WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION

Form #5

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OFFICE WEST VIRGINIA SECRETARY OF STATE

NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW

AGENCY: West Virginia Racing Commission TITLE NUMBER: 178

CITE AUTHORITY: WV Code 19-23-6(3)

RULE TYPE: PROCEDURAL x INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

_____

AMENDMENT TO AN EXISTING RULE: YES x NO ____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

TITLE OF RULE BEING AMENDED: Due Process and Hearings

_____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

_____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS April 21, 2012

Authorized Signature

TITLE 178
PROCEDURAL RULE
RACING COMMISSION

SERIES 6
DUE PROCESS AND HEARINGS

§178-6-1. General.

1.1. Scope. -- This rule specifies the procedure for hearings conducted before the Boards of Stewards, the Boards of Judges and the West Virginia Racing Commission.

1.2. Authority. -- W. Va. Code §19-23-6(3).

1.3. Filing Date. -- March 22, 2012

1.4. Effective Date. -- April 21, 2012

§178-6-2. Definitions.

As used in this rule and unless the context clearly requires a different meaning, the following terms have the meaning ascribed in this section.

2.1. "Appeal" means a request for the Racing Commission or its designee to consider and review any decisions or rulings of the stewards/judges of a meeting or to consider and review the ejection of an occupational permit holder by an association as authorized by 178 CSR 1, § 6.1. and 178 CSR 2, § 6.1.

2.2. "Association" or "racing association" means any individual, partnership, firm, association, corporation or other entity or organization of whatever character or description licensed by the Racing Commission to conduct horse or dog racing and pari-mutuel wagering.

2.3. "Clear and convincing evidence" means evidence which results in a reasonable certainty of the truth of the ultimate fact in controversy.

2.4. "Complaint" means a written allegation of a violation of the rules of racing and/or W. Va. Code § 19-23-1 *et seq.*

2.5. "Day" means a calendar day.

2.6. "De novo" means a new hearing or a hearing for a second time conducted in the same or a similar manner in which the matter was originally heard and with a review of the previous hearing.

2.7. "Ejection" or "ejection by an association" and "exclusion" or "exclusion by an association" mean the refusal of an association to admit onto or to allow a permit holder to remain on its grounds, either of which is subject to appeal to the Racing Commission pursuant to 178 CSR 1, § 6.1. and 178 CSR 2, § 6.1.

2.8. "Judge" means a duly appointed greyhound racing official with powers and duties specified by W. Va. Code § 19-23-1 *et seq.* and/or 178 CSR 2.

2.9. "Licensee" means any racing association holding a license required by W. Va. Code § 19-23-1 *et seq.*

2.10. "Permit holder" means any person holding a permit required by W. Va. Code § 19-23-1 *et seq.*

2.11. "Preponderance of the evidence" means evidence which is of a greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

2.12. "Steward" means a duly appointed thoroughbred racing official with powers and duties specified by W. Va. Code § 19-23-1 *et seq.* and/or 178 CSR 1.

§178-6-3. Proceedings by the Stewards/Judges.

3.1. Rights of Permit Holder. A permit holder who is the subject of a disciplinary hearing conducted by the stewards/judges is entitled to:

3.1.a. Proper notice of all charges;

3.1.b. Confront the evidence presented;

3.1.c. The right to counsel at the permit holder's expense;

3.1.d. The right to examine all evidence presented against him/her;

3.1.e. The right to present a defense;

3.1.f. The right to call witnesses;

3.1.g. The right to cross-examine witnesses; and,

3.1.h. The right to waive any of the above rights.

3.2. Complaints.

3.2.a. On their own motion or on receipt of a written complaint regarding the actions of a permit holder, the stewards/judges may conduct an investigation and, if warranted, a disciplinary hearing regarding the permit holder's actions.

3.3. Summary Suspension.

3.3.a. If the stewards/judges determine that a permit holder's actions constitute an immediate danger to the public health, safety or welfare, they may summarily suspend a permit pending a hearing.

3.3.b. A permit holder whose permit has been summarily suspended is entitled to a hearing not later than ten (10) days after the permit was summarily suspended. The permit holder may waive his/her right to a hearing on the summary suspension within the ten (10) day limit.

3.3.c. The stewards/judges shall conduct a hearing after imposing a summary suspension in the same manner as other disciplinary hearings.

3.4. Notice.

3.4.a. Except as provided by this rule regarding summary suspensions, the stewards/judges shall provide written notice at least twenty-four (24) hours before the hearing to the permit holder who is the subject of the disciplinary hearing. A permit holder may waive his/her right to such notice by executing a written waiver. In cases involving a disqualification during the running of a greyhound race or a thoroughbred race, or in cases involving a riding infraction during the running of a thoroughbred race, neither notice nor a hearing is required under this rule.

3.4.b. Notice given under this subsection shall include:

3.4.b.1. A statement of the time, place and nature of the hearing;

3.4.b.2. A statement of the legal authority and jurisdiction under which the hearing is to be held;

3.4.b.3. A reference to the particular sections of the statutes or rules involved;

3.4.b.4. A short, plain description of the alleged conduct that has given rise to the disciplinary hearing; and

3.4.b.5. A statement summarizing the rights of the permit holder as outlined in this rule.

3.4.c. If possible, the stewards/judges or their designee shall hand deliver the written notice of disciplinary hearing to the permit holder who is the subject of the hearing. If hand delivery is not possible, the stewards/judges shall mail the notice to the permit holder's last known address, as found in the Racing Commission's permit files, by certified mail, return receipt requested. If the disciplinary hearing involves an alleged medication violation that could result in the disqualification of a thoroughbred, the stewards shall provide notice of the hearing to the thoroughbred owner, managing owner, or lessee of the thoroughbred in the manner provided in this subsection. If the disciplinary hearing involves an alleged medication violation that could result in the disqualification of a greyhound, the judges shall provide notice of the hearing to the greyhound owner, greyhound kennel owner, or the trainer of the greyhound in the manner provided in this subsection.

3.4.d. Nonappearance of a summoned permit holder after adequate notice shall be deemed as an admission of the charges set forth in the notice of hearing and a waiver of the right to a hearing before the stewards/judges.

3.5. Continuances.

3.5.a. Upon receipt of a notice, a permit holder may request a continuance of the hearing.

3.5.b. The stewards/judges may grant a continuance of any hearing for good cause shown.

3.5.c. The stewards/judges may at any time order a continuance on their own motion.

3.6. Evidence.

3.6.a. All hearings shall be conducted by no less than a majority of the stewards/judges.

3.6.b. Each witness at a hearing conducted by the stewards/judges shall be sworn by the stewards/judges.

3.6.c. The stewards/judges shall allow a full presentation of evidence and are not bound by the technical rules of evidence. However, they may disallow evidence that is irrelevant or unduly repetitive of other evidence. The stewards/judges shall have the authority to determine, in their sole discretion, the weight and credibility of any evidence and/or testimony. The stewards/judges may admit hearsay evidence if the stewards/judges determine the evidence is of a type that is commonly relied on by reasonably prudent people. The rules of privilege recognized by West Virginia law apply in hearings before the stewards/judges.

3.6.d. The burden of proof is on the stewards/judges to show, by a preponderance of the evidence, that the permit holder has violated or is responsible for a violation of a statute or a Racing Commission rule. However, the burden is on the permit holder to prove by a preponderance of the evidence any defense that he or she may present.

3.6.e. All hearings shall be recorded. A copy of the recording or a transcript of the recording shall be provided to the permit holder or any interested person upon request. The cost of providing a copy of the recording or a transcript of the recording may be assessed against the requesting party in the discretion of the stewards/judges.

3.7. Representation.

3.7.a. A permit holder who is the subject of a disciplinary hearing before the stewards/judges may represent himself or herself; may be represented by a lay representative of any racing trade organization to which he or she is a member; or, may be represented by legal counsel licensed to practice law in the State of West Virginia. Attorneys who are not licensed to practice law in the State of West Virginia must comply with Rule 8.0, Admission Pro Hac Vice, of the West Virginia Rules for Admission to the Practice of Law, before representing any permit holder in disciplinary matters pending before the stewards/judges. Representation of a permit holder includes any communication with the stewards/judges on behalf of the permit holder; the filing or making of motions or any other written or oral requests on behalf of a permit holder; and, appearing before the stewards/judges on behalf of a permit holder.

3.8. Rulings.

3.8.a. The issues at a disciplinary hearing shall be decided by a majority vote of the stewards/judges. If the vote is not unanimous, the dissenting steward/judge shall include with the record of the hearing a written statement of the reason(s) for the dissent.

3.8.b. A ruling by the stewards/judges shall, at a minimum, include:

3.8.b.1. The full name, date of birth, last record address, permit type and permit number of the person who is the subject of the hearing;

3.8.b.2. A statement of the substantiated charges against the permit holder, including a reference to the specific section of the statutes or rules that the permit holder is found to have violated;

3.8.b.3. The date of the hearing and the date the ruling was issued;

3.8.b.4. The penalty imposed;

3.8.b.5. Any changes in the order of finish or purse distribution;

3.8.b.6. Information on the permit holder's right to appeal the ruling to the Racing Commission; and,

3.8.b.7. Other information required by the Racing Commission.

3.8.c. A ruling shall be signed by all three stewards/judges. However, in the event that the ruling is not unanimous, the ruling shall be signed by a majority of the stewards/judges with the dissenting steward/judge noting the reasons for his or her dissent.

3.8.d. If possible, the stewards/judges or their designee shall hand deliver a copy of the ruling to the permit holder who is the subject of the ruling. If hand delivery is not possible, the stewards/judges shall mail the ruling to the permit holder's last known address, as found in the Racing Commission's permit files, by certified mail, return receipt requested. A copy of the ruling shall be submitted to the NAPRA or RCI Ruling Database. If the ruling includes the disqualification of a greyhound, the judges shall provide a copy of the ruling to the owner of the greyhound. If the ruling includes a disqualification of a thoroughbred, the stewards shall provide a copy of the ruling to the owner of the horse, the horsemen's bookkeeper and the appropriate past performance service(s).

3.8.e. All fines imposed by the stewards/judges shall be paid to the Racing Commission within seven (7) calendar days after the ruling is issued, unless otherwise ordered by the stewards/judges.

3.9. Effect of Rulings.

3.9.a. Rulings against a permit holder apply to another person if continued participation in an activity by the other person would circumvent the intent of the ruling by permitting the person to serve, in essence, as a substitute for the ineligible permit holder.

3.9.b. The transfer of a thoroughbred or greyhound to avoid application of a Racing Commission rule or ruling by the stewards/judges is prohibited.

3.10. Appeals.

3.10.a. A permit holder aggrieved by a ruling of the stewards/judges may appeal to the Commission, except as provided in subdivision 3.10.g. of this subsection. A person who fails to file an appeal by the deadline set forth in this rule waives the right to appeal.

3.10.b. An appeal under this subsection must be filed with the Commission's executive director at the Racing Commission's principal office no later than twenty (20) days after the stewards/judges ruling is received by the permit holder.

3.10.c. An appeal shall be in writing on a form prescribed by the Racing Commission. The appeal shall include:

3.10.c.1. The name, address, telephone number and signature of the person making the appeal;

3.10.c.2. A statement of the basis of the appeal; and,

3.10.c.3. A sworn, notarized statement that the appealing party has a good faith belief that the appeal is meritorious and is not taken merely to delay the penalty imposed by the stewards/judges.

3.10.d. A permit holder who appeals shall pay security for hearing costs in the amount of one-hundred dollars ($100.00). This security fee shall be paid to the Racing Commission at the same time the appeal is filed. In the event that the Racing Commission determines that the fee is insufficient to cover the anticipated costs of holding the appeal hearing, the appealing permit holder may be required to pay an additional security for costs as specified by the Racing Commission. Such additional security fees shall be deposited with the Racing Commission within ten (10) days after notification. If the permit holder substantially prevails in an appeal hearing before the Racing Commission, the Commission may order a refund of all or part of any security fee paid by the permit holder. If a permit holder does not substantially prevail in an appeal hearing before the Racing Commission, the Commission may assess the costs of the appeal hearing incurred in excess of the security fee.

3.10.e. On notification by the Racing Commission that an appeal has been filed, the stewards/judges shall forward to the Racing Commission the record of the stewards'/judges' proceeding on which the appeal is based.

