BEFORE THE HORSE RACING BOARD

STATE OF CALIFORNIA

In the Matter of the Appeal of:

ALEXANDER SYWAK
CHRB License #289270
Appellant

Case No. 10GG0224
OAH No. 2011060963

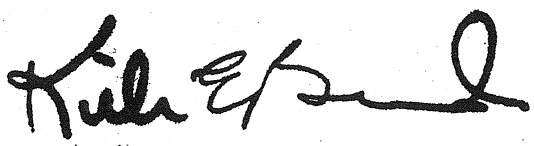
DECISION

The attached Proposed Decision is hereby adopted by the California Horse Racing Board as its Decision in the above-entitled matter.

The Decision shall become effective on November 18, 2011.

IT IS SO ORDERED ON November 17, 2011.

CALIFORNIA HORSE RACING BOARD
Keith Brackpool, Chairman



Kirk E. Breed
Executive Director

BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

In the Matter of the Appeal of:	Case No. 10-GG-0224
ALEXANDER SYWAK,	OAH Case No. 2011060963
Applicant.	

PROPOSED DECISION

This matter was heard before Rebecca M. Westmore, Administrative Law Judge, Office of Administrative Hearings, on August 10, 2011, in Oakland, California.

Alexander Sywak (appellant) appeared and represented himself.

Mary Cain-Simon, Deputy Attorney General, represented respondent, the California Horse Racing Board (CHRB).

PROCEDURAL BACKGROUND

Documentary and oral evidence was received, and the record remained open to permit appellant to submit a copy of an email from Sharyn Jolly regarding the rules applicable to this hearing, and an email from respondent's counsel regarding appellant's Order of Stayed Suspension. In addition, the record remained open to permit respondent to submit proof of service to appellant of the board's Statement of Decision dated April 14, 2010, and an email from respondent's counsel advising appellant of his right to review the administrative record.

On August 17, 2011, appellant timely submitted the email from Sharyn Jolly, and the email from respondent's counsel. Respondent did not object to the admission of these documents. The email from Sharyn Jolly was marked for identification as Exhibit F and admitted into evidence. The email from respondent's counsel was marked for identification as Exhibit G and admitted into evidence.

On August 24, 2011, respondent timely submitted a Supplemental Statement and Evidence in Compliance addressing the issue of the proof of service of the board's Statement of Decision dated April 14, 2010, and submitted a string of emails pertaining to appellant's right to review the administrative record. Appellant objected to the admission of the board's Statement of Decision on the grounds that he did not receive notice of the Statement of Decision.[1]

Appellant did not object to the string of emails pertaining to his right to review the administrative record. The string of emails was marked for identification as Exhibit 2, and admitted into evidence. The Statement of Decision is a jurisdictional document and is not admitted for evidentiary purposes in this de novo hearing. The Statement of Decision was admitted for jurisdictional purposes as Exhibit 3.

The record was scheduled to close on September 8, 2011. However, on August 31 and September 7, 2011, appellant requested a two week continuance to "study the other precedential decisions and to submit further arguments." On September 6, 2011, respondent submitted to appellant copies of the board's precedential decisions. Appellant's request for a continuance through September 26, 2011 was granted and respondent was permitted to submit its reply by October 3 2011, on which day the record would close.

On September 22, 2011, appellant filed a second motion for continuance requesting additional time to review the board's precedential decisions. Appellant's request was denied on the grounds that he was granted until September 26, 2011 to review the decisions and submit further argument regarding those decisions. The record closed, and the matter was submitted for decision on October 3, 2011.

PRELIMINARY MATTERS

Appellant's Motion to Dismiss – Denial of Due Process

1. At hearing, appellant moved to dismiss the Board of Steward's (board) action on the grounds that the board failed to advise him that this hearing would be conducted in accordance with the provisions of the Administrative Procedures Act (APA), commencing with Government Code sections 11500 et seq., and therefore he was denied due process.

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[1] In his Supplemental Statement and Evidence in Compliance, respondent admitted that the board did not mail the Statement of Decision to appellant. However, appellant received notice of the Statement of Decision because he timely appealed from that Decision.

