BEFORE THE HORSE RACING BOARD

STATE OF CALIFORNIA

In the Matter of:

Appeal of the Board of Stewards Official Ruling #230, Los Alamitos Quarter Horse Racing Assn., dated December 19, 2009

PAUL JONES
CHRB License #207689
Appellant

Case No. SAC 09-0078
OAH No. 2010110086

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 April 29, 2011.

IT IS SO ORDERED ON April 28, 2011.

CALIFORNIA HORSE RACING BOARD
Keith Brackpool, Chairman

Kirk E. Breed
Executive Director

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BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

CALIFORNIA HORSE RACING BOARD, Complainant, vs. PAUL JONES, Respondent.	CHRB Case No. 09LA0222 OAH No. 2010110086

PROPOSED DECISION

This matter came on regularly for hearing before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, at Los Angeles, California, on February 24, 2011.

Deputy Attorney General Kenneth C. Jones represented Complainant, the California Horse Racing Board (CHRB). Respondent Paul Jones was represented by John R. Cogorno, Attorney at Law.

Evidence was received by stipulation and documents, and argument was made. The record was held open for receipt of additional materials. The Supplement to Respondent's Hearing Brief was received March 7, 2011, and marked for identification as Exhibit B. Complainant's Reply to Exhibit B was received March 7, 2011, and marked for identification as Exhibit 9. During a telephonic status conference on March 9, 2011, it was determined that Exhibits B and 9 could be filed and that the matter would be submitted for decision as of March 9, 2011.

FACTUAL FINDINGS

The Administrative Law Judge makes the following Factual Findings:

1. The parties submitted an extensive stipulation containing facts, controverted issues, contentions and attachments (Stipulation) (Exhibits 1 through 7), as well as briefs. The following Factual Findings are taken from the Stipulation.

"1. At all relevant times, Respondent PAUL JONES was duly licensed as a quarter horse trainer by the CALIFORNIA HORSE RACING BOARD ("CHRB.) At all relevant times, JONES was under the jurisdiction of the CHRB and subject to the Horse Racing Law (Business & Professions Code sections 19400, et seq.) and the Horse Racing Rules (Code of Regulations Title 4, Division 4.).

"2. At all relevant times, JONES was the trainer of record for the horse "Jitter Done." On September 12, 2009, "Jitter Done" was on the "Official Veterinarian's List" pursuant to Rule 1866, and JONES worked the horse in an official work out in order to be removed from the Veterinarian's List.

"3. A required official post-work blood sample was taken from "Jitter Done."

"4. The official post-work blood sample was tested by Scott Stanley at the University of California, Davis, Kenneth L. Maddy Equine Analytical Chemistry Laboratory. The sample was found to contain the drug or medication substance Flunixin in the amount of 2400 ng/ml.

"5. Pursuant to the Horse Racing Rule 1844 (c)(2), the authorized level of Flunixin an authorized medication is 50 ng/ml. (A copy of Rule 1844 is marked as Attachment 1, herewith and incorporated herein by reference.)[[1]]

"6. On May 13, 2008, Dr. Richard Arthur, the CHRB Equine Medical Director, issued a memorandum stating: "All work-bloods are to be handled in the same fashion as post-race samples. . . . [I]f the sample analysis reveals a *violation of CHRB provisions as for racing*, the lab shall report their findings to the CHRB split sample custodian for regular processing of a volatile[2] sample. From that point, the *violation will be handled in the same manner as a scheduled race*." (A copy of this memorandum is marked as Attachment 5, herewith and incorporated herein by reference.)

"7. CHRB, brought a Complaint against JONES seeking the imposition of a penalty comprised of a monetary fine and license suspension under the California Horse Racing Rules and Regulations.

