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OAL Docket. No. RAC 11899-18
Agency Ref. No. NJRC-6-H-18-FR

ANN DEPIETRO,

Petitioner,

v.

**FINAL
DECISION**

NEW JERSEY RACING COMMISSION,

Respondent.

On February 14, 2018, New Jersey Racing Commission ("NJRC" or "Commission") Investigator Joseph Sczerbowicz conducted a random search of Congress Hill Farm, a licensed off-track stabling facility, in Jackson, New Jersey. Initial Decision at 3. In Petitioner's stabling area, Sczerbowicz witnessed a person, later identified as John Colisanti, latch but not padlock the door of Petitioner's tack room. Ibid. In the tack room, Sczerbowicz discovered 30 injectable bottles, 83 single needles and 44 syringes with needles. Ibid. Of the injectable bottles, 21 bottles were either empty or had residual contents. Id. at 9. One bottle contained the antibiotic Liquamycin and two bottles contained phenylbutazone. Id. at 10.

While at Congress Hill Farm, Sczerbowicz witnessed Colisanti, who is not licensed by the NJRC, place a race horse in cross-ties. Id. at 4. Thereafter, Sczerbowicz also witnessed Colisanti transporting horses trained by Petitioner to Freehold Raceway on multiple occasions. Ibid.



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The NJRC's Board of Judges conducted a hearing on June 22, 2018 and determined that Petitioner's possession of the hypodermic needles, syringes and other drug instruments constituted a violation of N.J.A.C. 13:71-7.29(a)(13) and N.J.A.C. 13:71-23.9(a) and imposed a 6-month suspension and \$1,000 fine. See Ruling No. 18FRE44 (Exhibit J-1). The Board of Judges determined that Petitioner's possession of the therapeutic prescription legend drugs violated N.J.A.C. 13:71-7.29(a)(13) and N.J.A.C. 13:71-23.9(a) and imposed a 6-month suspension, which shall be served consecutively, and \$1,500 fine. Ibid. Finally, the Board of Judges determined that Petitioner employed an unlicensed individual who had access to, cared for and transported race horses she trained in violation of N.J.A.C. 13:71-7.26(d) and imposed a 15-day suspension, to be served consecutively, and a \$500 fine. Ibid.

Petitioner appealed and her request for a stay of the penalties was granted. Colisanti's violations of the NJRC's rule by participating in racing without a license were addressed in a separate contested case.¹

On March 9, 2020, the Office of Administrative Law ("OAL") issued the initial decision in this matter. On April 21, 2020, NJRC staff applied for and received a 45-day extension of time to consider the initial decision. During this period of time, Governor Murphy issued Executive Order 127 (April 14, 2020) which mandates that "[i]n any contested case, any pending deadline . . . for adopting, rejecting or modifying a recommended report and decision, shall be extended by the number of days of the Public Health Emergency declared in Executive Order 103 (2020) plus an additional 90 days." See Executive Order 127 at ¶1. The Public Health Emergency declared in Executive Order 103, which remains ongoing, has been extended through subsequent executive orders. See, e.g., Executive Order 235 (April 15, 2021). As a result, consideration of the initial decision is timely.

The Commission considered the initial decision, Petitioner's exceptions, which were filed by Howard A. Taylor, Esq., and Respondent's exceptions, which were filed by Deputy Attorney General Jonathan S. Sussman, at its May 19, 2021 public meeting. The Commission adopts the Administrative Law Judge's ("ALJ") findings of fact.

¹ The NJRC imposed penalties on Colisanti for his activities with these race horses without a license. On January 22, 2020, the NJRC adopted the initial decision, which affirmed the 2-year suspension and \$1,000 fine, which the NJRC imposed on Colisanti for his activities See John Colisanti v. New Jersey Racing Commission, RAC 11895-18 (December 20, 2019). In 2018, Colisanti applied for a standardbred stable employee's license which was denied. See Final Decision, John Colisanti v. New Jersey Racing Commission, RAC 18173-18 (January 31, 2020).