2. However, evidence presented by appellant establishes that appellant was advised of the applicability of the provisions of the APA on two separate occasions prior to this hearing, and acknowledged this notice in his appeal to the board. At the March 26, 2011 CHRB hearing, appellant confirmed that he received a copy of the Governing Procedure for Hearing Before Board of Stewards, which states in paragraph 12 that an appeal of the Board of Steward's decision "will be heard on behalf of the CHRB by an administrative law judge (ALJ) ...." Appellant acknowledged the applicability of paragraph 12 in his written appeal of the board's Amended Ruling No. 51 issued on May 5, 2011. Thereafter, in an email dated May 26, 2011, CHRB Senior Special Investigator Sharyn Jolly notified appellant that "[a]n appeal from a Board of Stewards ruling will be reviewed by the Office of Administrative Hearings. Reference will be the California Administrative Procedure Act." While the notice provided in the Governing Procedure for Hearing Before Board of Stewards, was insufficient to place appellant on notice of the applicability of the APA, Senior Special Investigator Jolly's May 26, 2011 cleared up any ambiguity about the procedures that would be applied in this hearing. Therefore, appellant had sufficient notice of the applicability of the APA prior to this hearing.

Appellant's Motion to Dismiss – Witness Testimony

3. At hearing, appellant moved to dismiss the board's action on the grounds that he was unaware of the procedures for calling witnesses to testify on his behalf. However, as set forth in Preliminary Matters 2, appellant had sufficient notice of the applicability of the APA prior to this hearing, and therefore was aware or should have been aware of the procedures for calling witnesses to testify on his behalf at hearing. In spite of appellant's awareness of the applicability of the APA to this hearing, appellant was afforded an opportunity to make an offer of proof regarding the testimony of each witness he intended to call to testify on his behalf.

4. Evidence Code section 352, provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Government Code section 11513, subdivision (f), provides that "[t]he presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time." As set forth below, the testimony of each of the following witnesses was properly excluded, pursuant to Evidence Code section 352, and Government Code section 11513, subdivision (f), due to their lack of probative value:

> 1. **Darrell McHargue, CHRB Steward** – Appellant intended to call Steward McHargue to verify a conversation they had regarding the number of days or months trainers were required to keep horses in a CHRB-approved facility prior to a race, and the potential pitfalls of handling a horse prior to a race.

However, that conversation is recorded in the Reporter's Transcript of the March 26, 2011 CHRB hearing, beginning at page 46, line 9, and is included in the administrative record in this matter. Therefore, Steward McHargue's verification of his prior testimony adds no probative value to this hearing.

2. **Dennis Nevin, CHRB Steward** – Appellant intended to call Steward Nevin "to see how he had gone through the mitigating factors and how he came up with decision," and "why they ruled other ways with other trainers." Steward Nevin's consideration of mitigating factors, his ultimate decision, and his rulings in other trainer cases is not relevant to this de novo hearing.

3. **John Herbuveaux, CHRB Steward** – Appellant intended to call Steward Herbuveaux to "see how he arrived at the decision regarding the suspension and fine given my mitigating circumstances, and how it fits with other decisions." Steward Herbuveaux's reasons for suspending respondent's license and imposing a fine against respondent for his conduct arising on November 13, 2010 are not relevant to this de novo hearing.

4. **Sharyn Jolly, CHRB Senior Special Investigator** – Appellant intended to call Ms. Jolly to clarify the number of days a trainer is required to keep a horse at a CHRB-approved facility prior to a race. The board's rules and regulations provide the framework within which trainers must operate when handling a horse prior to a race. Therefore, Ms. Jolly's interpretation of the board's rules and regulations regarding the amount of time a trainer is required to keep a horse in a CHRB-approved facility prior to a race has no probative value in this hearing.

5. **Kirk E. Breed, CHRB Executive Director** – Appellant intended to call Executive Director Breed to question why he "signed off" on other trainer cases involving positive test results. Executive Director Breed's decision to "sign off" on other trainer cases is irrelevant to appellant's conduct in this case, and therefore has no probative value in this hearing.

6. **Mary Cain-Simon, Deputy Attorney General** – Appellant intended to call Deputy Attorney General Cain-Simon to question why the CHRB "signed off" on other trainer cases involving positive test results. Deputy Attorney General Cain-Simon's representation of the CHRB in other trainer cases is

protected by the attorney-client and attorney work product privileges, and are therefore not subject to disclosure in this hearing.

