received notice from the laboratory to hold the winnings for sample S-9409 until further testing could take place. On May 1, 2003, he received notice that the sample had tested positive for an illegal substance. He notified Lieberman of the positive test result on May 2, 2003.

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<sup>1</sup> Dexamethasone was described at the hearing as a Class Four medication, which means that it is a therapeutic medication rather than a performance enhancing substance. Joseph Strug, Jr., the laboratory director at Delare Associates, stated that it is a non-steroidal, anti-inflammatory drug primarily used to reduce inflammation and treat allergic reactions. Trainers are permitted to use dexamethasone in certain amounts and within certain time frames. However, dexamethasone may not be used within 24 hours of a race.

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In the meantime, Storm Watch won another race on April 29, 2003, before anyone had learned about the positive test result from the April 19 race. Again a urine sample was taken from Storm Watch, identified as S-7641, and sent to Delare Associates. On May 6, 2003, Harmon received notice from the laboratory that this sample also tested positive for dexamethasone. Lieberman was notified of the test results on the same day and requested that split samples of the urine specimen be sent to the Maryland State Laboratory for testing. Harmon received two test reports from Thomas F. Lomangino, Jr., the laboratory director of the Maryland State Laboratory, on May 21, 2003 concluding that both samples tested positive for dexamethasone.

The Board of Judges conducted a hearing on May 22, 2003 and concluded that Lieberman had violated Commission Rules 8.5, 8.5.1, and 8.5.2 when Storm Watch tested positive for dexamethasone after the April 19 and April 29, 2003 races. Lieberman was given the minimum penalty for each violation: a thirty-day suspension, \$2,000 fine, loss of purse with disqualifications, and \$150 drug testing cost.

Lieberman appealed the decision of the Board of Judges to the Delaware Harness Racing Commission. Following a hearing on the matter held on August 19, 2003, the Commission concluded that Lieberman had violated Commission Rules 8.5.1 and 8.5.2 when Storm Watch tested positive for dexamethasone after winning the race on April 19, 2003. The Commission imposed a penalty of a thirty-day suspension, \$2,000 fine, \$150 assessment for drug testing costs, loss of purse,

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disqualification of Storm Watch from that race and redistribution of the purse. In addition, the Commission concluded that Lieberman violated Commission Rules 8.5.1 and 8.5.2 when Storm Watch tested positive for dexamethasone after winning the race on April 29, 2003. The Commission imposed a penalty of a \$150 assessment for drug testing costs, loss of purse, disqualification of Storm Watch from the race and redistribution of the purse.

Lieberman then filed this appeal, arguing that the Commission erred when it ignored regulations regarding security of the testing procedure and confidentiality of a urine sample. In addition, Lieberman contends that the Commission erred by failing to consider mitigating circumstances and other evidence presented by Lieberman.

**Discussion**

On appeal from an administrative agency, the Superior Court may reverse the decision of the agency only when legal error was committed or when the decision is not supported by substantial evidence.<sup>2</sup> The Court may not substitute its judgment when there is substantial evidence supporting the agency's conclusion.<sup>3</sup> Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>4</sup>

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<sup>2</sup> *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* citing *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

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***Regulations Regarding Security of the Testing Procedure***

Lieberman contends that the Commission committed legal error because Commission Rules 8.4.1.3,<sup>5</sup> 8.4.3.1,<sup>6</sup> and 8.4.3.2.1<sup>7</sup> were not properly followed when the urine sample was taken from Storm Watch for testing. Specifically, Lieberman argues that because the detention area is not a separate area and because the trainer must use his own buckets, the reliability of the specimen collection process was undermined. Lieberman contends that the Commission's failure to follow their own rules constituted legal error. However, the State insists that the proper procedures were followed regarding the detention area, and, even though the trainer used his own buckets with the horse, there was no evidence that this tainted the sample.

The Commission specifically concluded that the area in the paddock used for post-race testing was secure because the Paddock Inspector ensured that no unauthorized persons obtained entry into the testing area. Further, the Commission

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<sup>5</sup> Commission Rule 8.4.1.3 states, " Unless otherwise directed by the State Steward, judges or the Commission Veterinarian, a horse that is selected for testing must be taken directly to the Test Barn."

<sup>6</sup> Commission Rule 8.4.3.1 states, " Horses from which specimens are to be drawn shall be taken to the detention area at the prescribed time and remain there until released by the Commission Veterinarian. Only the owner, trainer, groomer, or hot walker of the horses to be tested shall be admitted to the detention area without permission of the Commission Veterinarian."

<sup>7</sup> Commission Rule 8.4.3.2.1 states, " Buckets and water shall be furnished by the Commission Veterinarian."

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concluded that the fact that the trainer provided his own buckets and water after the races did not undermine the reliability of the collection process or accuracy of the reported test results.