3.10.f. If a person against whom a fine has been assessed files an appeal of the ruling that assesses the fine, the person shall pay the fine in accordance with this rule, unless the ruling is stayed in accordance with this rule. If the fine is paid before disposition of the appeal and the appeal is resolved in favor of the permit holder, the Racing Commission shall refund the amount of the fine.

3.10.g. A decision by the judges regarding a disqualification of a greyhound during the running of the race is final and may not be appealed to the Racing Commission. However, any permit holder fined or suspended as a result of circumstances giving rise to a disqualification of a greyhound is entitled to appeal a ruling on the suspension or fine only. The Racing Commission's decision on such an appeal shall not affect the disqualification.

3.11. Stays.

3.11.a. A person who has been disciplined by a ruling of the stewards/judges may apply for a stay to the Racing Commission or to the member of the Racing Commission designated to rule upon stay requests.

3.11.b. An application for a stay must be filed with the Commission's executive director at the Racing Commission's principal office no later than the deadline for filing an appeal.

3.11.c. An application for a stay must be in writing on a form prescribed by the Racing Commission and shall include:

3.11.c.1. The name, address, telephone number and signature of the person requesting the stay;

3.11.c.2. A statement of the justification for the stay; and,

3.11.c.3. A sworn, notarized statement that party requesting the stay has a good faith belief that the stay request is meritorious and is not taken merely to delay the penalty imposed the stewards/judges.

3.11.d. The granting of a stay is an extraordinary remedy. The Racing Commission or the member of the Racing Commission designated to rule upon stay requests may grant or deny a stay request after considering and balancing the following factors:

3.11.d.1. The likelihood that the permit holder requesting the stay will prevail upon the merits of his or her appeal.

3.11.d.2. The likelihood of irreparable harm to the permit holder if a stay is denied pending disposition of his or her appeal.

3.11.d.3. The likelihood of irreparable harm to the association if a stay is granted pending disposition of the permit holder's appeal.

3.11.d.4. The public interest.

3.11.d.5. Any other information deemed relevant by the Commission or the member designated to rule upon stay requests.

3.11.e. Rulings on stay requests shall be issued in writing to the person requesting the stay. The Racing Commission or the member of the Racing Commission designated to rule upon stay requests may rescind a stay granted under this subsection taking into account only a change in circumstances or new information not available at the time of the original grant of stay, and reconsideration and rebalancing the factors set forth in subdivision 3.11.d. in light of such change or new information .

3.11.f. The fact that a stay is granted is not a presumption that the ruling issued by the stewards/judges is invalid.

§178-6-4. Proceedings by the Commission.

4.1. Rights of Permit Holder, Licensee or Other Person.

4.1.a. A permit holder who is the subject of a disciplinary hearing who has filed an appeal to the Racing Commission from a stewards'/judges' ruling; a permit holder who has filed an appeal to the Racing Commission as a result of an ejection by an association and the association that is the respondent in the appeal; or a licensee who is the subject of a disciplinary hearing before the Racing Commission; or, any

other person under the jurisdiction of the Racing Commission who seeks relief from the Racing Commission, is entitled to:

4.1.a.1. Proper notice of all charges alleged by the stewards/judges and/or Racing Commission or, in the case of an ejection by an association, notice of the reason for the ejection, as stated by the association;

4.1.a.2. Confront the evidence presented;

4.1.a.3. The right to counsel at the permit holder's, licensee's or person's expense;

4.1.a.4. The right to examine all evidence presented against him/her/it;

4.1.a.5. The right to present a defense;

4.1.a.6. The right to call witnesses;

4.1.a.7. The right to cross-examine witnesses;

4.1.a.8. The right to request subpoenas and subpoenas duces tecum; and,

4.1.a.9. The right to waive any of the above rights.

4.2. Permit Holder Appeal of Ejection by Association.

4.2.a. A permit holder aggrieved by an ejection of an association may appeal to the Commission pursuant to 178 CSR 1, § 6.1. and 178 CSR 2, § 6.1. The Racing Commission may refuse to hear an appeal from an ejected permit holder who has been ejected in connection with his or her suspension or termination from employment with the association.

4.2.b. An appeal under this subsection must be filed with the Commission's executive director at the Racing Commission's principal office no later than twenty (20) days after the written ejection notice is received by the permit holder, or no later than thirty (30) days after the association receives the permit holder's written request to reenter.

4.2.c. The association must provide an ejected permit holder a written statement of all of the reasons for the ejection no later than twenty-four (24) hours after the permit holder is ejected.

4.2.d. An appeal shall be in writing on a form prescribed by the Racing Commission. The appeal shall include:

4.2.d.1. The name, address, telephone number and signature of the permit holder making the appeal;

4.2.d.2. A statement of the basis of the appeal;

4.2.d.3. A sworn, notarized statement that the appealing permit holder has a good faith belief that the appeal is meritorious; and,

4.2.d.4. A copy of the ejection notice received by the permit holder.

4.2.e. A copy of an appeal of an ejection filed by a permit holder shall be provided by the Racing Commission to a person designated by the association to receive the appeal on its behalf.

4.2.f. A permit holder who appeals an ejection shall pay security for the Commission's hearing costs in the amount of one-hundred dollars ($100.00). This security fee shall be paid to the Racing Commission at the same time the appeal is filed. In the event that the Racing Commission determines that the fee is insufficient to cover the anticipated costs of holding the appeal hearing, the appealing permit holder may be required to pay an additional security for costs as specified by the Racing Commission. Such additional security fees shall be deposited with the Racing Commission within ten (10) days after notification. If the permit holder substantially prevails in an ejection appeal hearing before the Racing Commission, the Commission may order a refund of all or part of any security fee paid by the permit holder.

4.3. Stays of Ejection of Permit Holder by Association.

4.3.a. A permit holder who has been ejected by an association may apply for a stay to the Racing Commission or to the member of the Racing Commission designated to rule upon stay requests.

4.3.b. An application for a stay must be filed with the Commission's executive director at the Racing Commission's principal office. An application for stay will not be considered or ruled upon unless and until the permit holder has filed an appeal of the ejection in accordance with subsection 4.2. of this rule.

4.3.c. An application for a stay must be in writing on a form prescribed by the Racing Commission and shall include:

4.3.c.1. The name, address, telephone number and signature of the person requesting the stay;

4.3.c.2. A statement of the justification for the stay; and,

4.3.c.3. A sworn, notarized statement that the permit holder requesting the stay has a good faith belief that the stay request is meritorious and is not taken merely to delay the effect of the ejection imposed by the association.

4.3.d. A copy of a stay request filed by an ejected permit holder shall be provided by the Racing Commission to a person designated by the association to receive the stay request on its behalf.

4.3.e. The association may respond in writing to a stay request filed by an ejected permit holder. Such response shall be filed with the Commission's executive director by a deadline established by the Commission or the member of the Racing Commission designated to rule upon stay requests. A copy of such response shall be served upon the permit holder by the association.

4.3.f. The granting of a stay is an extraordinary remedy. The Racing Commission or the member of the Racing Commission designated to rule upon stay requests may grant or deny a stay request after considering and balancing the following factors:

4.3.f.1. The likelihood that the permit holder requesting the stay will prevail upon the merits of his or her ejection appeal.

4.3.f.2. The likelihood of irreparable harm to the permit holder if a stay is denied pending disposition of his or her ejection appeal.

4.3.f.3. The likelihood of irreparable harm to the association if a stay is granted pending disposition of the permit holder's ejection appeal.

4.3.f.4. The public interest.

4.3.f.5. Any other information deemed relevant by the Commission or the member designated to rule upon stay requests.

4.3.g. Rulings on stay requests shall be issued in writing to the parties. The Racing Commission or the member of the Racing Commission designated to rule upon stay requests may rescind a stay granted under this subsection taking into account only a change in circumstances or new information not available at the time of the original grant of stay, and reconsideration and rebalancing the factors set forth in subdivision 4.3.f. in light of such change or new information.

4.3.h. The fact that a stay is granted is not a presumption that the ejection imposed by the association is invalid.

4.4. Notice.

4.4.a. Upon receipt of a written appeal by a permit holder from a stewards'/judges' ruling or an ejection by an association, the Racing Commission shall set a time and place for the appeal hearing not less than ten (10) nor more than thirty (30) days after receipt of the appeal. The permit holder may waive his/her right to a hearing within the above-referenced time frame by executing a written waiver. The Commission or a hearing examiner appointed by the Racing Commission may grant an extension of the above-referenced time frame for hearing for good cause shown.

4.4.b. In any matter instituted by the Racing Commission against a licensee or upon a permit holder's appeal from an ejection by an association, the Racing Commission shall provide no less than (10) days notice of the hearing.

4.4.c. The Racing Commission shall serve a notice of hearing by certified mail, return receipt requested, to the parties' last known address, as found in the Commission's permit or licensing files, or by personal service.

4.4.d. A notice of hearing shall include:

4.4.d.1. Statement of time, place and nature of the hearing;

4.4.d.2. Statement of the legal authority and jurisdiction under which the hearing is to be held;

4.4.d.3. Reference to the particular sections of the statutes and rules involved;

4.4.d.4. Short, plain statement of the matters asserted; and,

4.4.d.5. Any other statement required by law.

4.4.e. A party to the proceeding may move to postpone the hearing. The motion must be in writing; must set forth the specific grounds on which it is sought; and, must be filed with the Racing Commission before the date set for the hearing. If the Racing Commission, or a hearing examiner appointed by the Racing Commission, grants the motion for postponement, the Racing Commission shall cause new notice to be issued.

4.4.f. After a hearing has begun, the Racing Commission, or a hearing examiner appointed by the Racing Commission, may grant a continuance on oral or written motion, without issuing new notice, by announcing the date, time and place for reconvening the hearing before recessing the hearing.

4.4.g. If a party to a proceeding before the Racing Commission fails to appear after adequate notice, the Racing Commission may deem the charges alleged by the stewards/judges and/or Racing Commission set forth in the notice of hearing as admitted by the non-appearing party and may dismiss the proceedings before the Racing Commission. If a party to a proceeding before the Racing Commission pertaining to an association ejection fails to appear after adequate notice, the Racing Commission may grant a default ruling against the non-appearing party and may dismiss the proceedings before the Racing Commission.

4.5. Subpoenas, Subpoenas Duces Tecum and Oaths or Affirmations.

4.5.a. Any member of the Racing Commission, or a hearing examiner appointed by the Racing Commission, may issue subpoenas to compel the testimony of witnesses and subpoenas duces tecum to compel the production of documents, books, records, papers and other items.

4.5.b. Any party requesting the issuance of subpoenas or subpoenas duces tecum shall be responsible for proper service and payment of fees for the attendance and travel of witnesses in accordance with the requirements of W. Va. Code § 29A-5-1(b).

4.5.c. Any member of the Racing Commission, or a hearing examiner appointed by the Racing Commission, may administer oaths or affirmations to witnesses appearing before the Racing Commission.

4.6. Reporters and Transcripts.

4.6.a. The Racing Commission shall engage a court reporter to make a record of the hearing. The Racing Commission may allocate the costs of the reporter and any transcript produced among the parties.

4.6.b. If a person requests a transcript of the record, the Racing Commission may assess the costs of preparing the transcript to the person.

4.7. Nature of Hearings.

4.7.a. A hearing on an appeal by a permit holder from a decision of the stewards/judges shall be de novo. The Racing Commission shall have the burden of proving by a preponderance of the evidence that the permit holder has violated or is responsible for a violation of a statute or a Racing Commission rule. However, upon appeal by a permit holder of a decision of the stewards regarding a disqualification of a thoroughbred during the running of the race, the appeal hearing before the Racing Commission shall not be de novo and the burden shall be on the permit holder to prove by clear and convincing evidence that the stewards committed plain error in their decision. In the event that a permit holder appeals a stewards'

decision regarding a disqualification during the running of the race and does not prevail, he or she shall be assessed interest on any purse which may be held during the pendency of the appeal. Such assessment shall be collected by the Racing Commission and paid to the owner of the horse who moves up in the finish of the race as a result of the stewards' disqualification decision. The rate of interest shall be three (3) percentage points above the Fifth Federal Reserve District secondary discount rate in effect on the second day of January of the year in which the assessment is entered. Provided, that the rate of interest shall not exceed eleven (11) percent per annum or be less than seven (7) percent per annum. In addition, pursuant to the provisions of subdivision 3.10.d. of this rule, the Commission may assess the costs of the hearing incurred in excess of the one hundred dollar ($100.00) security fee against the appealing permit holder.