7. **Gabriel Palomar, CHRB Investigator** – Appellant intended to call Investigator Palomar to verify "the forthrightness and clearness of all three parties in terms of responding to his questions, and our timeliness and openness during the barn inspection." However, Investigator Palomar's confirmation that the parties' were candid during his investigation is recorded in the Reporter's Transcript of the March 26, 2011 CHRB hearing, beginning at page 89, line 20, and is included in the administrative record in this matter. Therefore, Investigator Palomar's verification of his prior testimony adds no probative value to this hearing.

8. **Jesus Samano Coyt, Horse Owner** – Appellant intended to call Mr. Coyt to verify that two years prior to the horse race on November 13, 2010, appellant instructed him not to give medications to the horse without first checking with appellant and their veterinarian. However, there is no dispute regarding appellant's conversation with Mr. Coyt two years prior to the November 13, 2010 race. Therefore, this testimony is irrelevant to this proceeding.

9. **Juan Coyt Reyes, Horse Owner's Brother** – Appellant intended to call Mr. Reyes to verify that two years prior to the horse race on November 13, 2010, appellant instructed him not to give medications to the horse without first checking with appellant and their veterinarian. There is no dispute regarding appellant's conversation with Mr. Reyes two years prior to the November 13, 2010 race. Therefore, this testimony is irrelevant to this proceeding.

10. **Alfonso Coyt, Groom and Horse Owner's Cousin** – Appellant intended to call Mr. Alfonso Coyt to verify that he was present at the horse owner's ranch two years prior to November 13, 2010, and overheard appellant instruct his cousin not to give medications to the horse without first checking with appellant and their veterinarian. There is no dispute regarding appellant's conversation with Mr. Alfonso Coyt two years prior to the November 13, 2010 race. Therefore, this testimony is irrelevant to this proceeding.

11. **Carlos Coyt, Horse Owner's Uncle** – Appellant admitted that Mr. Carlos Coyt was "not involved in this incident," but intended to call Mr. Carlos Coyt to testify to the conditions under which appellant works and races horses. Mr. Carlos Coyt's proposed testimony is irrelevant, and adds no probative value to the issues in this proceeding.

5. In sum, appellant received sufficient notice of the applicability of the APA prior to this hearing; he was afforded an opportunity to fully develop the facts of this case at hearing through his testimony and documentary evidence; and as set forth in Preliminary Matters 4, all of the witnesses appellant intended to call at hearing were properly excluded due to the lack of probative value of their testimony.

FACTUAL FINDINGS

1. The board issued Class C Trainer License Number 289270 to appellant Alexander Sywak on September 9, 2006. Appellant's license will expire on March 31, 2012, unless renewed.

2. On November 13, 2010, appellant was the trainer of record of the racing horse Don'tblocktheshot, which is owned by Jesus Samano Coyt. Don'tblocktheshot was delivered to appellant by Owner Coyt's uncle, Carlos Coyt, on November 12, 2010 at 0640 hours. On November 13, 2010, appellant entered Don'tblocktheshot in the 8th Race at Golden Gate Fields. The horse finished third in the race and collected a purse of $1,230.

3. On November 13, 2010, Scott Stanley, Ph.D., Chief Chemist at the University of California, Davis, California Animal Health & Food Safety Laboratory, collected and tested a sample of Don'tblocktheshot's blood and urine, sample number GG10340, and detected concentrations of Clenbuterol[2] (urine 7.9 ng/ml and blood 60 pg/ml) in excess of the authorized decision levels, a class 3 medication violation.

4. On December 1, 2010, CHRB Investigator, Gabriel Palomar, began his investigation of this violation. He conducted interviews with appellant, and the owner and the groom of Don'tblocktheshot, and included in his report the signed statement

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[2] According to documentation included in Investigator Palomar's report, Clenbuterol is "approved by the Food and Drug Administration for use in horses as a bronchodilator in the management of airway obstruction ...," but "has also been used as a performance-enhancing drug by increasing aerobic capacity, increasing blood pressure, and oxygen transport."

of Don'tblocktheshot's groom, Alfonso Coyt, in which Mr. Coyt admitted administering 5 cc of Clenbuterol paste in Don'tblocktheshot's morning feed on November 9, 2010, without the knowledge or permission of the owner or appellant.