"8. An informal hearing before the Board of Stewards of the CHRB was held on the Complaint on or about October 8, 2009, in Case No. SAC 09-0065. The minutes of the October 8, 2009, hearing were reported as follows:

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[1] Each attachment to the Stipulation became an Exhibit in this matter, bearing the same number (i.e., attachment 1 became Exhibit 1), and the Stipulation was received in evidence as Exhibit 7.

[2] First, the emphasis by using italicized language was added to the stipulation, and does not appear in the memo itself. More importantly, this apparent quote from Dr. Arthur's memo is incorrect. By reference to the memo itself, Dr. Arthur wrote of a "violative" sample, not a "volatile" sample. Despite the parties' stipulation, the language of the memo itself will be considered as controlling.

"TRAINER PAUL JONES WHO WORKED THE HORSE "JITTER DONE" IN ORDER TO BE REMOVED FROM THE VETERINARIAN'S LIST ON SEPTEMBER 12, 2009 AT LOS ALAMITOS RACE COURSE IS FINED ONE THOUSAND DOLLARS ($1,000.00)* PURSUANT TO CALIFORNIA HORSE RACING BOARD RULE'S #1866 (VETERINARIAN'S LIST) AND #1887 (A) (TRAINER TO INSURE CONDITION OF HORSE) FOR VIOLATION OF CALIFORNIA HORSE RACING BOARD RULE'S # 1843 (A&D) (MEDICATION, DRUGS AND OTHER SUBSTANCES) AND #1844 (C)(2) (AUTHORIZED MEDICATION -FLUNIXIN IN EXCESS OF PERMITTED LEVEL -2,400 NG/ML -CLASS IV). (Copies of Rules 1866, 1887 and 1843 are marked as Attachments 2, 3, and 4, herewith and incorporated herein by reference.)

"This ruling was agreed upon after trainer Jones agreed to an informal hearing. The complaint involved a positive test for Banamine[3] at a level of 2,400 nanograms. The horse was working to be removed from the vet's list. The trainer stated he works most of his horses on lasix and Banamine administered by the stable vet the morning of the work. Mr. Jones further explained he forgot to tell his foreman that the horse involved was working for the vet. In mitigation the Stewards took into consideration the trainer's excellent medication record and the large number of horses he runs."

"9. On October 8, 2009, the Board of Stewards issued its Official Ruling No. 197, imposing a $1,000 fine against Jones.

"10. On or about October 10, 2009, JONES filed an Appeal from the Board of Stewards Ruling to the full California Horse Racing Board.

"11. On October 14, 2009, the California Horse Racing Board issued an Order of Remand in Case No. SAC 09-0065 because there was an inadequate record and transcript from the October 8, 2009, hearing. In that Order of Remand, the prior ruing [sic: ruling] was set aside and the matter was remanded for a Rehearing and Determination of Findings pursuant to Rule 1537.

"12. The matter was assigned a new case number, Case No. 09LA0222. A rehearing on the complaint in was held November 20, 2009. A copy of the Transcript of Board of Stewards Hearing is marked as Attachment "6" and incorporated herein by reference.

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[3] Although not covered in the Stipulation, Banamine is another name for Flunixin.

[The Stipulation does not contain paragraphs numbered 13 or 14.]

"15. At the conclusion of that rehearing, the Board of Stewards of the CHRB issued an order finding Jones in violation of Rules 1844(c)(2) and imposed a $1,000 fine. The Official Ruling No. 230 states:

> "TRAINER PAUL JONES WHO WORKED THE HORSE "JITTER DONE" IN ORDER TO BE REMOVED FROM THE VETERINARIAN'S LIST ON SEPTEMBER 12, 2009 AT LOS ALAMITOS RACE COURSE IS FINED ONE THOUSAND DOLLARS ($1,000.00)* PURSUANT TO CALIFORNIA HORSE RACING BOARD RULE'S #1866 (VETERINARIAN'S LIST) AND #1887 (A) (TRAINER TO INSURE CONDITION OF HORSE) FOR VIOLATION OF CALIFORNIA HORSE RACING BOARD RULE'S # 1843 (A&D) (MEDICATION, DRUGS AND OTHER SUBSTANCES) AND #1844 (C)(2) (AUTHORIZED MEDICATION -FLUNIXIN IN EXCESS OF PERMITTED LEVEL -2,400 NG/ML -CLASS IV).