4.7.b. The Racing Commission may reject, affirm, or modify any penalty or disciplinary action imposed by the stewards/judges.

4.7.c. In any hearing on a matter instituted by the Racing Commission against a licensee, the Commission shall have the burden of proving by a preponderance of the evidence that the licensee has violated or is responsible for a violation of a statute or a Commission rule.

4.7.d. In any hearing on an appeal by a permit holder of an ejection by an association, the association shall have the burden of proving by a preponderance of the evidence that the permit holder acted improperly or engaged in behavior that is otherwise objectionable pursuant to 178 CSR 1, § 6.2. or 178 CSR 2, § 6.2.

4.7.e. The Racing Commission may reject, affirm, or modify any ejection imposed by the association on a permit holder, and the association and the permit holder shall abide by any orders, restrictions or conditions issued by the Commission in connection with its decision on the ejection appeal.

4.7.f. All hearings before the Racing Commission are open to the public. However, witnesses may be excluded or sequestered.

4.8. Conducting of Hearings.

4.8.a. A quorum of the Racing Commission and/or a hearing examiner appointed by the Racing Commission who is licensed to practice law in the State of West Virginia shall conduct and preside over Commission hearings.

4.8.b. The Racing Commission or its appointed hearing examiner may:

4.8.b.1. Issue subpoenas and subpoenas duces tecum;

4.8.b.2. Administer oaths or affirmations;

4.8.b.3. Receive evidence;

4.8.b.4. Rule on the admissibility of evidence;

4.8.b.5. Examine witnesses;

4.8.b.6. Set reasonable times within which a party may present evidence and within which a witness may testify;

4.8.b.7. Permit and limit oral argument;

4.8.b.8. Issue orders and findings of fact and conclusions of law;

4.8.b.9. Require written arguments to be filed by the parties;

4.8.b.10. Take notice of any and all judicially cognizable facts;

4.8.b.11. Regulate the course of the hearing; and,

4.8.b.12. Perform other duties necessary to a fair and proper hearing.

4.9. Evidence.

4.9.a. All testimony of witnesses before the Racing Commission must be given under oath or affirmation. The Racing Commission or its appointed hearing examiner may limit the number of witnesses and may exclude all irrelevant, immaterial or unduly repetitious evidence.

4.9.b. The Racing Commission and/or its appointed hearing examiner shall allow a full presentation of evidence and are not bound by the technical rules of evidence. The Racing Commission and/or its appointed hearing examiner shall have the authority to determine, in their sole discretion, the weight and credibility of any evidence and/or testimony. The Racing Commission and/or its appointed hearing examiner may admit hearsay evidence if it is determined that the evidence is of a type that is commonly relied on by reasonably prudent people. The rules of privilege recognized by West Virginia law apply in hearings before the Racing Commission.

4.10. Representation.

4.10.a. A person who is the subject of a hearing before the Racing Commission may represent himself or herself or may be represented by legal counsel licensed to practice law in the State of West Virginia. Attorneys who are not licensed to practice law in the State of West Virginia must comply with Rule 8.0, Admission Pro Hac Vice, of the West Virginia Rules for Admission to the Practice of Law, before representing any party involved in a matter before the Racing Commission. Representation of a party includes any communication with the Racing Commission or its agents on behalf of the party, the filing or making of motions or any other written or oral requests on behalf of a party, and, appearing before the Racing Commission or its appointed hearing examiner on behalf of a party.

4.11. Decisions.

4.11.a. If a hearing is conducted by a hearing examiner appointed by the Racing Commission, he/she shall issue a written recommended decision containing proposed findings of fact and conclusions of law to the Racing Commission. The hearing examiner shall mail a copy of his recommended decision to all parties to the proceeding.

4.11.b. Upon receipt of a recommended decision from an appointed hearing examiner, the Racing Commission shall consider the recommendation in a meeting noticed in accordance with the West Virginia Open Governmental Proceedings Act, W. Va. Code § 6-9A-1 *et seq*. The Racing Commission may:

4.11.b.1. Adopt or modify the recommended decision, in whole or in part;

4.11.b.2. Decline to adopt the recommended decision, in whole or in part;

4.11.b.3. Remand the proceeding for further examination by the hearing examiner; or,

4.11.b.4. Direct the hearing examiner to give further consideration to the proceeding with or without reopening the hearing.

4.11.c. If the Racing Commission modifies or declines to adopt a recommended decision of an appointed hearing examiner, either in whole or in part, it shall issue a reasoned, articulate explanation and a recitation of the underlying evidence or other matters upon which it bases its decision and particularized findings of fact and conclusions of law that support its decision.

4.11.d. If a hearing is conducted by a quorum of the Racing Commission it shall issue a written decision containing findings of fact and conclusions of law.

4.12. Orders.

4.12.a. The Racing Commission shall issue a final order in all matters heard before it. The Racing Commission's order shall be in writing and shall be signed by the Chairman.

4.12.b. The Racing Commission shall serve a copy of a final order upon all parties to the proceeding by certified mail, return receipt requested, or by personal service.

4.12.c. A final order of the Racing Commission takes effect on the date the order is entered, unless otherwise stated in the order.

4.12.d. The Racing Commission shall submit copies of all final orders to the NAPRA or RCI Ruling Database.

§178-6-5. Rulings In Other Jurisdictions.

5.1. Reciprocity.

5.1.a. The Racing Commission and the stewards/judges shall honor rulings, decisions and final orders from other racing jurisdictions regarding permit or license suspensions, revocations, and eligibility.

5.2. Appeals of Reciprocal Rulings.

5.2.a. Persons subject to rulings, decisions and final orders in other racing jurisdictions shall have the right to request a hearing before the Racing Commission or a hearing examiner appointed by the Racing Commission to show cause why such ruling should not be enforced in West Virginia.

5.2.b. Any request for such hearing must clearly set forth in writing the reasons for the appeal.

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FEDERAL EXPRESS

Re: Comments on Behalf of PNGI Charles Town Gaming, LLC
to Proposed Amendments to 178 W.Va. Code of State Rules, Series 6

Dear Commissioners:

On behalf of PNGI Charles Town Gaming, LLC d/b/a Hollywood Casino at Charles Town Races ("HCCTR"), I hereby submit the following comments to the proposed amendments to the Due Process and Hearings Rules of the West Virginia Racing Commission ("Racing Commission"), published for public comment on January 19, 2012.

OVERVIEW

Licensed racing associations are partners with the Racing Commission in preserving the integrity of thoroughbred racing in this state. The right of racing associations to exclude from their premises persons they believe to be harmful to racing is entirely consistent with the state's regulation of the sport. For decades, the racing associations and the Racing Commission have worked together, using the powers and rights available to them, to uphold the fairness, transparency, and integrity of horse racing.

The right most important to a racing association's ability to preserve the integrity of racing is the power to exclude those who would harm its business. A racing association's power to

exclude is not derived from statute or regulation; instead, it is a right rooted in the common law. *See PNGI Charles Town Gaming, LLC v. Reynolds,* --- S.E.2d ----, 2011 WL 5830424 (W.Va.) ("The concept of allowing a licensed racing association like CTR&S to eject a person from its grounds undoubtedly arises from the common law.") Accordingly, any limitation imposed on that right by the state must be clear and unequivocal.

Mindful of the need to balance the state's interest in protecting the public against the racing associations' private rights and interests in operating their businesses, the West Virginia Legislature placed the following limitation on the state's plenary power to supervise race meetings: "The Racing Commission shall not interfere in the internal business or internal affairs of any licensee." W.Va. Code § 19-23-6. In other words, the state's power to supervise racing does not allow it to interfere with the racing associations' internal business decisions.

Unfortunately, the Racing Commission's new proposed procedural rules violate the letter and spirit of W.Va. Code § 19-23-6 by granting the state nearly unlimited power to nullify the internal decisions of racing associations and substitute its own judgment for the business judgment of licensees.

HCCTR therefore submits the following comments and suggestions regarding the proposed rule changes.

COMMENTS

1. The proposed rule changes are substantive, inconsistent with the current statutory and common law, and would require approval by the legislature in order to become effective.

HCCTR objects to the Racing Commission's characterization of the new rules as merely procedural. The proposed rules make significant substantive changes to the law of exclusions which require legislative approval.

Currently, neither the West Virginia Code nor the Thoroughbred Racing Rules restrict a racing association's right to exclude. Racing associations may exclude persons for any reason not prohibited by law. *See Martin v. Monmouth Park Jockey Club,* 145 F.Supp. 439, 440 (D.N.J.1956), *aff'd,* 242 F.2d 344 (3d Cir.1957) ("Although it is intensely regulated, the defendant Club is a private organization. Nothing is more elementary than its right as a private corporation to admit or exclude any persons it pleases from its private property, absent some definite legal compulsion to the contrary."). State law does not, for instance, provide that racing associations may exclude only for "conduct detrimental to racing," or for interference with the "orderly conduct of a race meeting." Instead, the Thoroughbred Racing rules, part of the substantive law of this state, provide that racing associations "have the power to exclude ... persons acting improperly or whose behavior is otherwise objectionable." 178 W.Va. Code of State R. § 1-6.2 (effective July 10, 2011). Racing associations maintain the right to exclude anyone, including permit holders, for violations of the association's internal rules, whether or not those rules relate to racing. It is the broadest possible expression of the property right.

A. The new burden of proof would constitute a substantive change in the law of exclusions.

Instead of crafting procedural rules that apply the current substantive legal standards, the Racing Commission seeks to impose a new standard that significantly changes the law without legislative approval. Under Proposed Rule 178-6-4.7.d, an exclusion would not be upheld by the Racing Commission unless the racing association proves, by a preponderance of the evidence, "that the [ejected] permit holder's presence or conduct is detrimental to the best interests of racing or to the orderly conduct of a race meeting." Any exclusion that does not conform to this new standard can be reversed by the Racing Commission. *See* Proposed Section 178-6-4.7.e. This new rule would effectively modify the substantive law of this state by prohibiting any permit holder ejections that are not based on "conduct detrimental to racing" or interference "with the orderly conduct of a race meeting." The West Virginia Administrative Procedures Act provides that "[e]very rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule." W.Va. Code § 29A-1-2(d) (2007 Repl. Vol). Legislative rules "shall have full

force and effect only when authority for promulgation of the rule is granted by an act of the Legislature and the rule is promulgated pursuant to the provisions of [§ 29A-3-13]." W.Va. Code § 29A-3-9. Simply put, the Racing Commission has no power to change the substantive law of exclusions without legislative approval.

In order to be consistent with the common law and the Rules of Thoroughbred Racing governing exclusions, proposed Rule 4.7.d should instead place the burden of proof on the appealing permit holder to show that his exclusion is illegal. Absent such proof, the ejection should stand. Such a rule would preserve the racing association's longstanding substantive common law right to exclude anyone from its premises for any reason or no reason, so long as it does not exclude for an illegal reason.

B. The stay provision exceeds the Racing Commission's statutory powers and is unwise.

In addition, the proposed amendment granting the Racing Commission the new power to "stay" exclusions would also require legislative action. [1] Under the current law, the Racing Commission only has the power to stay decisions of the stewards and judges, not the racing associations. According to W.Va. Code § 19-23-16(c), "[u]pon the written request of any permit holder who has been adversely affected **by an order of the stewards or judges**, a stay may be granted by the Racing Commission, its chairman, or by a member of the commission designated by the chairman." W.Va. Code § 19-23-16(c). Consistent with this legislative grant of authority, the current Procedural Rule of the Racing Commission states that "[a] person who has been disciplined **by a ruling of the stewards/judges** may apply for a stay to the Racing Commission or to the member of the Racing Commission designated to rule upon stays." 178 C.S.R. § 6.3.11.a (effective July 10, 2011). Under the proposed amendments, the Racing Commission seeks to expand its

[1] The term "stay" is somewhat of a misnomer. A stay typically refers to an agency's or a court's decision to stop its own proceedings (or those of a lower tribunal) pending review. Unlike the stewards, who are state agents, racing associations are a private actors, and their decisions are not "rulings" or "orders" of the state which can be "stayed." Exclusion decisions, pursuant to W.Va. C.S.R. § 178-1-6.1 are subject to "appeal" but not stay. The Racing Commission can hold a hearing and review the exclusion, but prior to that hearing, it has no power to reverse, modify or stay the ejection.

power to stay beyond the rulings of the stewards to include the ejection decisions of racing associations. *See* Proposed Rule 178-6-4.3. While the Racing Commission now has the power to hear appeals of excluded permit holders, *see Reynolds, supra,* neither the West Virginia Code nor the *Reynolds* decision allows the Racing Commission to reverse an ejection--even temporarily--without an appeal hearing. Absent amendment of West Virginia Code § 19-23-16(c) to expand the Racing Commission's stay power to include exclusion decisions of racing associations, the Racing Commission has no power to issue stays of ejection decisions prior to appeal hearings. Proposed Rule 4.3 must be removed in its entirety.