5. On March 26, 2011, the Board of Stewards held a formal hearing to address appellant's violations of California Code of Regulations, title 4, section 1843, subdivisions (a), (b), (c), and (d) (Medications, Drugs and Other Substances); 1844, subdivisions (e)(9) and (f) (Authorized Medication); and 1894 (Duties of Trainer), as well as the applicability of California Code of Regulations, title 4, sections 1859.5, 1887, and 1888, subdivision (c).

6. In his written statement to the board, appellant admitted that "I am in violation of [section 1843, subdivision (a)]" (No horse participating in a race shall carry in its body any drug substance) due to the "elevated levels of Clenbuterol," and [section 1843, subdivision (d)] (A finding by an official chemist that a ... finding of a drug substance in excess of the limit established by the Board for its use shall be prima facie evidence that the trainer ... has ... been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered to the horse) due to "the blood level of Clenbuterol."

7. In his written statement, appellant agreed that the horse should be disqualified from the race and the purse returned pursuant to California Code of Regulations, title 4, section 1859.5; that "I am responsible for the condition of the horse in my care," pursuant to section 1884, and that "I am the absolute insurer and am responsible for the condition of the horse," pursuant to section 1887.

8. In his written statement, appellant denied that he violated California Code of Regulations, title 4, section 1843, subdivision (b) (administration of a drug substance to a horse entered into a race), because "Alfonso stated that he gave the Clenbuterol"; section 1843, subdivision (c) (possession of any drug substance that can be administered to a horse), because Clenbuterol was not found in his possession during the inspection of his barn; and section 1843, subdivision (d), based on the urine level of Clenbuterol.[3]

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[3] In its charging document, the board identified the urine level as 7.9 ug/ml, instead of 7.9 ng/ml. It is clear from the record, including the laboratory report, that this was a typographical error. Appellant's denial of the violation based on that typographical error was therefore disingenuous. At its best, appellant's denial demonstrates that he has no knowledge regarding medications administered to horses. At its worst, appellant's denial reveals a devious attempt to avoid his responsibilities as a licensed trainer.

9. On April 1, 2011, in Ruling No. 50, the board disqualified Don'tblocktheshot "from all purse monies earned," and "deemed [the horse] unplaced," and appellant, the owner of the horse, and the jockey were ordered to return "all purse monies" for redistribution pursuant to a revised order of finish.

10. On April 1, 2011, in Ruling No. 51, the board found appellant in violation of California Code of Regulations, title 4, sections 1843, subdivisions (a) and (d) (Medication, Drugs and Other Substances); 1844, subdivisions (e)(9) and (f) (Authorized Medication); and 1894 (Duties of Trainer). The board suspended appellant's license for thirty (30) days, and ordered him to pay a $3,000 fine, pursuant to California Code of Regulations, title 4, section 1887 (Trainer to Insure Condition of Horse).

11. On April 3, 2011, appellant timely appealed the board's Ruling No. 51 on the basis that "I believe I have strong mitigating factors that were not considered in the Steward's ruling," and "would like to present the ... mitigating factors and hope to reduce the suspension days and monetary fine." On April 4, 2011, appellant requested a temporary stay of the board's Ruling No. 51, which the board granted on April 6, 2011, pending appellant's appeal.

12. On April 28, 2011, the board denied appellant's Petition for Reconsideration of Penalty, and vacated its April 6, 2011 stay order. On May 5, 2011, the board issued Amended Ruling No. 51 imposing the thirty (30) day suspension of appellant's license and ordering him to pay a $3,000 fine.

13. On May 8, 2011, appellant requested a stay of the board's May 5, 2011 Amended Ruling No. 51 imposing the suspension and ordering payment of a $3,000 fine, which the board granted on May 11, 2011, pending the appeal and final disposition of this hearing.

Appellant's Argument – The Trainer Rule is Not Absolute

14. Appellant contends that the trainer rule is not absolute, and cites to California Code of Regulations, title 4, section 1888, subdivision (c), as his defense. Section 1888, subdivision (c), provides, in pertinent part, that "[a] trainer ... may defend, mitigate or appeal the charge if: ... [h]e shows by a preponderance of evidence that he made every reasonable effort to protect the horses in his care from tampering by unauthorized persons ...." Appellant relies on a conversation in 2009 with the owner and groom in which he advised them not to administer medication to the horse without talking to him about it.[4] Appellant also asserted that because he did

[4] Reporter's Transcript of March 26, 2011 hearing, at p. 75.

not administer the medication to the horse, did not ask that the medication be administered to the horse, and because the medication was administered on the owner's ranch before the horse was delivered to him, "I do not feel responsible for it."