When asked about the detention area, Harmon stated that while the detention area itself was not secure, the stalls where the horses were kept until testing were secure. In addition, Harmon testified that the trainers use their own water buckets after the race, rather than the Commission veterinarian supplying buckets. However, no evidence was presented to the Commission indicating how either of these occurrences tainted the testing.

Lieberman presented no evidence supporting his claim that the sample was contaminated due to the alleged failure to comply with the rules. This Court must defer to the Commission's own interpretation of its regulations unless the Commission's construction is clearly erroneous.<sup>8</sup> The evidence established that the stalls where the horses were kept prior to testing were secure. The Commission's conclusion that the detention areas, including the secure test stalls, met the statutory requirements is not clearly erroneous.<sup>9</sup>

Rule 8.4.3.2.1 states that the Commission veterinarian shall supply buckets and water in the detention area. Generally, an agency is required to follow its rules

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<sup>8</sup> *Givens v. State Harness Racing Commission*, 1999 Del. Super. LEXIS 66, \*15.

<sup>9</sup> Commission Rule 8.4.1.1.3 states, "Horses selected for testing shall be taken to the Test Barn or **Test Stall** to have blood, urine and/or other specimen sample taken . . ." (emphasis added).

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and regulations.<sup>10</sup> However, an exception exists when there is no harm from the violation because no substantial rights are involved.<sup>11</sup> While Rule 8.4.3.2.1 was violated when the trainer was required to supply the bucket to give water to the horse, there was no evidence presented establishing that substantial rights were involved. Lieberman merely argued that his bucket could have been contaminated with dexamethasone after the race, but he failed to present any evidence to the Commission showing that the use of his bucket, rather than the veterinarian-supplied bucket, resulted in the positive results for dexamethasone on two separate occasions. Unsubstantiated arguments made to the Commission are insufficient to overcome the burden placed on the trainer after a positive test result. Thus, the Court finds that the Commission's decision with respect to Rules 8.4.1.3, 8.4.3.1, and 8.4.3.2.1 is supported by substantial evidence and the Commission's decision will not be overturned on this basis.

***Regulations Regarding Confidentiality of Sample***

Lieberman contends that the Commission failed to follow its own rule requiring anonymity of the samples.<sup>12</sup> Lieberman's argument centers on the

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<sup>10</sup> *Richards v. Delaware Harness Racing Commission*, 1998 Del. Super. LEXIS 511, \*7.

<sup>11</sup> *Id.*

<sup>12</sup> Commission Rule 8.4.3.5.5 states, "The Commission Veterinarian shall take every precaution to ensure that neither the Commission chemist nor any member of the laboratory staff shall know the identity of the horse from which a specimen was taken prior to the completion of all testing."

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numbering system used to identify each sample sent to the laboratory for testing. The samples taken on April 19, 2003 were numbered 9401 through 9415. Storm Watch raced in the ninth race of the day and was sample number 9409. On April 29, 2003, the samples were numbered 7631 through 7645. Storm Watch raced in the eleventh race and was sample number 7641. Lieberman's contention is that the samples were easily identifiable in violation of Rule 8.4.3.5.5. The State insists that the procedure followed did allow for a confidential sample, particularly since the Commission chemist, Joseph Strug, testified that he had no knowledge of what horses ran in the races on April 19 and April 29, 2003. Further the State argues that even if Strug decoded the consecutive log numbers, he still would be unable to determine which horse it is because any of the top four finishers from each race are tested, not simply the winner of the race.

This Court agrees with the Commission's decision that Lieberman's contentions regarding the testing process were not supported by substantial evidence. Strug testified that he did not know the identity of the horses. The procedures followed by the Commission in assigning numbers to the samples appear to have adequately protected the confidentiality of the samples. Although Lieberman can point to a pattern in the numbering of the samples after the fact, it would not have been possible for the laboratory to know at the time they did the testing that this particular pattern was the numbering system in use. In addition, the fact that the sample could be drawn from any of the top four finishers further supports the Commission's finding that the confidentiality of the sample had been adequately

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preserved. Lieberman presented no evidence establishing that the laboratory personnel knew the identity of the samples they were testing, thus, the Commission' s decision will not be overturned on this basis.

***Consideration of Mitigating Circumstances***

Lieberman contends that it was legal error for the Commission to not consider mitigating circumstances under Rule 8.3.2.6 and the circumstances of the case. Specifically, Lieberman argues that the Commission should have considered the fact that dexamethasone is a therapeutic drug, rather than a performance enhancing drug, when determining the penalty. The State contends that the Commission considered mitigating circumstances when it imposed the fine and suspension for only one of the offenses. Further the State argues that it was not legal error for the Commission to impose the penalties in a case such as this.