The stay provision should also be eliminated because it is unwise and likely to be abused. The proposed stay rule does not provide an outside limit on the length of stays. An ejected permit holder could file an appeal, apply for and be granted a stay by the Racing Commission, then waive his right to a hearing within 30 days under Proposed Rule 4.4.a.[2] The hearing could then be rescheduled to a much later time, and the permit holder would be permitted to return to the grounds and race throughout those weeks or months. The seven jockeys in the Reynolds case used this "stay and waive" strategy to continue racing for more than a year before their appeals were decided by the Racing Commission. To this day, they continue to race, despite findings that they connived with the Clerk of Scales "in the commission of a corrupt practice" by engaging in "farcical" weigh outs. So long as a hearing is conducted promptly, the absence of a stay provision will not significantly affect permit holders' due process rights. *See Hubel v. West Virginia Racing Commission,* 376 F.Supp. 1 (S.D.W.Va.), *aff'd,* 533 F.2d 240 (4th Cir.1974). Permit holders will still be free to pursue relief in circuit court, if they so choose.

[2] Proposed Rule 4.4.a gives permit holders a waiver right, but does not give racing associations the right to insist on a speedy hearing where a stay has been granted to the permit holder. When the Racing Commission overrides an ejection decision with a stay, the racing association should be entitled to a hearing within 10-30 days regardless of whether the permit holder waives his own right. Unlike the State, which has no property right or business interests being impacted by a delay in proceedings, racing associations' property rights directly affected by stays. Each minute they are required to do business with undesirable persons, they are deprived of their most basic property rights.

2. Requiring racing associations to give a "reason" for an exclusion alters the common law.

A racing association has the common law right to exclude persons for any reason *or no reason*, as long as the exclusion is not for an illegal reason. *See, e.g. Brooks v. Chi. Downs Ass'n*, 791 F.2d 512, 513 (7th Cir.1986) (holding that "under Illinois law the operator of a horse race track has the absolute right to exclude a patron from the track premises for any reason, or no reason, except race, color, creed, national origin, or sex"). A broad rule such as Thoroughbred Racing Rule 6.2 that authorizes racing associations to eject any person deemed "objectionable" declares and preserves this common law right. *See Tamelleo v. N.H. Jockey Club, Inc.*, 102 N.H. 547, 163 A.2d 10, 13 (1960) (regulation authorizing licensed racetrack to eject any person the licensee deems objectionable is "substantially declaratory of the common law which permits owners of private enterprises to refuse admission or to eject anyone whom they desire") The Racing Commission now attempts to restrict the right to exclude for no reason by requiring racing associations to provide excluded permit holders with written "notice[s] of the reason for the ejection," 178-6-4.1.a.1, -4.2.b., and 4.2.c.4.[3]

To avoid altering the substantive law, the procedural rules must recognize the standards established by current law regarding management ejections. The proposed procedural rules should eliminate any requirement that racing associations provide written notice or reasons for their ejections.

[3] Proposed Rule 178-6-4.1.a.1 requires that "in the case of an ejection by an association," the association must state a "the reason for the ejection" even though the Rules of Thoroughbred Racing do not require a reason or written notice. Similarly, 178-6-4.2.b states that the appeal time does not run until "twenty (20) days after the written ejection notice is received by the permit holder." Again, the Racing Commission is trying to rewrite the substantive law of the state through a procedural rule. Instead, the rule should provide that permit holders must file their written appeals within twenty (20) days of being notified orally or in writing of their ejections. Ensuring "receipt" of written notices of ejection can be extremely difficult because the would-be recipients often attempt to evade such notices, or refuse to claim mailed notices.

3. The Racing Commission cannot reserve the right to interfere with a racing association's internal business decisions.

Conspicuously absent from the proposed rules is any acknowledgment that the Racing Commission has no power to interfere with the internal business affairs of the racing associations. *See* W.Va. Code § 19-23-6. In HCCTR's view, there is no more basic an internal business decision than the decision to exclude unwanted persons from entering its private property. HCCTR has established internal rules through its Racing Guide and its Employee Guidance Manual that govern the behavior of permit holders on its grounds. Many of the rules exist solely to protect HCCTR's business interests and have little or nothing to do with the conduct of racing. For example, HCCTR prohibits solicitation on its property and can eject anyone who ignores its directive not to solicit. It can eject persons for harassing people in the casino, or for stealing food from the Epic Buffet. The Racing Commission has absolutely no authority to reject or modify an exclusion of a permit holder for violating purely internal policies such as these. Yet, the proposed rules do not acknowledge this limitation on its review power. Because every HCCTR employee holds a racing permit, every ejection of an employee (or former employee) is subject to review under the proposed rules, even if the grounds for ejection are wholly unrelated to racing.

The only provision approximating a limitation on the Racing Commission's review power is Section 178-6-4.2.a, which states that "[t]he Racing Commission **may** refuse to hear an appeal from an ejected permit holder who has been ejected in connection with his or her suspension or termination from employment with the association." (emphasis added). In other words, the Racing Commission reserves the option to hear appeals from ejected employees, even though West Virginia Code § 19-23-6 clearly prohibits such interference with HCCTR's internal business decisions. The West Virginia Legislature has determined that the Racing Commission shall have no power to interfere with quintessential internal affairs of racing associations such as employment decisions. Even if a decision to exclude a terminated employee is, in the Racing Commission's view, illegal, it has no power to interfere with the decision. The proposed rules must acknowledge this limitation on the Racing Commission's power, especially given the high likelihood that it will

be frequently presented with appeals of permit holders ejected for violating internal policies of the racing associations.

CONCLUSION

The Racing Commission must revise its intended approach to hearing appeals from ejected permit holders to afford substantial deference to the racing associations' common law rights and internal business decisions. The racing associations invest millions of dollars into their racing properties, and like any other private enterprise, their decisions with whom to do business should be afforded deference. Both the common law and the current Rules of Thoroughbred Racing allow racing associations to police their own properties and exercise their independent business judgment to promote horse racing. Statutes like W.Va. Code § 19-23-6 are designed to ensure that racing associations have the freedom to make business decisions without interference by the Racing Association. The procedural rules must reflect these principles.

Procedural rules exist to protect substantive rights, not to eviscerate them. The rules proposed by the Racing Commission so substantially alter the right to exclude that they would require not only legislative approval, but amendment to the state code. Such action can be avoided by amending the proposed rules to comport with current substantive law by eliminating the stay provision, removing the requirement that racing associations give written reasons for ejections, and placing the burden of proof on the appellant to show his ejection was illegal in order to obtain a reversal. Such changes would maintain the Racing Commission's power to uphold the law while preserving the racing associations' ability to police their properties and promote their businesses.

We thank the Racing Commission for the opportunity to submit these comments.

Respectfully Submitted:

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February 20, 2012

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RE: Comment on Proposed Procedural Rule Changes, 178 CSR 6, "Due Process and Hearings"

Dear Sir/Madam:

Please accept these comments on the proposed procedural rule changes published by the Office of Secretary of State of West Virginia on January 19, 2012. The proposed changes primarily concern procedures that implement the decision of the Supreme Court of Appeals of West Virginia in the *PNGI Charles Town Gaming, LLC v. Reynolds, et al.*, --- S.E.2d ---, 2011 WL 5830424 (Nov. 18, 2011). These comments are made on behalf of the Thoroughbred horsemen's associations in West Virginia – the Charles Town H.B.P.A. and the Mountaineer Park H.B.P.A. The membership of these associations includes approximately 4,700 occupationally permitted horsemen and horsewomen within the state of West Virginia.

Proposed Definition Changes - §178-6-2.

2.2 & 2.3 – These changes are fine.

2.7 – This change would be fine except that the word "exclusion" is not mentioned. The language appears to cover exclusions as well as ejections, but should probably mention both terms explicitly, given that §178 CSR 1, §178-1-6.1, -6.2 and -6.3, use both terms in their title and body. Consistent with §178-1-6's terminology, therefore, "exclusion" needs to be added into this definition, perhaps as follows:

> "'Ejection' or 'ejection by an association,' and 'exclusion' or 'exclusion by an association,' means the refusal of an association to admit onto, or allow a permit holder to remain on, ~~to~~ its grounds, either of which refusal is subject to appeal to the Racing Commission pursuant to 178 CSR 1, §6.1 and 178 CSR 2, §6.1."

Alternatively, the term "exclusion" might be defined in a separate subsection from "ejection." An ejection is an immediate expulsion or removal of a permit holder already on an association's grounds whereas an exclusion is the prevention of a permit holder from entering the grounds at all. In both respects, they refer to a licensed association refusing to allow, or preventing, a permit holder to ply his/her trade as an owner, trainer or jockey on association grounds. However, this definitional section of the procedural rules should speak to both situations.

Clarity regarding terminology is no small matter because there should be no confusion between the situation of a duly-permitted occupational permit holder being prevented from plying his/her trade on association grounds by the association and action taken by the stewards/judges, or the Racing Commission, conditioning, restricting or limiting the holder's rights in his/her occupational permit – *e.g.*, suspending or restricting the holder's ability to use the permit for a time, or placing the condition of payment of a "fine" upon its use, etc. Conditions, restrictions and limitations on a permit are clearly state-imposed action, and should never be confused with an association's ejection or exclusion of a properly licensed occupational permit holder.

The permit holder clearly possesses an appeal right of any ejection/exclusion to the Racing Commission per the *Reynolds* decision. If appealed, the Commission decides what is in racing's "best interests" with regard to the ejection or exclusion at or on a particular racing association's grounds. The Commission's role in an ejection/exclusion appeal hearing is to resolve the dispute between the parties licensed by it – the permit holder and the association – whose disagreement turns on what is in the "best interests of racing" at, or on, the association's grounds.

Once the disputants' disagreement is heard, the Commission might be persuaded that the association's "evidence" against the permit holder warrants initiation of action by the Commission itself directly against the permit holder; for example, it might want to "fine" the holder or condition his/her use of the permit by way of suspension, or otherwise "restricting" or "limiting" it. *See, e.g.*, 178 CSR 1, §178-1-24.9. Alternatively, the Commission might decide the association's ejection or exclusion is too harsh of a sanction, and inconsistent with the "best interests of racing." If so, it may order the association to relieve the effects of, or even reverse, the ejection/exclusion upon such terms as it deems proper within the "best interests of racing."

Regardless what the Commission decides, its decision regarding any ejection/exclusion appeal is separate and distinguishable from any decision in an appeal from the action(s) of stewards or judges. Hearings in both types of appeals involve different questions, even if they happen to involve the same or similar underlying facts. For efficiency sake, however, hearings in either type of appeal should not be redundant nor inconsistent in result.

For reasons explained further in the Additional Comments section at the end of this letter, it is recommended the Commission give serious consideration to sequencing these hearings (should they arrive at the Commission at or about the same time and involve similar factual predicates) so that redundancies and inconsistencies are avoided, and a form of "finality" be allowed to attach to facts the Commission has previously heard and ruled upon. Consistency as to any "adverse" state-imposed action against a permit holder's permit (which affects the holder's legal right to ply a trade anywhere in West Virginia), and the usability of that permit on the grounds of a particular racing association, is of overarching importance to maintain the authority of the Commission over all things racing within this state. Moreover, consistency is important to give meaning to the "best interests of racing" standard which should guide the Commission's decisions in both types of appeal.

2.8 – 2.12 – The renumbering of these subsections is fine.

Proposed Changes to §178-6-3.

3.4.b. – This change is fine.

3.10.b. – This change is fine.