Regarding the ALJ's conclusions, the Commission adopts the ALJ's finding "that the petitioner was in constructive possession of prohibited items in her equipment room..." Initial Decision at 17. The Commission also generally adopts, except as discussed below, the ALJ's conclusion that Petitioner violated N.J.A.C. 13:71-7.29(a)(13) and 13:71-23.9(a) by possessing hypodermic needles, syringes, paraphernalia, and therapeutic prescription legend drugs. Id. at 21. The Commission also adopts the finding that of the 30 injectable bottles, 21 bottles were either empty or had residual contents, one bottle contained the antibiotic Liquamycin and two bottles contained phenylbutazone. Id. at 9-10.

Further, the Commission adopts the ALJ's conclusion that Petitioner violated N.J.A.C. 13:71-7.26(d) by failing to prevent an unlicensed individual from being involved in the care and custody of the horses she trained, as well as the ALJ's conclusion that Petitioner violated N.J.A.C. 13:71-1.19 by engaging in conduct detrimental to the sport. Id. at 19. The Commission also adopts the ALJ's conclusion that a 15-day suspension, to be served consecutively to the other ordered suspensions, and a \$500 fine for employing an unlicensed individual who had access to and cared for horses she trained is an appropriate penalty for the violation of N.J.A.C. 13:71-7.26(d). Id. at 21.

However, the Commission rejects the ALJ's conclusion that "the penalties sought to be imposed by the Commission for the violations of N.J.A.C. 13:71-7.29(a)(13) and 13:71-23.9(a) shall be merged and modified to a penalty of a full suspension of the petitioner's license for six months and a \$2,500 fine." Ibid. Finding that "all contraband items, including drugs, syringes, and needles, were found at the same time and same place," the ALJ applied a criminal law doctrine of merger and substantially reduced the penalties imposed by the NJRC's Board of Judges. Id. at 18. Relying on criminal case law, the ALJ states that "an accused [who] committed only one offense . . . cannot be punished as if for two." Id. at 18 (quoting State v. Tate, 216 N.J. 300, 302 (2013) and State v. Davis, 68 N.J. 69, 77 (1975)). The ALJ goes on to conclude that "[w]hile one offense may have occurred here, namely, possession of contraband (drugs and syringes and needles) as proscribed by the regulation, any penalty to be imposed must consider all of the evidence that was found at the scene of the violation, as well as the results of the testing laboratory." Ibid.

In filing Respondent's exceptions, DAG Sussman argues that "[t]he Merger doctrine is appropriate only under narrow circumstances in the criminal context." See Respondent's Exceptions at 10. Pointing out that this is not a criminal matter, DAG Sussman correctly asserts that "the possession of impermissible substances and, separately, the possession of instruments of injection are each their own violation" and that "[o]ne violation is not a lesser included offense of the other." Id. at 11-12.

In finding two distinct infractions of N.J.A.C. 13:71-7.29(a)13 and N.J.A.C. 13:71-23.9(a), the NJRC's Board of Judges imposed a 6-month suspension and \$1,000 fine for the possession of hypodermic needles and syringes and other drug instruments on a licensed off-track stabling facility. See Ruling No. 18FRE44 (Exhibit J-1). The Board of Judges also imposed a 6-month suspension, "which shall be served consecutively," and a \$1,500 fine for possession of therapeutic prescription legend drugs on the licensed off-track stabling facility. Ibid.

The Commission rejects the ALJ's conclusion that the violation for Petitioner's possession of hypodermic needles and syringes and other drug instruments and the violation for her possession of prescription legend drugs at the licensed off-track stabling facility should merge. The Commission finds that the appropriate penalty for Petitioner's violation of N.J.A.C. 13:71-7.29(a)13 and N.J.A.C. 13:71-23.9(a) by possession of hypodermic needles and syringes and other drug instruments on a licensed off-track stabling facility is a 6-month suspension and \$1,000 fine. The Commission finds that the appropriate penalty for Petitioner's violation of N.J.A.C. 13:71-7.29(a)13 and N.J.A.C. 13:71-23.9(a) by possession of the therapeutic prescription legend drugs is an additional 6-month suspension, which shall be served consecutively, and a \$1,500 fine.

