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STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CUMSC-AP-16-21

STEVEN VAFIADES,)
RANDY BICKMORE, AND)
W. DREW CAMPBELL,)

Petitioners)

v.)

MAINE STATE HARNESS RACING)
COMMISSION,)

Respondent)

STATE OF MAINE
Cumberland ss. Clerk's Office

JUN 09 2016

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ORDER ON MOTION TO STAY

Petitioners have filed an appeal for review of the Decision and Order (hereafter "Decision") of the Maine Harness Racing Commission (hereafter the "Commission"), dated April 26, 2016. The Decision suspended Petitioners' racing licenses, prohibit them from engaging in any horse racing activities in the State of Maine for between 270 and 450 days and imposed financial penalties and required forfeitures of purses.

Presently before the Court is Petitioners' motion to stay the Decision pending final resolution of their appeal, in keeping with M.R. Civ. P. 80C(b) and 5 M.R.S. § 11004. After careful consideration of the arguments advanced by the parties in their papers and orally before the Court on June 7, 2016, the motion is GRANTED.

I. BACKGROUND

Petitioners are Maine residents who have over the course of decades engaged in horse racing in Maine and throughout New England. During that time they have participated in the sport as owners, trainers and drivers of harness horses. The Maine Department of Agriculture,

Conservation and Forestry (hereafter the “Department”) alleged and the Commission after hearing concluded that Petitioners raced their horses with elevated levels of the naturally occurring element, cobalt, in their blood. The Commission concluded that cobalt is a “prohibited substance.” In arriving at its conclusion the Commission applied Commission Rule, Chapter 11, Section 4, sub-section 4, which provides as follows:

A substance shall not be present in a horse in excess of a concentration at which the substance would occur naturally if it affects the performance of the horse.

Petitioners contend that the administrative record before the Commission lacked competent and substantial evidence upon which to arrive at its conclusion. *See, e.g. Sinclair Builders, Inc. v. Unemployment Ins. Comm’n*, 2013 ME 76, 9, 73 A.3d 1061. Specifically, Petitioners argue that all of the experts agreed that no scientific study has been performed regarding the performance-enhancing effects of cobalt in horses. The Respondent’s concede that all of the expert witnesses agreed that there has not been a scientific study regarding cobalt levels as it relates to enhanced performance in horses. However, Respondent urges, that while no scientific study supporting the Commission’s conclusion has ever been conducted, two experts, Dr. Fenger and Dr. Matzkin, testified as to the “science” generally describing the physiological effects of cobalt as increasing red blood cell counts and helping mitigate the effects of “tying up,” a muscle cramping problem. As such, the Commission concluded that the presence of cobalt was “performance enhancing.”

The relative uncertainty regarding the use of cobalt was placed in further relief by the Commission’s early conclusion regarding the penalty class to be used in this case. Initially, the Commission concluded, “Cobalt’s potential to influence performance is high.” Ultimately the Commission concluded that cobalt should be included in the class 3 schedule which includes

substances described as having a therapeutic indication in the horse and which have a “low potential to influence performance.”

II. ANALYSIS

The court is guided by 5 M.R.S. §11004, which sets out the requisite elements of a successful motion to stay of final agency action. A stay may issue only if Petitioner can demonstrate all of the following:

1. Irreparable injury to the petitioner;
2. no substantial harm to adverse parties or the general public; and
3. a strong likelihood of success on the merits.

5 M.R.S. §11004.

The Court is satisfied that the Petitioners will suffer irreparable harm. The penalties imposed are substantial, including license suspensions ranging from 270 to 450 days, fines in the thousands of dollars and repayment of all purses that Petitioners have won in affected races. While Respondent calls into question the amount of income that the Petitioners will lose, it is undisputed for purposes of the present motion that the amount is substantial and likely to cause a significant disruption to their personal and professional lives. Respondent refers the Court to the Department of Labor statistics for comparable income producing jobs, such as roofing and painting. This point is of no moment to the Court’s analysis.