3.10.c.3. – No change has been proposed to this subsection, but, as written, it appears to require more than what the Horse and Dog Racing statute, §19-23-16(c), requires. The statute simply requires a person adversely affected by an order of the stewards or judges to "fil[e] with the Racing Commission a ***written demand*** for such hearing." (Emphasis added). A "written demand" need not be a "sworn, notarized statement that the appealing party has a good faith belief that the appeal is meritorious and is not taken merely to delay the penalty imposed...." §178-6-3.10.c.3. This subsection, in other words, requires too much, and should be changed to require only what the statute requires: a "written demand" for hearing.

Note: there is a missing word "by" in this subsection, which belongs between the words "imposed" and "the stewards/judges," toward the end of the sentence.

3.11.c.3. – Same comment to this subsection as above-stated regarding subsection 3.10.c.3.

3.11.d. – 3.11.d.4. – The version of this subsection - originally drafted and circulated for "pre-publication comment," on or about December 20, 2011, embodies the only proper change to this rule (as noted in underlining below). That change was as follows:

> "3.11.d. The Racing Commission or the member of the Racing Commission designated to rule upon stay requests may grant a stay for cause. Rulings on stay requests shall be issued in writing to the person requesting the stay. The Racing Commission or the member of the Racing Commission designated to rule upon stay requests may rescind a stay granted under this subsection for reasonable cause."

The above language is consistent with the statute and adapts the current rule, as minimally necessary, to reflect a subsection re-numbering. Nothing else is needed.

The new proposed language for 3.11.d. refers to a stay as an "extraordinary remedy" and imports four "factors" for granting or denying a stay, but those factors, while perhaps an accurate reflection of injunctive relief standards generally, need not be recited in the rule. Furthermore, their recitation is more likely to precipitate further litigation because they narrow the discretionary nature of any stay-request review. Each appeal in the racing industry must be handled with utmost promptness as delay undermines the efficacy of any ruling. There should be no encouragement in these rules for potential collateral litigation over whether a stay was appropriately or inappropriately granted, especially in light of the entitlement to a hearing on an appeal within a 10- to 30-day (maximum) window without leave.

Furthermore, to spell these four factors out in 3.11.d., without also adding them into 3.11.e.,

creates an unbalanced situation. In law, there should be no difference in the factors balanced for an initial stay request from those considered for rescinding a stay. Yet, there is no mirror of the four factors in 3.11.e. as are proposed for 3.11.d. The two subsections should involve consideration of the same factors.

Furthermore, the statute does not necessitate further refinement of the stay review process. In pertinent part, §19-23-16(c) of the statute simply provides:

> "Upon the written request of any permit holder who has been adversely affected by an order of the stewards or judges, ***a stay may be granted*** by the Racing Commission, its chairman, or by a member of the commission designated by the chairman. A request for stay must be filed with the Racing Commission's executive director no later than the order for filing a written demand for a hearing before the commission." (Emphasis added).

In pertinent part, §29A-5-1(c), incorporated into the Horse and Dog Racing statute at §19-23-16(e), provides:

> "The filing of [a court] petition shall not stay enforcement of the agency order or decision or act as a supersedeas thereto, ***but the agency may stay such enforcement***, ..." (Emphasis added).

The statutes grant to the Racing Commission maximum discretion in granting or denying stays, and there is no reason to limit that discretion as proposed in this change. Each stay request should be handled on its own merits and in light of the facts presented in each situation. Likely, the four factors listed in this proposed change would be considered by the Commission, or member, anyway. Setting them out in the rule is no substitute for good lawyering (or good representation of one's self) in requesting a stay. Finally, setting them out could arguably obligate the Commission, or member, to search for evidence of each factor even if none is presented by the requesting or opposing party. Again, a rule is no substitute for good representation of a party's position, pro or con, regarding a stay request.

That stated, if the Commission proceeds with these proposed rule changes in 3.11.d., it is respectfully submitted that the law on granting stays generally requires a "balancing" of the four factors in this rule. No one factor should be deemed controlling. Accordingly, the words "and balancing" should be inserted into the last sentence of 3.11.d., just before the listing of each factor, such that the lead-in reads: "The Racing Commission or the member of the Racing Commission designated to rule upon stay requests may grant or deny a stay request after considering and balancing the following factors: ...."

3.11.e – This subsection is fine as proposed ***if*** the four factors listed in 3.11.d, discussed above, are ***removed*** from the proposed rule (as commented and requested above). If 3.11.d remains unchanged, notwithstanding the above comment, then 3.11.e should be also changed to add a clause at the end of the second sentence to mirror the factors in 3.11.d, to read as follows:

> "Rulings on stay requests shall be issued in writing to the person requesting the stay. The Racing Commission or the member of the Racing Commission designated to rule upon stay requests may rescind a stay granted under this subsection ~~for reasonable cause~~ taking account only a change in circumstances or new information not available at the time of the original grant of stay, and re-considering and re-balancing the factors set out in 3.11.d. in light of such change or new information.

3.11."d." (second) – This is a second subsection labeled "3.11.d," and it should be labeled, if nothing changes in the numbering of the current draft of 3.11.d. and 3.11.e. above it, to "3.11.f."

Proposed Changes to §178-6-4.

4.1.a. – This change is fine.

4.1.a.1. – This change is generally fine. However, there needs to be a definitive writing that gives the ejected permit holder proper "notice" of all of the association's reasons for ejection. In accord with §29A-5-1(a), this notice must minimally contain "a short and plain statement of the matters asserted" by the association in support of an ejection or continuing exclusion. Not until the permit holder receives such notice should the time limitation for taking an appeal commence. However, receipt of such notice should not be required to initiate an appeal of an ejection. The act of ejecting a permit holder is alone sufficient to trigger the right to appeal, and written notice of the reasons can be required in accordance with the time standard set out in §19-23-16(a), which provides, "as soon as thereafter practicable." As long as these principles are written into the **final** procedural rule, they may, but need not, be included in this particular subsection (4.1.a.1.).

Additionally, wherever the rule includes a provision requiring associations to provide this written notice, ***if*** the Racing Commission sees fit ***not*** to change 3.10.c.3. (in response to the horsemen's comments to that subsection above – concerning the impropriety of requiring a permit holder to file a "sworn, notarized statement that [his/her] appea[l is taken in] ... good faith ... and not merely to delay the penalty imposed...."), then a mirrored requirement should be imposed on associations who provide written notice of reasons for ejection. As commented above, requiring any "sworn, notarized statement" of a party to an appeal before the Racing Commission is probably not authorized at all, and should be removed, but if not, and permit holders continue to be so required, then such requirement should be equally imposed on associations that provide written notice of reasons for ejection.

4.1.a.2. – 4.1.a.8. – No change has been proposed to these subsections, but their current wording

does not mention the parties' entitlement to subpoenas or subpoenas duces tecum. Appeals in ejection situations are likely to involve compelling the attendance of reluctant witnesses and the production of documents that are not desired to be turned over. In these subsections' recitation of rights, it is respectfully submitted that a reference to parties' entitlement to subpoenas and subpoenas duces tecum, as set out in 4.5., should be inserted. The statutes plainly grant such entitlement. *See* §29A-5-1(b); §19-23-6(14); §19-23-16(e) & (f), but this entitlement is not even alluded to in these subsections (although admittedly the mechanics of obtaining a subpoena or subpoenas duces tecum is appropriately spelled out in 4.5.).

Additionally, 4.1.a.4. does not spell out how a permit holder can obtain access to, or "examine" any "evidence" that an association may possess, and use against him/her in the ejection appeal hearing. Distinguished from an appeal of a steward's/judge's decision, at which a permit holder will have already had a chance to see the evidence against him/her at the stewards' hearing level, in an ejection appeal, no prior examination or other "discovery" will have occurred before going to the Racing Commission. There needs to be, therefore, a pre-hearing examination process (akin to a trial court's pre-trial "discovery" procedure) to allow the permit holder to pre-examine the "evidence" to be used against him/her in the ejection appeal hearing. A permit holder would not otherwise know if s/he needed to subpoena third-party documents or witnesses to rebut whatever "evidence" allegedly supports her/his ejection or exclusion.

If there is no such right provided for pre-hearing examination of the evidence, 4.1.a.4.'s right to "examine all evidence presented against him/her" is not very meaningful, and if such right is given meaning only at or during the hearing stage itself, there will likely have to be a continuance to allow the permit holder an opportunity to issue subpoenas or subpoenas duces tecum to obtain third-party witnesses or documents needed to rebut an association's "evidence" that the holder could not anticipate would be used against him/her in the ejection appeal hearing.

For this reason, 4.1.a.4. could be amended to provide:

> "4.1.a.4. The right to examine all evidence presented against him/her/it, and in the case of an ejection or exclusion appeal, a reasonable opportunity to examine such evidence no less than five (5) days prior to the ejection appeal hearing date; ....

4.2. Title – This change is fine.

4.2.a. – This change is fine except that the last sentence should have the word "solely" inserted, as follows: "The Racing Commission may refuse to hear an appeal from an ejected permit holder who has been ejected solely in connection with his or her suspension or termination from employment with the association."

4.2.b. – The comments offered above regarding 4.1.a.1. are incorporated herein. Furthermore, a sentence needs to be inserted that obligates the association to provide prompt written notice of the reasons for an ejection or continuing exclusion, and if this 4.2.b. rule is the appropriate place

to insert it, the language for such provision should read:

> "The association must provide an ejected permit holder a written statement of all reasons for ejection as soon as practicable, but no later than twenty-four (24) hours after a permit holder is ejected, and, in the case of exclusion of a permit holder for more than three (3) months, the association must provide the excluded permit holder a written statement of all reasons for the exclusion no later than ten (10) days after the association receives a written request from the permit holder to re-enter association grounds."

It is suggested that since 4.2.c. requires an appeal to be "in writing on a form prescribed by the Racing Commission" that a similar form could be prescribed by the Commission and required of associations to use when they eject a permit holder or refuse an excluded permit holder's request for re-entry. Such a form should also include a recitation of the ejected permit holder's appeal rights and the time for taking an appeal. The use of such a form is done in other states (such as Pennsylvania), and would ensure the proper framing of issues to be heard in the appeal. If this recommendation is followed, the suggested sentence above, should be modified to read: "The association must provide an ejected permit holder a written statement, on a form prescribed by the Racing Commission, that gives ~~of~~ all the reasons for the ejection as soon as practicable, but no later than twenty-four (24) hours after a permit holder is ejected, and in the case of exclusion of a permit holder for more than three (3) months, the association must provide the excluded permit holder a written statement, on such form, that gives ~~of~~ all the reasons ...."

Furthermore, if the above-suggested language is adopted, 4.2.b. should be modified regarding the time limit to take an appeal, as follows:

> "4.2.b. An appeal under this subsection must be filed with the Commission's executive director at the Racing Commission's principal office no later than twenty (20) days after the written ejection notice is received by the permit holder, or in the case of an exclusion, no later than thirty (30) days after the association receives the permit holder's written request to reenter."

Finally, as mentioned in the second paragraph of the comments on proposed 4.1.a.1. above, ***if*** the Racing Commission does ***not*** change 3.10.c.3. and other similar provisions (in response to the horsemen's comments herein about the impropriety of requiring a permit holder to file a "sworn, notarized statement" of the "good faith" nature of his/her appeal), then a mirrored requirement should be imposed on the association when it provides a written statement (*i.e.*, "notice") of the reasons for a permit holder's ejection or continuing exclusion.

4.2.c.3. – For reasons previously mentioned in comments on 3.10.c.3., 4.1.a.1, 4.2.b., and other similar provisions, it is not proper to require a "sworn, notarized statement" of a permit holder who exercises his/her right to appeal. If such requirement is not removed, however, then a mirrored requirement should likewise be imposed on an association in any provision that requires it to give a written statement (*i.e.*, "notice") of the reasons for a permit holder's ejection or continuing exclusion.

4.2.d. – Typo: the word "designed" should read "designated."

4.2.e. – This change appears to be authorized by §19-23-16(c); however, it is imbalanced. It has no similar assessment of costs on associations should an ejected permit holder substantially prevail in his/her appeal. A final sentence should be added to the proposed rule, as follows: "If the permit holder substantially prevails in an ejection appeal hearing, the Racing Commission may assess its costs incurred in conducting the appeal hearing to the association, and may also assess the costs incurred by the permit holder in the appeal, to the association."

4.3. Title – This change is fine.

4.3.a. – **4.3.c.2.** – These changes are fine.