15. Appellant's contention is without merit. The transcript of the board's March 26, 2011 hearing reveals that appellant made no effort whatsoever to protect Don'tblocktheshot in his care. To the contrary, appellant admitted that prior to entering the horse in the 8th race, he did not specifically ask the owner or the groom about medications, but rather had a "general discussion" about entering the horse in the race, and admitted that "I usually don't run through a list of – checking for a whole bunch of things."[5]

Ignorance is not innocence, and appellant's failure to ask basic questions regarding the health of the horse demonstrates his complete and utter disregard not only for the condition of this horse while in his care, but also for his role as a trainer. Indeed, had appellant asked basic questions of the owner and the groom he would have learned of the medication administration and had an opportunity to scratch the horse from the race. Appellant's reliance on the conversation he had with the owner and the groom when they began their relationship in 2009 is also misplaced. A conversation two years prior to an incident does not absolve appellant of his responsibility. Rather, it serves to illuminate either careless business practices, or appellant's unwillingness, inability or lack of basic qualifications necessary to perform his duties as a professional trainer.

Appellant's Argument – The Board Failed to Notify Him That He Should Maintain Horses in his Care Longer Than 24 Hours Prior to a Race

16. Appellant contends that the board failed to notify him that he should maintain horses in his care longer than 24 hours prior to a race. Appellant cites to California Code of Regulations, title 4, section 1588, subdivision (j), as justification for his argument. Section 1588, subdivision (j), provides, in pertinent part, that: "a horse is ineligible to start in any race if ... when, except with prior approval of the stewards, such horse has not been on the grounds of the association or its approved auxiliary stable area for at least 24 hours prior to the time the race is to be run."

17. Appellant is correct. There are no rules that require a horse to be in his care longer than 24 hours prior to a race. However, section 1588 sets forth grounds upon which to deny a horse eligibility to start a race. It does not address appellant's responsibilities to care for the condition of a horse once it is entered into a race. Therefore, appellant's contention is without merit. Worthy of note, however, is appellant's admission in the transcript of the board's March 26, 2011 hearing, that prior to this incident, he was cautioned by Steward McHargue about "the pitfalls of

[5] Reporter's Transcript of March 26, 2011 hearing, at pp. 75 and 76.

allowing a horse to be trained outside the grounds and then brought in to [appellant] two days before a race after having been given a drug that doesn't clear a horse's system and you run it under your name," as well as "the possible repercussions if a horse comes up positive, that it would be a responsibility of [appellant] because [appellant is] down as trainer on those horses."[6]

Appellant's Argument – The Board Failed to Consider Mitigating Factors

18. Appellant contends that the board failed to consider mitigating factors when it issued its decision to suspend his trainer license and to order payment of a $3,000 fine. Appellant asserted that due consideration should have been given to the fact that he did not administer Clenbuterol to the horse and that the horse's groom admitted administering the medication to the horse. Appellant believes that his trainer license should not be subject to suspension, and that his fine should be reduced.

19. However, the record is clear that Chairman Herbuveaux advised appellant at the close of the board's March 26, 2011 hearing that "[w]e will review the evidence and testimony given today, and we will arrive at a decision." In addition, he advised appellant that "[a]s to the culpability of the three of you for the positive test result, that is what we will deliberate over. We will do that, come to a decision."[7] Finally, in its Statement of Decision, pages 11 through 13, dated April 14, 2011,[8] the board set forth in detail all the factors considered in arriving at its decision. Therefore, appellant's contention is without merit.

LEGAL CONCLUSIONS

1. Business and Professions Code section 19517, subdivision (a), provides, in pertinent part, that the CHRB may overrule any decision of the board if a preponderance of the evidence indicates any of the following:

(1) The steward mistakenly interpreted the law.
(2) New evidence of a convincing nature is produced.
(3) The best interests of racing and the state may be better served.

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[6] Reporter's Transcript of March 26, 2011 hearing at pp. 83 through 86.

[7] Reporter's Transcript of March 26, 2011 hearing, at p. 92.

[8] The board's decision was inadvertently dated April 14, 2010.