"16. This Appeal by Jones is from Official Ruling No. 230.

"17. Jones has paid the $1,000 fine.

"18. The parties stipulate to enter into evidence the transcript of the Board of Stewards Hearing dated November 20, 2009, marked as Attachment 6,[4] and incorporated herein by reference thereby eliminating the need for further testimony."

2. The transcript of the Board of Stewards hearing contains the testimony of Respondent (Exhibit 6, pages 16 – 19). Of significance, Respondent testified credibly that, in Respondent's 20 years of training horses, and in the prior 20 years that Respondent's father was training horses, to Respondent's knowledge Rule 1866[5] has never before been applied to authorize imposition of a fine when a horse performing a work-out to be removed from the Veterinarian's List has a blood sample that includes medications in excess of the limits established by other Rules. Rather, when Respondent has had such horses with a blood sample that includes medications in excess of the limits established by other Rules, he has been informed that the horse would not be removed from the Veterinarian's List. Further, Respondent was not aware of the May 13, 2008 memorandum by Rick Arthur, DVM (Exhibit 5), to the effect that when work-out blood samples under Rule 1866 include medications in

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[4] The Stipulation, as submitted, mistakenly referred to the Transcript as Attachment 5. By agreement of counsel, on the record, it was changed to refer to Attachment 6.

[5] The Horse Racing Rules are found in California Code of Regulations, title 4.

excess of the limits established by other Rules, "the violation will be handled in the same manner as a scheduled race."

LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing Factual Findings, the Administrative Law Judge makes the following Legal Conclusions:

1. The CHRB has the authority to suspend or revoke any license it has issued if any law or regulation has been violated, under Business and Professions Code section 19461.[6] Under Code sections 19581 and 19582, the CHRB may suspend a license or impose a monetary penalty, or both, for administering unauthorized substances to a horse "after it has been entered to race in a horse race." (Section 19581.)

2. This case turns on the Code sections above and several of the CHRB's Rules, as follows. Medications are discussed in Rules 1843 and 1844; fines for medication violations are found in Rule 1843.3; the Veterinarian's List is in Rule 1866[7]; and the Trainer to Insure Condition of Horse is in Rule 1887.

3. Rule 1843 provides, in pertinent part:

"It shall be the intent of these rules to protect the integrity of horse racing, to guard the health of the horse, and to safeguard 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. In this context:

"(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."

"(b) No drug substance shall be administered to a horse which is entered to compete in a race to be run in this State except for approved and authorized drug substances as provided in these rules.

"(c) No person other than a licensed veterinarian or animal health technician shall have in his/her possession any drug substance which can be administered to a horse, except such drug substance prescribed by a licensed veterinarian for a specific existing condition of a horse and which is properly labeled.

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[6] All statutory references are to the Business and Professions Code unless indicated.

[7] The parties agreed that the applicable version of Rule 1866 was as it existed prior to a recent amendment. The applicable version is found in Exhibit 2 and is quoted below.

"(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."

4. Under Rule 1844, certain medications are authorized "to safeguard the health of the horse entered to race . . . ." Under subdivision (b)(2), "non-steroidal anti-inflammatory drug substance (NSAID) may be administered to a horse that is entered to race," including "Flunixin in a dosage amount that the test sample shall contain not more than 50 nanograms of the drug substance per milliliter of blood plasma or serum."