4.3.c.3. – Same comment to this subsection as above-stated regarding subsection 3.11.c.3. (& 3.10.c.3.).

4.3.d. – Typo: the word "designed" should read "designated."

4.3.e. – It is inappropriate to require a permit holder in 4.3.c.3. to give a "sworn, notarized statement that the permit holder has a good faith belief that the stay request is meritorious and is not taken merely to delay the effect of the ejection imposed by the association" without also requiring the association that responds "in writing to a stay request filed by an ejected permit holder" to give a similar sworn statement. As commented above regarding subsections 3.11.c.3 and 4.3.c.3, permit holders ought not to have to give such sworn statements, but if they are going to be so required, the association must have a mirrored requirement in this proposed rule.

4.3.f. – **4.3.f.4.** – Same comment to this subsection as above-stated regarding subsection 3.11.d. – 3.11.d.4.

4.3.g. – **4.3.h.** – These changes are fine.

4.4. – **4.4.f.** – These changes are fine.

4.4.g. – This proposed rule is fine so long as the final sentence suggested in comment to 4.2.e. is included in these procedural rules. That suggested sentence permits the assessment of costs on the association if the permit holder substantially prevails. This 4.4.g. provision imposes a "default" penalty on an association for failing to appear at a hearing to justify an ejection. Since the permit holder must post $100.00 in security for costs of an appeal, an association could eject a permit holder, cause him/her to have to expend $100.00 to appeal the ejection, and then fail to

appear to justify its ejection. The permit holder would likely receive a "default" ruling setting aside the ejection under this proposed rule's language, but would still be out of pocket the $100.00 in costs. While s/he may receive a refund of such costs, the association should not be able to potentially "play games" with an ejection that not only costs a permit holder, but in the end, could end up needlessly costing the Racing Commission for unnecessary ejections. Accordingly, this proposed rule is fine so long as the final sentence in comment to 4.2.e. above is included in these procedural rules.

4.5. & 4.6. in their entirety – These changes are fine.

4.7. – 4.7.c. – These changes are fine.

4.7.d. – This proposed rule appropriately places the burden on the association to show by a preponderance of the evidence that a permit holder should not be allowed onto association grounds. This rule's proposed standard "detrimental to the best interests of racing or to the orderly conduct of a race meeting" does not track the statutory or legislative rule language, but should. The statute, in pertinent part, provides: "The Racing Commission has full jurisdiction ... (9) ... to rule off the grounds of any horse ... racetrack ***any ... undesirable individual determined inimical to the best interests of horse ... racing or the pari-mutuel system of wagering in connection therewith***; ...." §19-23-6(9) (emphasis added). The legislative rule, in pertinent part, provides: "The ... Racing Commission may restrict, limit or impose any condition or conditions on an occupational permit that they consider necessary in their discretion to protect ***the best interests and integrity of racing***." 178 CSR 1, §178-1-24.9 (emphasis added). Subsections 178-1-24.11.a. through 24.11.o (178 CSR 1), go on to list numerous circumstances for which the Commission may take action against a permit holder, and this list is non-exhaustive.

The proposed standard in 4.7.d. should track the language of the statute and legislative rule. It should be left to this Racing Commission to flesh out who is or is not an "undesirable" and what is or is not "inimical to the best interests of racing" in the facts of each case. There should be absolutely no question – after the decision in *PNGI Charles Town Gaming, LLC v. Reynolds, et al.*, --- S.E.2d ---, 2011 WL 5830424 (Nov. 18, 2011) – that an association possesses no greater right to eject persons who are "undesirable" and whose presence on association grounds are not in the "best interests" and "integrity" of racing than the WVRC. In Hollywood Casino at Charles Town Race's (HCCTR's) erroneous view, a permit holder could be ejected or excluded for merely opposing the association's position on expanded gaming, or expressing an opinion that another racetrack cares more for, or takes care of, owners, trainers, jockeys, horses, or backside personnel than HCCTR. HCCTR's overly broad assertion of the power to eject is intolerable in a free society, and not only unconstitutionally chills free speech and association rights of permit holders, but its assertion of such power itself is "inimical to the best interests of racing."

The standard in this 4.7.d. should be, much more akin to that originally proposed on or about December 20, 2011, in accordance with the statute and legislative rule, to wit: "inimical to the best interests of horse or dog racing or the pari-mutuel system of wagering in connection therewith." The standard might also mention the word "undesirable" and the phrase "integrity of racing," both of which are contained within the wording of the statute and legislative rule. Beyond such additional language, however, the standard should not be expanded, and especially not upon the erroneous view asserted by HCCTR that associations retain some sort of common law property right to eject permit holders with broader authority than the Racing Commission itself may act. The *Reynolds* case lays that erroneous view to rest once and for all.

4.7.e. – This proposed rule is fine, ***but*** it needs the following underlined language added:

> "4.7.e. The Racing Commission may reject, affirm, or modify any ejection imposed by the association on a permit holder, and the association and permit holder shall abide by any orders, restrictions or conditions issued by the Commission in connection with its decision on the ejection appeal."

The addition of the above-stated language makes clear that parties to any ejection appeal hearing must abide by both the letter and spirit of the Commission's ruling and orders. The Commission has full authority to impose its will, including ordering a permit holder back onto an association's grounds, should his/her ejection appeal be successful. Moreover, the failure of an association to abide by such an order is spelled out in 178 CSR 1, §178-1-20.1. Likewise, permit holders must abide by any "restrictions, limitations and conditions" that the Commission may impose on their permits. *See* 178 CSR 1, §178-1-24.9. Therefore, the addition of the above language is statutorily supported and ensures compliance with the outcome of any appeal. Moreover, this is what the *Reynolds* case holds.

4.7.e. – the end of the proposed rule – All these changes are fine.

Additional Comments for Consideration and Potential Inclusion in the Procedural Rules

There are some additional issues and concerns that the Charles Town H.B.P.A. and the Mountaineer Park H.B.P.A. wish to bring to the attention of the West Virginia Racing Commission.

(1) Permit holders ejected or excluded at any time prior to the effective date of these rules should be allowed to submit a request to the association excluding them to re-enter association grounds. If the association continues in its exclusion of them, they should then be permitted to appeal in accordance with proposed rule changes noted in the comments to 4.2.b. above.

(2) Procedures need to be developed for the sequencing of hearings when a permit holder appeals an ejection by an association, and in a close time period, and/or for the same or similar reasons, also appeals disciplinary action taken by the stewards. Generally speaking, restrictions or conditions imposed on a permit holder's license by the stewards, should take hearing precedence over an appeal of an association's ejection. If the stewards' factual findings in

support of discipline are warranted and upheld, and an appropriate penalty imposed on the permit holder, to the extent the association's ejection amounts to a more severe penalty, the association should be notified of the Racing Commission's restrictions or conditions imposed on the permit holder (after the hearing on the appeal from the stewards), and the association be permitted to acquiesce in such penalty, or be prepared to show cause why its ejection is still necessary and meets the standard of proof set out in 4.7.d.

(3) Procedures also need to be developed for how to handle appeals by the same permit holder from an ejection at one association in West Virginia, which ejection may be automatically followed by the other association in West Virginia. A permit holder ought not to have to re-litigate the same issues twice if s/he is successful in the first ejection appeal. In other words, if a permit holder substantially prevailed in an appeal from an ejection by the first association, and a second association were to eject him/her for the same or similar reason, the permit holder's appeal of the second association's ejection, ought to be procedurally handled such that the second association is notified of the Racing Commission's order in the first appeal, and the second association be permitted to acquiesce in such order, or be prepared to show cause why an ejection is still necessary at the second association in accordance with the standard of proof set out in 4.7.d.

Sincerely,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

Douglas L. McSwain

And

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February 17, 2012

West Virginia Racing Commission
106 Dee Drive, Suite 2
Charleston, WV 25311

Attention: Mr. Jon Amores, Executive Director

Re: Comments to West Virginia Racing Commission Proposed Rules Relating to Appeals of Ejections of Certain Occupational Permit Holders.

For the Racing Commission:

Thoroughbred Racing Associations of North America, Inc. ("TRA") welcomes the opportunity to comment on certain aspects of the rules proposed by the West Virginia Racing Commission (the "Racing Commission") which would implement procedures to allow certain permit holders to appeal their ejections from racing associations in the State.

TRA is the Association of North American thoroughbred racetracks formed in 1942 to serve as a strong and unified voice of our nation's thoroughbred racetrack operators. Membership is open to all thoroughbred racetracks provided that they adhere to the exacting TRA Code of Standards and By-Laws, and also place maximum emphasis on the integrity of racing. TRA currently has 48 member racing associations conducting racing at 41 racetracks in the United States and Canada.

Through the years, TRA has played a leading role in the establishment of many programs beneficial to the racing industry and to the honesty and integrity of the sport. Critical among these was the formation in 1946 of the Thoroughbred Racing Protective Bureau ("TRPB"), a subsidiary of the TRA, to preserve integrity and security in racing. TRPB today maintains the most extensive private collection of records on individuals and horses as well as tattoo

information which is the cornerstone of effective identification of all horses competing in thoroughbred racing events.

TRA's interest in the rules proposed by the Racing Commission is in support of the private property rights of North American racing associations to exclude from their property persons thought by them to be undesirable of attendance or participation in the events hosted by the racing associations. TRA considers these rights to be entirely consistent with state regulatory formats and absolutely essential to the integrity of thoroughbred racing.

The right to exclude anyone thought undesirable from one's property is a bedrock of the common law, and has been repeatedly confirmed by the vast majority of Federal and State Courts in the United States, including the overwhelming majority of significant racing jurisdictions, and specifically under the laws of West Virginia. *Marrone v. Washington Jockey Club*, 227 U.S. 633 (1913); *Wilkerson v. Waterford Park, Inc.*, WV Hancock Cty. Cir. Ct. (1969), aff'd, W. Va. 1060, cert. denied, *Wilkerson v. Waterford Park, Inc.*, 396 U.S. 906 (1969).

Where the property involved is a racetrack, this right of the property owner has been applied in West Virginia and a host of other states to exclude owners, trainers, jockeys, harness drivers, grooms, track employees, and patrons, both licensed and not. *PNGI Charles Town Races & Slots, LLC v. West Virginia Racing Commission*, et al. No. 100098, cert. denied (W. Va. April 5, 2010 (Order Granting Writ of Prohibition, Sept. 24, 2009, and cases cited)). In the judgment of TRA, there is no more basic an internal business matter in the sport of thoroughbred racing than the common law right of exclusion of the racing association.

An unfortunate but hopefully limited diversion from this basic principle was the recent 3-2 decision of the Supreme Court of Appeals of West Virginia in *PNGI Charles Town Gaming, LLC v. Reynolds et al* (decided November 18, 2011) which held that an ejection of independent contractor permit holders, namely jockeys, by either a racing association or the stewards was subject to review by your Commission.

PNGI Charles Town Gaming, LLC ("CTR&S") had asserted its common law property rights to exclude from the racetrack jockeys who had been actually video-taped falsifying their

weights during the weigh out prior to races, to the obvious and substantial detriment of the racetrack, the wagering public, and all participants.

As you know, in the CTR&S case, the Stewards found specifically that the jockeys who misrepresented their weights had engaged in "dishonest or corrupt practices," had violated the West Virginia Code related to conspiracy, and had engaged in "improper, obnoxious, unbecoming or detrimental conduct." Your Commission's own Hearing Examiner found that the jockeys were guilty of "conniving" with the Clerk of Scales "in the commission of a corrupt practice" by engaging in "farcical" weigh outs.

The Board of Stewards imposed a $1,000 fine (the maximum permitted) on each of the jockeys and a thirty-day suspension of each of the jockey's occupational permits. The Clerk of Scales was also fined, his occupational permit was indefinitely suspended, and he was terminated from his employment with CTR&S. Since jockeys are independent contractors retained by the owners and not by the racing association, CTR&S could not terminate their employment, but could and did immediately exclude them from the racetrack.

After a somewhat tortured and very lengthy procedural history, during which the jockeys enjoyed a stay of the exclusion order, your Supreme Court of Appeals held that since the jockeys were independent contractors, they should have a right of appeal of their ejections to your Commission, and your proposed rules are now intended to deal with appeals such as these. Since the Clerk of Scales was a racetrack *employee*, this Commission and the Court's decision do not question the racetrack's decision to terminate his employment and to eject him, even though he was also an occupational permit holder. [1]

TRA's Comments

The integrity of thoroughbred racing must be protected and preserved, first and foremost, by those closest to the sport, who must act firmly and decisively, in protection of their sport, all its participants, the wagering public, and also to preserve and protect their own license status.