A stay of the discipline imposed on the Petitioners while the underlying appeal is resolved does not present substantial harm either to the parties or to the general public. The Court accepts the representation by counsel for the Petitioners that the participants in local harness racing are now properly on notice regarding the use of cobalt. The Court perceives no harm to the public or the parties as a result.

The Petitioners have demonstrated a likelihood of success on the merits. Petitioners raise several issues on appeal but offer only one to support the motion to stay; to wit, that the Commission concluded that cobalt affected the performance of horses without any competent record evidence to do so. It is true that the Court does not weigh the relative merits of competing experts' testimony but rather determines whether there was competent and substantial record evidence on the whole for the Commission to have concluded as it did. The record is not sufficiently clear for the Court to conclude in the affirmative.

The Commission found that "Cobalt at a level of 50 parts per billion is in excess of the concentration at which the substance would occur naturally."¹ The Commission also concluded "Cobalt is performance enhancing." The Commission bottomed the latter conclusion on the testimony of Dr. Fenger and Dr. Matzkin. Dr. Matzkin's opinion essentially was that cobalt was being administered to horses to increase the red blood cell count, which in turn could make the carrying of oxygen to the muscles more efficient. This observation by Dr. Matzkin was based upon what he was hearing around the track not whether it in fact was increasing the red blood cell count, and if so, at what quantum of cobalt measured in the blood beyond that which is naturally occurring did it have a performance effect, if any. Dr. Matzkin testified that cobalt is performance enhancing in other species but that there have been no studies to demonstrate its effect in horses. When asked if she considered cobalt supplements to a racehorse to be a performance enhancing substance, Dr. Fenger replied, "no." *Fenger* Tr. 230, lines 9-12.

The record reflects a study funded by the USTA the purpose of which is to establish a dose response curve regarding cobalt in horses. *Fenger*, T. 123, p. 226, line 11-24. This

¹ This threshold apparently was adopted from the RCI article but was not the basis for any expert testimony in the case, and was not identified as such in the various iterations of the Department's expert witness designations.

suggests a subtlety in the record, which appears to be lacking, but which is significant. The rule proscribes a substance in amounts greater than that which occurs naturally and which affects performance. These are separate inquiries. Merely because the first part of the rule is answered in the affirmative, does not lead to an affirmative response to the second part of the rule. The record is not clear that there was competent evidence before the Commission to demonstrate that cobalt measurements in the blood resulted in physiological changes, which in turn were “performance enhancing” or had the potential to be “performance enhancing.” The Court is mindful that conflicting competent evidence is not enough to demonstrate a lack of competent evidence. However, when the evidence upon which the fact finder expressly relied does not appear to support the conclusion it reached, the Court cannot ignore this paucity in its appellate capacity even in light of the deference the Court properly affords the agency.

As an independent but related basis for granting Petitioners’ motion to stay, the Court is troubled by what appears to be a dubious notification to licensees regarding the testing for cobalt and the timing and use of the ARCI report relative to the enforcement action taken against the Petitioners. The Court eagerly looks forward to the parties’ submissions regarding these issues as the case unfolds. At this point it is enough to simply observe that basic notions of due process apply to state agencies with the same solemnity as they do in our courts. It is unclear to the Court why the promulgation of a rule after notice and hearing on the issue of the use of cobalt in horses was not explored in lieu of an enforcement action regarding such a complex issue that is as yet unsupported by any reliable data. The Commission is responsible in the first instance for enforcing its own rules. However, this particular rule requires a rather complex analysis of whether and in what amounts cobalt enhances performance, which requires evidence of equal qualitative value. Absent evidence that is equal to the rigor required by the rule, the Commission


may wish to exercise its rule-making authority for the salutary benefit it seeks to advance, which also may provide greater predictability and transparency to the licensees. For now, the potential procedural infirmities are sufficient for the Court to grant Petitioners' motion to stay.

III. CONCLUSION

Based on the foregoing, Petitioners' motion to stay is granted.

The Clerk is directed to enter this Order on the civil docket by reference pursuant to Maine Rule of Civil Procedure 79(a).

Date: June 8, 2016



Lance E. Walker
Justice, Superior Court