5. Under Rule 1843.3, operative May 23, 2008, penalties may be imposed for medication violations. The rule requires consideration of any aggravating and mitigating circumstances, and also consideration of the classification of a drug substance as referred to in Rule 1843.2 and the CHRB Penalty Categories Listing By Classification (1/08). Flunixin is a Class 5 drug, and is included in Category "C" (NSAIDS) for purposes of establishing a range of possible fines or penalties. Under Category "C," when Flunixin is found in an amount equal to or greater than 100 ng/ml, and it is a first offense, the recommended penalty for a trainer is a fine from $1,000 to $2,500, and for the owner, "Horse must pass Board-approved examination pursuant to Rule 1846 before being eligible to run." (Rule 1843.3, subdivision (d).) Rule 1846 provides that every horse entered to race shall be subject to a veterinary examination known as the "Racing Soundness Exam."

6. Under the version of Rule 1866 in place at the time (see footnote 5), horses deemed unfit to race due to injury are placed on the Veterinarian's List, and "shall be removed from the list only after having demonstrated to the satisfaction of the Official Veterinarian or the Racing Veterinarian that the horse is then raceably sound and in fit physical condition to exert its best effort in a race. A horse may be required to perform satisfactorily in a work-out or qualifying race to demonstrate its physical fitness, and if so a blood and/or urine post-work test sample shall be taken from the horse and the provisions of this article shall apply to such official work-out in the same manner as to a scheduled race."

7. When Rule 1866 refers to "this article," it is referring to Article 15 of the Rules, which encompasses Rule 1840 to Rule 1867.

8. Rule 1887 is found in Article 16 of the Rules.[8] It is titled "Trainer to Insure Condition of Horse," and provides:

"(a) 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 as 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.

"(b) Notwithstanding the above, if the Board or its agents fail to notify a trainer of a potential positive test within 18 calendar days from the date the sample was taken, the trainer shall not be deemed responsible under this section unless it is shown by the preponderance of the evidence that the trainer administered the drug or other prohibited substance defined in Rule 1843.1 of this division, caused the administration or had knowledge of the administration."

9. Under the authorities noted above, the CHRB's authority to issue a fine applies to the circumstances of this case. More specifically: Rule 1843, subdivisions (a) and (b), refer to medications that cannot be administered to a horse "participating in a race" (subdivision (a)) or "which is entered to compete in a race to be run in this State" (subdivision (b)). Rule 1844's specific limits on authorized medications, including Flunixin, apply to a horse "entered to race." Violations may lead to the imposition of fines under Rule 1843.3. Despite language in these rules that they apply to horse races, these provisions are applicable to a work-out to be removed from the Veterinarian's List because, under Rule 1866, the provisions of Article 15 also apply to such workouts, and all of these Rules are found in Article 15. Therefore, for a violation of these Rules, the CHRB has the authority to issue a fine.

10. The authority to issue a fine under the Trainer Insurer rule, Rule 1887, is limited by the opening phrase that the trainer "is the absolute insurer of and responsible for the condition of horses **entered in a race** . . . ." (Emphasis added.) As Rule 1887 is <u>not</u> in the same Article as Rules 1843, 1844 and 1866, the language of Rule 1866 authorizing application of other "provisions of this article" does not permit the Trainer Insurer rule (Rule 1887) to be applied to a work-out for purposes of removing a horse

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[8] For purposes of Legal Conclusions 7 and 8, official notice is taken of the organization of the Rules into different numbered Articles. See Government Code section 11515 (official notice may be taken of generally accepted technical matters and of any fact which may be judicially noticed by the courts), and Evidence Code sections 451 and 452 (permitting judicial notice of state regulations and facts that are capable of accurate determination by resort to accurate sources).

from the Veterinarian's List (Rule 1866). To the extent that Board of Stewards Official Ruling No. 230 refers to, and relies upon, Rule 1887, it is void. However, there is no question that Respondent was responsible for the condition of "Jitter Done" at the work-out, as the Stipulation includes that Respondent was the trainer of record and, on September 12, 2009, "JONES worked the horse in an official work out." (Factual Finding 1, paragraph 2.) Official Ruling No. 230 contains sufficient reference to the Rules prohibiting certain medications in a work-out test sample, including the language from Rule 1843, subdivision (d), that a chemist's finding of a prohibited drug shall be prima facie evidence that the trainer has been negligent. The imposition of a fine is authorized by Rule 1843.3.