[1] Logically, the proposed Rules should make clear that employees have no appeal rights.

In this respect, it is critical to acknowledge that licenses and occupational permits confer *privileges*, not inviolate rights. Licenses can be withdrawn by Commissions such as yours, and occupational permits can and fairly often are rescinded, usually for conduct far less egregious than the outrageous fraud which was perpetrated in the CTR&S case.

In West Virginia, as in all other jurisdictions which regulate racing, permits are required to be an owner, trainer, jockey, groom, veterinarian, agent, clerk of scales, starter, judge, or any pari-mutuel employee. But the permit confers no absolute right to work. Being employed or retained is purely a business decision which, with jockeys for example, requires a trainer to decide to recommend the jockey, requires an owner to decide to retain the jockey, who is an independent contractor free to accept or decline, and requires a racing association willing to permit the jockey to ride at a race which is hosted by the association. At least four independent business decisions are required to concur positively before the jockey ever rides the horse. If any of the four do not concur, the jockey does not ride, regardless the wishes of the other three.

Your proposed Rules 4.7.d and 4.7.e would now dictate that one, and only one, of these four independent business decisions, that of the racing association, would have to be justified by the racing association having the burden to prove by a preponderance of the evidence that an ejected permit holder's presence was inimical to the best interests of horse racing or the related pari-mutuel system of wagering, and that the Commission may reject, affirm, or modify any ejection imposed by the association on a permit holder.

With respect, TRA believes that these proposed Rules turn any appropriate appellate process absolutely on its head, in effect by setting up a presumption that every ejection from every racetrack is improper unless proven otherwise by the racing association by a preponderance of the evidence. The other decision-makers are not subjected to any similar presumption of invalidity – the trainer can decide not to recommend the jockey, the owner can decide not to retain the jockey, and the jockey can decide to ride another horse, or not to ride at all, without any supervening requirements to justify their business decisions, or even to do more than announce them. Yet the racing association can make its own internal business decision, for example to eject the fraudsters who were video-taped in the act, as it did in the CTR&S case, and then have to justify its conduct, under an extremely variable and subjective standard, or else risk

having its internal business decision reversed and being required to let the illicit conspirators back on the grounds. How does this possibly preserve, protect and defend the integrity of thoroughbred racing?

Your Racing Commission is the primary initial arbiter of appropriate conduct, the first line of defense of the integrity of our sport, and through your power to deny or revoke permits, you can in some cases be the sole arbiter. But if your Commission decides on less severe sanctions in any case of a violation of your Rules, then the field is and should be left to the other participants, with their own independent business decisions to make, and their own principles of integrity and fair dealing to apply. It is a fundamental business decision for them whether to accept and eventually forgive the wrongdoers' activities, or to themselves simply cease doing business with them. Permit holders who object to this economic reality have a simple solution: don't cheat.

Each racing association makes its own decision in exclusion cases; there is no undisclosed cabal among the racetracks. In fact, while exclusions are not reciprocated or honored by other racetracks, there is often *de facto* reciprocity among racing *commissions*, which in effect allows a commission sometimes to administer essentially a national ban. Exclusion by racetracks is a far more measured response which would not automatically deprive a person from employment elsewhere, and there are numerous examples of a jockey or other permit holder being excluded from one racetrack and quickly reappearing elsewhere.

TRA also observes that in many cases in its experience, since penalties or revocations by one racing commission are given significant weight by commissions in other states, commissions sometimes err in good faith on the side of leniency in setting penalties even in egregious cases, knowing the force that their decisions will be given elsewhere.

As with all internal business decisions, reasonable persons may differ on exactly the right response in any given situation. But these variations have no effect upon the underlying legality of the exclusion practice. Exclusion judgments are typically debated and contested by those adversely affected, and there can certainly be differing results. A jockey excluded in another state at another time might well be permitted to ride elsewhere, in West Virginia for example, until independent observation by the local racing association confirms or denies his or her

dedication to integrity, or the lack of it. That is not capricious: it is sound business judgment. A jockey, excluded in another state, must first be licensed here, and then recommended by a trainer here, and then hired by an owner here, before the racing association must decide whether to permit the jockey to ride, or to exclude him. All of those favorable independent judgments must coincide, or the jockey does not ride.

In effect, virtually every decision regarding the participation of anyone in the sport of thoroughbred racing in West Virginia carries with it as a necessary prerequisite the favorable decision of various other participants. Some of these decisions are statutorily or regulatorily mandated, and must be favorably secured before the person wishing to take part can seek a home for his or her desires. But most are *private* decisions, by *private* persons, who must decide favorably, in the independent exercise of their personal good judgment, with whom they are willing to entrust their business and property. Some of these are farms, and some are owners, and some are trainers, and some are jockeys. And some are racing associations.

While your Commission now clearly has the right to hear and decide appeals from permit holders ejected, TRA believes it is essential that the common law right be preserved and protected to the maximum possible extent. Your Commission's position on the central substantive issues, and your proposed rules for appeals from exclusion orders, should be considered against the background that West Virginia is now in the distinct minority of jurisdictions which question the racing association's absolute right to exercise its business judgment and determine whom to allow on its property, and whom to exclude.

Contrast for example the most recent case on the exclusion issue, *Bell v. Tampa Bay Downs, Inc.*, decided by the U.S. District Court for the Middle District of Florida on December 21, 2011. There the licensee jockey, five years after the fact, alleged that he was excluded after being accused of fixing a horse race, despite his being tape-recorded in the process, just as the jockeys were in the CTR&S case. The Court clearly and firmly upheld the absolute right of the racing association to make a business judgment with whom it cared to do business:

> "Even though the State regulates and controls pari-mutuel wagering in Florida, that does not abrogate the common law right of pari-mutuel enterprises to exclude persons with whom they choose not to do business from their property." Id. at 4.

West Virginia now finds itself in the perilous position of potentially diluting the property rights of its racing associations to exclude, in the exercise of their own business judgment, persons who, in the CTR&S case for example, were independently determined by the Board of Stewards and your own Hearing Examiner to have engaged in "dishonest . . . corrupt . . . conniving . . . improper . . . . obnoxious . . . . unbecoming . . . detrimental . . . farcical . . . conduct." And these were not only not employees, who arguably had their own property rights in the balance, but were wholly independent contractors, who came on to the racetrack, actively and repeatedly engaged in fraud, and now assert some claimed due process rights to be permitted to return to the scene of their fraud and perhaps to do it again.

The racing associations, who have invested scores of millions of dollars in their racing properties in West Virginia, justifiably deserve the unqualified support of your Commission in their independent business decisions regarding whom to allow on their racetracks, and whom to exclude.

TRA therefore proposes two adjustments to your proposed Rules:

First, TRA believes that the Rules should set forth your Commission's firm and unequivocal position that the integrity of Racing absolutely requires that virtually conclusive support be given to a racing association which determines, in the exercise of its business judgment, to exclude anyone thought undesirable from its property. The racing public deserves no less, and the owners, trainers, and all other participants should be constantly assured that in West Virginia, as in Florida and all the other States which affirm the right of exclusion, West Virginia will not permit fraudsters or other undesirables to participate in pari-mutuel racing over the objections of the very hosts of the races.

Second, consistent with the position expressed in the preceding paragraph, the right of appeal of an occupational permit holder to an exclusion order should be strictly limited to a determination that the exclusion was not based upon race, creed, national origin, or other constitutionally protected classification, and was not otherwise wholly arbitrary, capricious and unreasonable. The burden of proof on these issues and with respect to any underlying questions of fact should be clearly on the person objecting to the exclusion.

Some years ago, the West Virginia Legislative Auditor observed that "The purpose of the West Virginia Racing Commission is to regulate the industry and to assure confidence in clean races. Integrity is essential for the success of the racing industry."

TRA believes that the integrity of racing in West Virginia demands that the Commission firmly asserts its position in support of its racing associations to exercise their business judgment and to exclude those thought undesirable from participation in the sport in this State.

Thank you for the opportunity to submit these comments. We would be delighted to appear in person before the Committee to express the position of the TRA and the TRPB on these important issues which are so central to the integrity of thoroughbred racing.

Respectfully submitted,

THOROUGHBRED RACING ASSOCIATIONS
OF NORTH AMERICA, INC.

By _____
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February 21, 2012

West Virginia Racing Commission
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RE: Public Comments on the updated Procedural Rules 178CSR -6

Dear Commissioners:

The following comments are submitted for consideration by the Commission concerning the proposed amendment to the procedural rules addressing hearings on racetrack ejections of occupational permit holders.

It is my opinion that the procedural rules which identify an association's authority to reject a permit holder are ambiguous, overly subjective and inconsistent with the current ejection standard followed by the Commission.

The specific provision objected to is 4.7.d. which appears to grant to an association the authority to eject a permit holder if such "permit holder's presence or conduct is detrimental to the best interest of racing or to the orderly conduct of a race meeting."

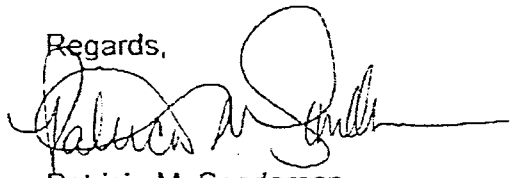
The *detrimental conduct* aspect of this provision is highly subjective. It provides no bright line standard to allow a permit holder to determine in advance what action may support an ejection. It appears to give an association too much latitude in ejecting a permit holder for any conduct it subjectively deems to be detrimental.

This subjective provision is inconsistent with the current rules concerning the Commissions right to eject a permit holder from association grounds. Rules 24.11.a-p identify 15 specific activities which would constitute grounds for the Commission to impose disciplinary measures including ejection of a permit holder from an association's grounds. In addition, Rule 24.11.o allows such imposition for any other violation of the Thoroughbred Racing Rules. These provisions are not vague, ambiguous and do provide advance notice to permit holders of the activities which may support an ejection from association grounds. The inconsistency between the Commission's ejection standards and the proposed association's ejection standards would allow an association to eject a permit holder for the same conduct which would not support an ejection by the Commission.

In order to achieve consistency among the authoritative bodies (the Commission and an association) the conduct authorizing an ejection should be the same for each. I would therefore, propose that instead of utilizing the subjective *detrimental conduct* ejection standard, the proposed rules incorporate the same objective and specific standards for ejection now followed by the Commission as set forth in 24.11.a-o.

Thank you for your time and consideration of my comments.

Regards,



Patricia M. Sanderson

RESPONSE TO THE COMMENTS

WEST VIRGINIA RACING COMMISSION

DUE PROCESS AND HEARINGS 178 CSR 6

The Commission received four comments upon the amendments to its Due Process and Hearings Rule, 178 CSR 6, (a procedural rule), that was out for comment during the period January 19, 2012 to February 21, 2012. The amendments proposed by the Commission are intended to provide for hearing procedures before the Commission for occupational permit holders who are ejected by licensed thoroughbred and greyhound racetracks and who file an appeal to contest such ejections pursuant to 178 CSR 1, § 6.1. and 178 CSR 2, § 6.1. On November 18, 2011, the West Virginia Supreme Court held that occupational permit holders who are ejected from licensed thoroughbred and greyhound racetracks in this State have a right of appeal to the West Virginia Racing Commission under the above referenced sections of the Commission's legislative rules. *See PNGI Charles Town Gaming, LLC v. Reynolds*, Slip Op. No. 101503 (Nov. 18, 2011). The Supreme Court further recognized the Commission's plenary statutory authority under West Virginia Code §§ 19-23-1 *et seq.* to hear such appeals. The issue of whether permit holders had such a right of appeal had been a matter of dispute and had been the subject of litigation in which the Commission was involved. The Supreme Court's decision in the *Reynolds* case resolved this dispute. In order to provide for an orderly and fair procedural framework in which to hold appeal hearings in accordance with the Commission's authority recognized by the West Virginia Supreme Court in *Reynolds*, it is desirable for the Commission to amend its Due Process and Hearings Rule to establish rules governing such appeal hearings.