Finally, the Commission rejects the ALJ's finding that N.J.A.C. 13:71-23.9(a) prohibits the injectable liquids in the injectable bottles but not the possession of the injectable bottles. Initial Decision at 18. The record establishes that NJRC Investigator Sczerbowicz confiscated 30 injectable bottles, 44 syringes with needles and 83 needles without syringes from the tack room. See Exhibit J-3; Exhibit R-1; T.21:19 to T.22-7.²

Injectable bottles necessitate the use of a hypodermic needle and syringe. Injectable bottles have rubber tops that are designed to contain liquids for multiple use injections without leakage. See Photograph 2 (Exhibit R-1). A hypodermic needle is inserted through the rubber top to extract the liquid from the bottle and draw it into the syringe attached to the needle. Once the liquid is drawn into the syringe, the liquid can then be injected into the horse.

The Commission's rules prohibit the possession of injectable bottles as well as prohibited liquids in the injectable bottles. N.J.A.C. 13:71-23.9(a) states that:

No person aside from licensed veterinarians shall have in his possession anywhere within the grounds of any association conducting a race meeting, or anywhere within the confines of a

² The symbol T.21:19 references the Transcript of the OAL hearing on August 19, 2019, page 21, line 19.

racetrack enclosure, or anywhere within the grounds of any licensed off-track stabling facility, any drugs not possessed in accordance with the laws of the State of New Jersey, nor any contraband drug or unauthorized prescription legend drugs, nor any hypodermic syringes or needles, or any other instrument which may be used for injection, unless the injectable device is possessed for self-administration....

The rule prohibits unauthorized drugs, hypodermic syringes or needles and “any other instrument which may be used for injection, unless the injectable device is possessed for self-administration....” Ibid.

Injectable bottles are prohibited instruments used for injection. Injectable bottles, designed to permit the easy extraction of liquids into a hypodermic needle and syringe for injection, are prohibited drug paraphernalia that cannot be allowed near race horses on property subject to the NJRC’s jurisdiction. Unless possessed in connection with self-administration, as provided in the rule, no person other than a licensed veterinarian may possess injectable bottles and the liquid substances therein at racetracks or anywhere within the grounds of any licensed off-track stabling facility. See Final Decision, Battula v. New Jersey Racing Commission, OAL Docket No. RAC 07184-20 (May 21, 2021).

Horse racing is a highly regulated industry; participation in it is a privilege and not a right. Wendling v. New Jersey Racing Commission, 279 N.J. Super. 477 (App. Div. 1995). The need for strict regulation of the horse racing industry is well established and has a long history. Horsemen’s Benevolent and Prot. Ass’n v. Atlantic City Racing Ass’n., 98 N.J. 445 (1985); Jersey Downs, Inc. v. Div. of New Jersey Racing Commission, 102 N.J. Super. 451, 457 (App. Div. 1968); State v. Dolce, 165 N.J. Super. 448 (Law Div. 1979). “The danger of clandestine and dishonest activity inherent in horse racing, as in all forms of gambling, has been well recognized.” DeVitis v. New Jersey Racing Commission, 202 N.J. Super. 484, 490-91 (App. Div. 1985).

Drugging a horse can lead to the injury or death of the drugged horse and endanger others participating in the same race. Tampering with a race horse also defrauds the wagering public, which is entitled to expect that the races are conducted without licensees seeking chemical advantage. The unauthorized presence of drugs and instruments of injection on property where race horses are located undermines the public’s trust in the integrity of the sport and strict penalties are warranted when a trainer is caught with prohibited substances and injectable instruments.

For the reasons set forth above, the Commission hereby orders that Petitioner's license shall be suspended for a total of 380 days and a \$3,000 fine shall be imposed for her violations of N.J.A.C. 13:71-7.29(a)13, N.J.A.C. 13:71-23.9(a), N.J.A.C. 13:71-7.26(d) and N.J.A.C. 13:71-1.19. NJRC staff will issue a ruling setting forth the dates of the suspension and the due date for the payment of the fine.

NEW JERSEY RACING COMMISSION

By: Judith A. Nason
Judith A. Nason, Executive Director

Date: May 21, 2021