Cause for Discipline - Medication, Drugs and Other Substances

2. California Code of Regulations, title 4, section 1843, subdivisions (a) and (d), provide that:

> (a) No horse participating in a race shall carry in its body any drug substance or its metabolites or analogues, foreign to the horse except as hereinafter expressly provided.
>
> [¶] ... [¶]
>
> (d) A finding by an official chemist that a test sample taken from a horse contains a drug substance or its metabolites or analogues which has not been approved by the Board, or a finding of more than one approved non-steroidal, anti-inflammatory drug substance, or a finding of a drug substance in excess of the limit established by the Board for its use shall be prima facie evidence that the trainer and his/her agents responsible for the care of the horse has/have been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered to the horse.

3. As set forth in Factual Findings 3, 4 and 6, Chemist Scott Stanley, Ph.D. confirmed that Don'tblocktheshot participated in the 8th race at Golden Gate Fields on November 13, 2010, while carrying Clenbuterol in its body. Therefore, cause exists to discipline appellant's trainer license pursuant to California Code of Regulations, title 4, section 1843, subdivisions (a) and (d).

Cause for Discipline – Authorized Medication

4. California Code of Regulations, title 4, section 1844, subdivisions (e)(9) and (f), provide, in pertinent part, that:

> [D]rug substances and medications authorized by the Board for use may be administered to safeguard the health of the horse entered to race provided that:
>
> (e) Official urine test samples may contain one of the following drug substances, their metabolites or analogs, in an amount that does not exceed the specified levels:
>
> [¶] ... [¶]

(9) Clenbuterol; 5 nanograms per milliliter

[¶] ... [¶]

(f) Official blood test samples may contain clenbuterol in an amount not to exceed 25 picograms per milliliter of serum or plasma.

5. As set forth in Factual Findings 3 and 4, Don'tblocktheshot carried 7.9 ng/ml of Clenbuterol in his urine, and 60 pg/ml of Clenbuterol in his blood at the time of the 8th race at Golden Gate Fields on November 13, 2010. It is undisputed that the amounts carried by Don'tblocktheshot exceeded the amounts permitted for use by the board. Therefore, cause exists to discipline appellant's trainer license pursuant to California Code of Regulations, Title 4, section 1844, subdivisions (e)(9) and (f).

Cause for Discipline – Duties of Trainer/Trainer to Insure Condition of Horse

6. California Code of Regulations, title 4, section 1894 provides that:

> Trainers are responsible for the condition of horses in their care and are presumed to know the rules. A trainer represents the owner relative to horses which he is training in the matter of entries, declarations, and the naming of jockeys or drivers, unless the owner notifies the stewards in writing to the contrary. A trainer is responsible for the timely attendance of his horse at the receiving barn and paddock and he shall attend his horse in the paddock and be present to supervise the saddling except when relieved of such duty by the stewards. No trainer shall delegate or sublet his duties as a trainer except as provided in this article, nor shall a trainer have any interest in the earnings, winnings, or bonuses of any other trainer.

7. California Code of Regulations, title 4, section 1887, subdivision (a), provides that:

> The trainer is the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties, except as otherwise provided in this article. If the chemical or other analysis of urine or blood test samples or other tests, prove positive showing the presence of any prohibited drug substance defined in Rule 1843.1 of this division, the trainer of the horse may be fined, his/her license suspended or revoked, or be ruled off. In addition, the owner of the horse, foreman in charge of the horse, groom, and any other

person shown to have had the care or attendance of the horse, may be fined, his/her license suspended, revoked, or be ruled off.

8. As set forth in Factual Finding 2 and included in appellant's written statement and statement under oath at the board's March 26, 2011 hearing, appellant entered Don'tblocktheshot into the 8th race at Golden Gate Fields on November 13, 2010, listing himself as the trainer of record. As set forth in Factual Finding 4, appellant delegated his duties as a trainer to Don'tblocktheshot's groom, Alfonso Coyt. As set forth in Factual Finding 7 and included in appellant's written statement and statement under oath at the board's March 26, 2011 hearing, appellant agreed that he was responsible for the condition of the horse and the absolute insurer of the horse. In his Final Statement dated October 3, 2011, however, appellant retracted his admissions on the grounds that he "was not familiar with the rules and laws related to medication violations, and since studying the rules more closing and being granted access to review the interpretation of these rules via the precedent cases,[9] appellant now believes he is NOT in violation of these two rules." [Emphasis in original.] Appellant attempted to justify his subsequent denial by unilaterally adding a violation of Business and Professions Code section 19851 to the charges brought by the board. This is evidenced by his lengthy argument about the timing of the administration of Clenbuterol to Don'tblocktheshot.[10] However, the board did not charge appellant with a violation of Business and Professions Code section 19851, rendering appellant's argument and retraction of his admissions without merit. Therefore, based on appellant's absolute liability for the condition of the horse, and his admissions under oath, cause exists to discipline appellant's trainer license pursuant to California Code of Regulations, title 4, sections 1887, subdivision (a), and 1894.