As a result of the public comments received, the Commission made several amendments to the proposed rule. The amendments and the reasons for those amendments are fully described in a document entitled "Amendments Made to Rule as a Result of Comments" included with the filing of this agency approved rule. Such document constitutes, in part, the Commission's response to a number of the comments received. Such document summarizes certain comments, discusses the issues involved, explains the changes made to the rule as a result of the comments and explains the reasons for such changes.

Other comments that were received that are not addressed in "Amendments Made to Rule as a Result of Comments" were carefully considered by the Commission, but did not cause the Commission to make changes to the proposed amendments to the procedural rule. In particular, the Racing Commission received a public comment from PNGI Charles Town Gaming (hereinafter PNGI), the bulk of which is based upon a disregard of the fact that the Racing Commission prevailed in the *Reynolds* case and a disregard of the clear and unequivocal holding by the Supreme Court in that case. PNGI's disagreement with the Court's holding cannot serve as basis to adopt the amendments it proposes, which is nothing more than a attempt to eviscerate the Court's holding. Specifically, certain comments received from PNGI and the Thoroughbred Racing Associations (an organization in which PNGI is a member and in which PNGI's Vice President of Racing is the President and PNGI employees are directors) centered around the concept that the holding of ejection hearings under the proposed procedural rule would interfere in the internal business affairs of the racetracks in violation of West Virginia Code § 19-23-6. However, this position was

advanced by PNGI in the context of the *Reynolds* case and was resolved by the West Virginia Supreme Court. PNGI argued in *Reynolds* that ejections of permit holders and the reasons therefor were "internal business affairs" and that it would impinge upon such business affairs for the Commission to hold ejection hearings and to inquire into and review such ejections. The Commission argued to the contrary and the West Virginia Supreme Court agreed with the Commission's position. The proposed procedural amendments establish a framework for the Commission to review ejection appeals filed by permit holders -- which fits squarely within the authority recognized by the Supreme Court. Therefore, PNGI's and the TRA's continued argument that the Commission's review of an ejection of a permit holder constitutes an interference with the track's internal business affairs is without merit. And, PNGI's insistence that the Commission must, in some manner, acknowledge in its rules that its authority to hear ejection appeals is limited because it may interfere in its business affairs is plainly inconsistent with the Supreme Court's decision. Given the Commission's clear power to review and to ultimately reverse (if warranted) a track's decision to eject a permit holder, the track's reason for its decision to eject is in no way an untouchable internal business decision. The Supreme Court has spoken clearly on this point. Therefore, there is no reason to change the proposed amendments based on the track's assertions in this regard.

PNGI also comments that it should not have to give a reason when it ejects a permit holder and that it should not bear the burden of proving that the reason for ejection meets the standard set forth in the proposed amendment to the rule. If PNGI's position was adopted, a permit holder would not be given a reason for an ejection and the permit holder would then have to appear at an ejection appeal hearing and prove that the ejection was illegal (while having no notice of the reason for the ejection). As the Supreme Court recognized in the *Reynolds* case, a permit holder's right to appeal a track ejection to the Racing Commission is fundamentally predicated upon the tenet that a permit holder has a property right in their permit and the due process rights associated therewith. It is inconsistent with due process of law for a permit holder to lack notice of the basis of the ejection action that they are contesting. Therefore, it is squarely within the ambit of *Reynolds* to require the racetracks to give a reason for the ejection which the permit holder may choose to appeal.

PNGI's position in its public comment that the permit holder, and not the racetrack, should bear the burden of proof in ejection appeals is contrary to settled law in every racing jurisdiction in which the right of appeal has been recognized and/or codified. Moreover, it is inconsistent with the provisions of the Racing Commission's legislative rules pertaining to ejections. If the West Virginia Racing Commission adopted PNGI's position, it would be the only racing jurisdiction that hears ejection appeals that places the burden on the permit holder and it would be acting contrary to its legislative rules which establish a standard that associations must meet in order to eject. There is simply no public policy or legal reason for the Commission to adopt this stance in its rule and it does not, in the Commission's judgment, advance the best interests of racing to do so.

All four public comments received by the Commission contained comments on the issue of the burden of proof that the association should or should not bear in connection with the hearings held by the Commission on permit holder ejections. After considering these comments and examining the burden of proof stated in § 4.7.d. of the rule, the Commission decided to alter the

burden of proof so that it conforms precisely to the pertinent provisions of its Thoroughbred Racing and Greyhound Racing legislative rules (178 CSR 1, § 6.2. and 178 CSR 2, § 6.2.). Such legislative rule provisions state that an association can eject persons who have acted improperly or engaged in behavior that is otherwise objectionable. Inasmuch as this is the standard that the West Virginia Legislature has established for ejections in the Commission's legislative rules, it is consistent for the Commission's procedural to recognize this as the standard/burden that the association must meet when ejection appeals are heard by the Commission.

This standard/burden does not require proof that the permit holder actually violated a rule of racing promulgated by the Commission. The racetracks may eject a permit holder for a whole host of reasons that do not rise to the level of a racing rule violation, as long as it can be demonstrated that the permit holder acted improperly or engaged in behavior that is otherwise objectionable. This standard/burden provides ample latitude for the racetracks to demonstrate that an ejection is warranted, while also providing parameters in which a permit holder may have a fair and meaningful hearing.

PNGI also comments that the Commission should not entertain stay requests from ejected permit holders and should omit the provisions in the rule that govern the procedures for such stay requests. Of course, other public comments submitted to the Commission are in support of the provisions that govern stay requests, but contain suggestions about language changes. The Commission's authority to entertain and to grant or deny stay requests doesn't derive from the procedural rule itself. The procedural rule merely sets forth the procedures by which stay requests from ejected permit holders will be governed. The Commission's authority to entertain stay requests derives from West Virginia Code §§ 19-23-1 *et seq.* and 178 CSR 1 § 6.1. and 178 CSR 2, § 6.1., which the Supreme Court expressly upheld in *Reynolds*. Implicit and inherent in the Commission's authority and jurisdiction over ejection appeals, is the authority and jurisdiction to entertain and to either grant or deny stay requests filed by appealing permit holders who have been ejected by licensed racetracks. If the Commission can exercise its jurisdiction to completely overturn an ejection, it logically follows that it has the jurisdiction to review a stay request made pending the disposition of an ejection appeal and temporarily stay such ejection after the appropriate procedural and substantive safeguards are observed.

PNGI also comments that the proposed amendments are not "procedural" in nature. It should be noted that at one time the Commission's hearing procedure rules were contained in its legislative rules pertaining to thoroughbred and greyhound racing. When those legislative rules were under review by the Legislative Rule Making Review Committee immediately prior to the 2011 Legislative Session, the Commission was explicitly instructed to take its hearing procedure rules out of its legislative rules and promulgate them separately in a procedural rule. The Commission heeded this instruction, which resulted in 178 CSR 6. The Commission now proposes to amend that procedural rule to provide for procedures for its ejection hearings.

Pursuant to West Virginia Code § 29A-1-2(g), a procedural rule is a rule which fixes rules of procedure, practice or evidence for dealings or proceedings before an agency. A rule establishing the burden of proof in ejection appeal hearings is a rule which fixes an evidentiary standard.

Therefore it is a rule that constitutes a "procedural" rule under the West Virginia Code. However, as discussed above, the section of the Commission's procedural rule that states the standard/burden of proof in ejection appeals mirrors and is in conformance with the Commission's legislative rules. Therefore, the standard/burden imposed in the procedural rule derives directly from authority granted by the West Virginia Legislature. A rule establishing the procedures and practices to be followed in the event that an ejected permit holder asks for a stay are also "procedural" under the West Virginia Code. Simply put, the rule and its proposed amendments are fundamentally procedural in nature and are in complete compliance with the authority granted to the West Virginia Racing Commission by our Legislature.

A comment was received by the Mountaineer and Charles Town HBPAs on several items in the rule. Changes made based upon this comment are noted in the document entitled "Amendments Made to Rule as a Result of Public Comments." Insofar as the letter from the HBPAs included comment that did not result in changes to the rules, the Commission thoroughly reviewed those comments and found the suggested changes to be unnecessary.

AMENDMENTS MADE TO RULE AS A RESULT OF PUBLIC COMMENTS

Due Process and Hearings - 178 CSR 6

The following amendments were made to the rule as a result of the joint public comment made on behalf of the Charles Town and Mountaineer horsemen:

§ 2.7. The Commission amended the definition of "ejection" and "ejection by an association" to reference the terms "exclusion" and "exclusion by an association" and clarified that the definition includes the act of refusing to allow a permit holder to remain on its grounds, in addition to refusing to allow admission onto the grounds. This change is necessary because the original proposed definition, which only referenced "ejection," may have been arguably considered incomplete. The Commission views the terms "ejection" and "exclusion" to be interchangeable for the purposes of an appeal therefrom, and the new definition evidences this interpretation.

§ 3.10.c.3. The Commission fixed a typographical error by adding the word "by" which was missing from the proposed version.

§ 3.11.d. and § 4.3.f. The Commission added the word "balance" to this subsection to indicate that in determining whether to grant a stay of a permit suspension or association ejection, the Commission will consider "and balance" the listed factors. This change is necessary to reflect the law of injunctive relief that requires a balancing of the factors.

§ 3.11.d.5. and § 4.3.f.5. In determining whether to grant a stay of a permit suspension or association ejection, the Commission added a fifth factor to the four factors to be considered and balanced: "Any other information deemed relevant by the Commission or the member designated to rule upon stay requests." This change is made in order to reflect the discretionary nature of stay-request review by the Commission.

§ 3.11.f. The Commission fixed a typographical error in the numbering of the proposed version of the rule, which incorrectly numbered this subsection as 3.11.d.

§ 4.1.a.8. The Commission added to the list of the parties' rights in an appeal proceeding before the Commission of a permit suspension or association ejection, that any party has the right to request subpoenas and subpoenas duces tecum. The procedural rule already provided, and still provides, for the issuance of subpoenas and subpoenas duces tecum in § 4.5.a., but it is beneficial to also list the right to request subpoenas along with the other rights in § 4.1.a.

§ 4.2.b. The original proposed version of this subsection requires that an appeal of a association ejection be filed with the Commission no later than twenty (20) days after the permit holder receives the association's written ejection notice. The Commission amended this subsection to add an alternative clause that an appeal of an association ejection must be filed no later than thirty (30) days after an association receives an ejected permit holder's request to re-enter the grounds. This change is intended, in part, to address permit holders who were ejected prior to the effective date of this procedural rule and who continue to be ejected after the effective date. The change is

designed, in part, to create a time frame within which those permit holders must file an appeal so as to prevent ejected permit holders from sitting on their rights to appeal, which may ultimately prejudice an association's ability to meet its burden in the ejection appeal.

§ 4.2.c. The Commission added a new subsection that requires an association to provide an ejected permit holder with a written notice of all the reasons for the ejection within twenty-four (24) hours after the ejection. The proposed version of the rule in § 4.1.a.1. provides an ejected permit holder with the right to have "notice of the reason for the ejection" as part of the other list of the parties' rights for any appeal to the Commission. This amendment clarifies and places a time frame on this requirement.

§ 4.2.d. through and including § 4.2.f. These subsections were re-numbered due to the addition of the new subsection § 4.2.c. mentioned above.

§ 4.2.e. and § 4.3.d. The Commission fixed a typographical error by changing the word "designed" to "designated."

§ 4.2.f. The Commission struck the last sentence of this subsection which allowed the Commission to assess a non-prevailing permit holder with the cost of an ejection appeal proceeding. There is no corresponding provision which allows the Commission to assess the costs to an association in the event the permit holder prevails. Rather than add such a provision, the Commission chose to strike the proposed provision altogether.

§ 4.7.e. The Commission amended this subsection to add that the permit holder and association shall abide by the Commission's order which rejects, affirms or modifies an ejection. This amendment clarifies that the Commission's review power over ejection appeals.

The following amendment was made to the rule as a result of all four public comments received insofar as they all contained comments on the issue of the association's burden of proof in ejection appeal hearings:

§ 4.7.d. The Commission amended this subsection to conform the association's burden of proof to the provisions of 178 CSR 1, § 6.2. and 178 CSR 2, § 6.2. (the pertinent sections of the Commission's legislative rules governing thoroughbred and greyhound racing) so that the association must prove by a preponderance that the permit holder acted improperly or engaged in behavior that is otherwise objectionable.