The Commission rules state that when the rules for a Class 4 substance are violated the following penalties may be imposed,

In the absence of extraordinary circumstances, a minimum license revocation of thirty days and a minimum fine of \$2,000, and a maximum fine up to the amount of the purse money for the race in which the infraction occurred, forfeiture of purse money, and assessment for the cost of the drug testing.<sup>13</sup>

The Commission determined that Lieberman violated Rules 8.5.1 and 8.5.2 and considered aggravating and mitigating circumstances. The Commission agreed that

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<sup>13</sup> Commission Rule 8.3.2.4.

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Lieberman's lack of a significant prior disciplinary record was a mitigating factor. In addition, the Commission found the fact that the second positive test result occurred before Lieberman received the first positive test report was a mitigating circumstance. The Commission did not find any relevance in the fact that dexamethasone is a therapeutic drug rather than a performance enhancing drug, concluding that the distinction was already factored into the classification of the drugs and the recommended penalties for each class. Finally, the Commission found that Lieberman's argument that dexamethasone had no effect on Storm Watch's performance was not persuasive and concluded that the Commission was not required to consider this under the rules.<sup>14</sup>

After consideration of these circumstances, the Commission imposed the minimum penalty under Rule 8.3.2.4 for the first positive test result, including a \$2,000 fine and 30-day suspension. For the second positive test result, the Commission did not impose an additional fine and suspension. The Court finds that the Commission properly considered the mitigating circumstances and that the decision is supported by substantial evidence.

***Consideration of Substantial Evidence with respect to Rule 8.5.1***

Commission Rule 8.5.1 states that a positive test result for a prohibited substance is prima facie evidence of a violation of this rule. The trainer is

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<sup>14</sup> The Commission relied on *Speers v. Delaware Harness Racing Commission*, 449 A.2d 205, 207 (Del. 1982) (whether or not the horse ran faster in the race does not rebut the presumption that the drug was administered to improve the horse's performance).

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responsible for such violation in the absence of substantial evidence to the contrary.<sup>15</sup>

The burden is on the trainer to overcome the presumption created by a positive test result. Lieberman maintains that the Commission failed to consider “substantial evidence to show that there is a likelihood that this medication was administered after the horse raced.”<sup>16</sup> Again Lieberman points to what he believes were shortcomings in the sample collection and testing process. Further, Lieberman contends that the Commission should have considered Storm Watch’ s consistency before, during and after the races in question. However, the State argues that the evidence presented by Lieberman does not amount to substantial evidence sufficient to overcome the presumption, and thus the decision of the Commission should be upheld. Specifically the State argues that the horse’ s performance is not evidence sufficient to rebut the presumption that the drug was administered.

The Commission concluded that the evidence presented by Lieberman did not amount to the substantial evidence required to overcome the prima facie evidence established by the positive test results. The Commission found that the collection and testing procedures were followed and that Lieberman failed to establish that Storm Watch was administered dexamethasone after the race but before the testing.

The decision of the Commission appears to be supported by substantial evidence. Delare Associates found that the sample taken from Storm Watch tested

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<sup>15</sup> Commission Rule 8.5. 1.

<sup>16</sup> Appellant’ s Opening Brief, p. 11.

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positive for dexamethasone. The split sample sent to the Maryland laboratory also tested positive for dexamethasone. The Commission correctly found that Lieberman presented no substantial evidence establishing that the dexamethasone was not in Storm Watch's system during the race. Although he pointed to possible shortcomings in the testing procedures, he did not establish that this resulted in dexamethasone being given to Storm Watch after the race but before the test. Lieberman's trainer's agent was with Storm Watch after the race and witnessed the sample collection. Although Harmon, the presiding judge, testified that Storm Watch had raced consistently on April 19 and April 29, based upon his past performance, the State is correct in its assertion that this is insufficient to overcome the presumption established in Rule 8.5.1.<sup>17</sup> Thus, the Commission's decision is properly based upon the evidence presented.

***Effects of Suspension***

Lieberman's final argument is that the Commission did not give adequate consideration to the effect a suspension would have on Lieberman's business. However, Lieberman has cited no authority establishing that the Commission must give consideration to the impact of the suspension. As stated previously, the Commission properly considered the evidence presented, including the mitigating factors, prior to making its decision. Therefore, the Court will not overturn the Commission's decision on this basis.

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<sup>17</sup> See *Speers*, 449 A.2d at 207.

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### **Conclusion**

Based upon the briefs submitted by the parties and the record of the proceeding below, the decision of the Delaware Harness Racing Commission finding that Jeffrey Lieberman violated Rules 8.5.1 and 8.5.2 when Storm Watch tested positive for dexamethasone after races on April 19, 2003 and April 29, 2003 is *affirmed*. In addition, the penalty assessed by the Commission is *affirmed*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

Judge

WLW/dmh

oc: Prothonotary

xc: Order Distribution

File