9. When all the facts and circumstances are considered, appellant failed to establish, by a preponderance of the evidence, that the decision of the board should be overruled. No evidence was presented to establish that the stewards mistakenly interpreted the law, no new evidence of a convincing nature was produced, and in light of appellant's failure to accept responsibility for his duties and responsibilities as a professional horse trainer, the best interests of racing and the state will not be better served by overruling the board's determination that appellant violated California Code of Regulations, title 4, sections 1843, subdivisions (a) and (d) (Medication, Drugs and Other Substances); 1844, subdivisions (e)(9) and (f) (Authorized Medication); and 1894 (Duties of Trainer), as set forth in the board's Amended Ruling No. 51.

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[9] In the Matters of Koriner and Burnett-Nutter.

[10] See Appellant's Final Closing Argument, at pp. 1 through 7.

Appropriate Penalty

10. California Code of Regulations, title 4, section 1528 provides, in pertinent part:

> The stewards may suspend the license of anyone whom they have the authority to supervise or they may impose a fine or they may exclude from all inclosures in this State or they may suspend, exclude and fine. All such suspensions, fines or exclusions shall be reported immediately to the Board.

11. The use of Clenbuterol in excess of the authorized decision levels has been designated by the CHRB as a Category B penalty. As set forth in the Penalty Categories Listing By Classification (1/08), the first offense for a Category B penalty by a trainer is a "[m]inimum 30-day suspension absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of a 60-day suspension. AND/OR a minimum fine of $500 absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum fine of $10,000." [Emphasis in original.][11]

12. A mitigating factor is appellant's unawareness of the administration of Clenbuterol to Don'tblocktheshot (Factual Finding 4). However, factors in aggravation include appellant's delegation of his duty as a trainer to Alfonso Coyt (Factual Finding 4); his prior knowledge that delegating his duties as a trainer may create pitfalls and may result in repercussions (Factual Finding 18); his failure to ask any questions about the condition of the horse at the time he entered Don'tblocktheshot into the 8th race (Factual Finding 15); and his failure to take steps to safeguard the horse (Factual Finding 15).

13. The CHRB is charged with the responsibility of ensuring the integrity of horse racing, guarding the health of the horse, and safeguarding the interests of the public and the racing participants through the prohibition or control of all drugs, medications and drug substances foreign to the horse. When all the mitigating and aggravating factors are considered, a 30-day suspension and a $1,500 penalty are appropriate terms of discipline in this case.

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[11] Business and Professions Code section 19582, subdivision (a)(3)(B), is not being considered in reaching a decision regarding the penalty imposed in this matter, as that section only applies to a violation of Business and Professions Code section 19581, which was not charged by the board. (See Factual Findings 5 and 10).

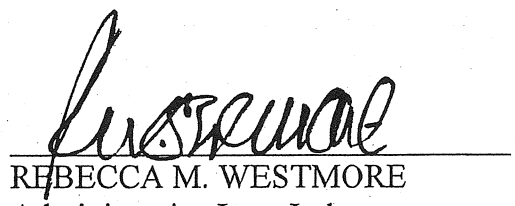
ORDER

1. Amended Ruling No. 51 of the Board of Stewards is AFFIRMED in part and AMENDED in part.

2. Appellant Alexander Sywak's Class C Trainer License Number 289270 is suspended for 30 (thirty) days.

3. Within 10 days of the effective date of this decision, appellant Alexander Sywak shall pay to the board a penalty in the amount of $1,500.

Dated: October 31, 2011



REBECCA M. WESTMORE
Administrative Law Judge
Office of Administrative Hearings

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