11. Respondent contends that Rule 1866 contains the exclusive penalty for a violation; that is, a horse whose post work-out test sample shows a drug that violates the medication rules does not get removed from the list and cannot be entered to race. (This penalty is not expressly stated in the rule, but it is a fair inference, as the rule allows a horse to be removed from the Veterinarian's List only after demonstrating soundness and fit physical condition.) This contention is rejected, as it is internally inconsistent and contrary to the express language of the applicable Rules. Respondent's contention necessarily includes the element that the language of Rules 1843 and 1844 on prohibited medications that limits their application to horses entered in a race does not prevent the application of those Rules to a horse performing a work-out. This is supported by the language in Rule 1866 that a test sample is to be taken from the horse after the work-out "and the provisions of this article shall apply to such official work-out in the same manner as to a scheduled race." However, Respondent would then limit the application of the other rules in the same article to those rules that only identify prohibited drugs, and not include Rule 1843.3, also in the same article as Rule 1866, which authorizes the imposition of a fine for certain violations.

12. As noted in Legal Conclusion 6, Rule 1843.3 became operative on May 23, 2008. Therefore, Respondent's contention that fines had not been imposed based on work-out test samples for the prior 20 or 40 years is of limited weight. This fine, in this case, is based upon a rule that only recently became operative.

13. The regulatory scheme is consistent with its underlying statutory authority. Regulations are to be consistent with existing law and may "fill up the details" to help effectuate the law (see, for example, *Knudsen Creamery Co. v. Brock* (1951) 37 Cal.2d 485), and be "reasonably necessary to effectuate the purpose of the statute" (*Physicians & Surgeons Laboratory, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 982, citing Government Code section 11342.2 (1979). The general rule is that if a statute or regulation can be construed in a manner that will uphold its validity, then such a construction should apply. (*Cal. Drive-in Restaurant Ass'n. v. Clark* (1943) 22 Cal. 2d 287, 292). See also *Bryant v. Swoap* (1975) 48 Cal.App.3d 431, 439: "Where possible, appellate courts must construe statutes and regulations to render them valid.")

14. Dr. Arthur's memo (Exhibit 5) does not alter the analysis set forth above. Of note, the memo is directed to "All Official and Association Veterinarians," with no indication that it was intended to be distributed to trainers such as Respondent. Second, it is dated May 13, 2008, prior to the operative date of Rule 1843.3 which authorizes the imposition of the fine herein.

15. In *County of San Luis Obispo v. Workers' Compensation Appeals Board* (2001) 92 Cal.App.4th 869, 878 [112 Cal.Rptr.2d 246], the Court held that, in determining the amount of a penalty, it must examine the entire record for "fairness, reasonableness, and proportionality in the overall scheme of the workers' compensation law and the purposes sought to be accomplished by that law. (Citations.)" These same factors are included in the authority of Rule 1843.3 for imposition of the $1,000 fine against Respondent. The fine is affirmed.

16. Cause exists to impose a monetary penalty or fine relating to Respondent's license under Board of Stewards Official Ruling No. 230 for violation of California Code of Regulations, title 4, sections 1843, 1843.3, 1844 and 1866, as set forth in Factual Finding 2 and Legal Conclusions 1 through 7, 9, and 11 through 14.

17. There is no authority to impose a fine under Rule 1887 under the facts of this case, as set forth in Factual Finding 2 and Legal Conclusions 8 and 10.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Board of Stewards Official Ruling No. 230 is affirmed, including the monetary penalty of $1,000, payable to the CHRB, imposed against Respondent Paul Jones, except to the extent that it relies upon Rule 1887.

DATED: March 24, 2011.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings