



PHILIP D. MURPHY  
*Governor*

SHEILA Y. OLIVER  
*Lt. Governor*

*State of New Jersey*  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF NEW JERSEY RACING COMMISSION  
PO Box 088  
TRENTON, NJ 08625-0088

MATTHEW J. PLATKIN  
*Attorney General*

PAMELA J. CLYNE  
*Chairman*

MICHAEL J. ARNONE, D.D.S.  
LAWRENCE DEMARZO  
FRANCIS X. KEEGAN, JR.  
CHARLES E. TOMARO  
GLEN VETRANO  
*Commissioners*

JUDITH A. NASON  
*Executive Director*

OAL Docket No. RAC 07166-2021  
Agency Ref. No. NJRC-14-H-21-MD

DON TIGER,

Petitioner,

v.

Final Decision

NEW JERSEY RACING COMMISSION,

Respondent.

In the Meadowlands Pace on July 17, 2021, the New Jersey Racing Commission's ("NJRC" or "Commission") Board of Judges witnessed an incident during the race on the final turn and posted the "inquiry" sign when the horses crossed the finish line. The three NJRC judges reviewed the video recordings of the race from multiple angles. All three judges agreed that that the 9 horse, Charlie May, broke stride in the final turn and interfered with three other horses. The NJRC's Board of Judges disqualified Charlie May, who crossed the finish line first, placed Charlie May ninth and declared the race official. By letter dated July 19, 2021, Don Tiger ("petitioner"), the owner of Charlie May, filed a notice of appeal and the Commission transmitted the matter to the Office of Administrative Law ("OAL") as a contested case.

At the OAL, Administrative Law Judge Andrew M. Baron ("ALJ") conducted a hearing via Zoom on December 15, 2021 and January 27, 2022. The ALJ issued an initial decision on February 10, 2023. In the initial decision, the ALJ ordered that the determination of the NJRC's Board of Judges "must be reversed,



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as it was arbitrary, capricious and unjust...” Initial Decision at 13. The ALJ decided that the determination of the NJRC’s Board of Judges “violated petitioner’s fundamental due process rights, and the rights of the wagering public...” Ibid. The ALJ ordered that “Charlie May should be reinstated as the winner of the Meadowlands Pace...” Ibid.

On February 23, 2023, counsel for respondent, NJRC, filed exceptions to the initial decision. On February 27, 2023, counsel for petitioner filed a reply to the exceptions. With the filing of the reply to the exceptions, the record before the NJRC closed.

The NJRC has reviewed the initial decision, OAL record, including the video recordings and transcripts of the testimony, exceptions and reply to the exceptions. The initial decision is a recommended decision which the Commission may adopt, reject or modify.

The best evidence in this case is Exhibit J-1, which is the video recordings of the 2021 Meadowlands Pace. The video recordings, which total 11 minutes and 34 seconds in duration, document various views of the race from different camera angles.<sup>1</sup> For example, the beginning of the recording through 2:04<sup>2</sup> documents the pan shot view of the entire race with a partial split screen. Thereafter, the video recordings show multiple views of portions of the race, which were reviewed by the NJRC’s judges during the inquiry.<sup>3</sup>

At issue in this contested case is the incident that occurred on the final turn beginning at 1:30 where Charlie May broke stride and interfered with horses

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<sup>1</sup> The cameras at the Meadowlands Racetrack are installed on four separate towers stationed around the track to afford the judges multiple angles and viewpoints throughout the race. Tower 1 is located at the end of the homestretch at the beginning of the first turn. Tower 2 is located at the top of the backstretch at the end of the first turn. Tower 3 is located at the end of the backstretch at the beginning of the final turn and Tower 4 is located at the top of the homestretch at the end of the final turn.

<sup>2</sup> The symbol “2:04” references the video recording at 2 minutes and 4 seconds.

<sup>3</sup> From 3:24 to 3:56, the video documents the incident in the final turn as recorded by the camera on Tower 1. From 3:57 to 4:17, the video documents the incident as recorded by the camera on Tower 3. From 4:18 to 7:22, the video documents multiple views of the incident as recorded by the camera on Tower 4. From 7:23 to 8:10, the video documents an unrelated incident involving the 7 horse coming off the course in the backstretch as recorded by the camera on Tower 1. From 8:11 to 8:40, the video documents an unrelated incident involving the 7 horse in the backstretch as recorded by the camera on Tower 2. From 8:41 to 9:49, the video documents both the incident involving the 7 horse leaving the track and the incident involving the 9 horse (Charlie May) in the final turn as recorded by the camera on Tower 3. From 9:50 to 10:48, the video documents the incident in the final turn as recorded by the camera on Tower 4. Finally, from 10:48 to 11:34, the video documents the incident in the final turn from the camera located on Tower 1. Exhibit J-1.

6, 8 and 10, causing both the 6 and the 8 to also break and go off-stride. The video recording, which is clear and obvious, documents Charlie May breaking stride and interfering with 6, 8 and 10 in the final turn from multiple angles.<sup>4</sup>

An excellent angle that documents the break and interference is from the camera on Tower 4 at 4:51 to 5:03. In the final turn, Brett Miller, the driver of Charlie May, positioned his horse behind the 4 horse, which was in the first-over position and beginning to tire. Mr. Miller moved Charlie May out to pass the 4. Charlie May broke and went off-stride at 4:51, which immediately impeded the progress of the 6, 8 and 10, forced their drivers to grab up their horses, and caused the 6 to break at 4:57 and the 8 to break at 5:00.

The Commission finds that the actions of Charlie May during the Meadowlands Pace constitutes interference in violation of the NJRC's rules. "Interference" is defined as "any act, which by design or otherwise, hampers or obstructs any competing horse or horses." N.J.A.C. 13:71-4.1. N.J.A.C. 13:71-20.6(a)(2) prohibits any driver or horse from interfering with another horse or driver and 20.6(a)(8) prohibits any driver or horse from committing "any act which impedes the progress of another horse or causes him to 'break.'"

The Commission finds that pursuant to N.J.A.C. 13:71-20.9, Charlie May should be disqualified and placed ninth, which is behind the three horses with whom he interfered. The interference by Charlie May caused the 6, 8 and 10 horses to finish in a lower position than they would have but for the interference. As a result, it was proper to place Charlie May ninth.

The initial decision contains numerous errors which are addressed herein. As indicated above, the video recordings of the race clearly document Charlie May going off stride and interfering with the 6, 8 and 10 horses. Certain errors by the ALJ are contrary to the clear video evidence. Several of the ALJ's errors are immaterial or irrelevant. Nevertheless, the Commission will state with particularity herein its reasons for rejecting the erroneous finding of fact or conclusion.

The Commission rejects the ALJ's finding that "the appeal conducted by the track side judges was flawed, in that it was rushed," and that the NJRC's judges "failed to follow protocols, including but not limited to conducting interviews with several of the parties involved in the race prior to determining that Charlie May should be disqualified." Initial Decision at 11.

The Commission finds that the Board of Judges followed correct procedures during the inquiry, there was no need to interview the drivers in the

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<sup>4</sup> As indicated *supra* n. 3, during the inquiry, the NJRC's judges also reviewed video replay of an unrelated incident in the race where the 7 horse went inside the pylons in the backstretch.

race and the Board of Judges correctly disqualified Charlie May for interference and placed him ninth. In officiating races, the NJRC utilizes a three judge panel comprised of a Presiding Judge and two Associate Judges. These judges have substantial experience and expertise in officiating races that take place in New Jersey in accordance with the NJRC's rules. Here, their decision was unanimous and correct.

The initial decision advances a fundamental misunderstanding regarding the nature of an inquiry and the licensees' rights during one. There is no due process requirement in New Jersey which mandates that the judges must interview the drivers or any other licensee during an inquiry. As explained herein, neither the NJRC's rules, nor any other legal authority, require an interview of the race participants during an inquiry.

All participants in the race and the public are immediately made aware of an inquiry into a race, then a decision is rendered by the Board of Judges and the race is declared official. A licensee's due process right to notice and the opportunity to be heard takes place after the race is declared official. Upon receiving notice that an owner wants to appeal the disqualification of a horse, the Commission transmits the matter to the OAL for a hearing. At the hearing, the administrative law judge makes a de novo review of the disqualification and reaches a decision based upon a preponderance of the evidence introduced at the hearing.<sup>5</sup> Petitioner was afforded all applicable due process rights here.<sup>6</sup>

The ALJ erred when he found that the NJRC's Board of Judges was conducting an appeal.<sup>7</sup> The NJRC's judges were conducting video review of the in-race actions of a horse during an inquiry immediately prior to declaring the race results "official." N.J.A.C. 13:71-8.24(a)(7). The record establishes that the

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<sup>5</sup> In the initial decision, the ALJ failed to apply the correct standard of review. Instead of determining whether the disqualification of the horse was supported by a preponderance of the evidence in the record, the ALJ incorrectly utilized the appellate review standard of determining if the agency action was arbitrary, capricious or unreasonable. See Initial Decision at 11, 13.

<sup>6</sup> Courts have found that "due process is satisfied if there has been a 'full and fair hearing' before the administrative law judge." Moiseyev v. New Jersey Racing Commission, 239 N.J. Super. 1, 10 (App. Div. 1989)(citing De Vitis v. New Jersey Racing Commission, 202 N.J. Super. 484, 501 (App. Div. 1985)).

<sup>7</sup> The ALJ erroneously found that petitioner immediately contested the judges' decision to disqualify Charlie May and place him ninth. Initial Decision at 9. According to the ALJ, "Petitioner challenged the decision on site and was denied." Id. at 3. The NJRC rejects this finding. The OAL record establishes that by letter dated July 19, 2021, two days after the race, petitioner filed a letter with the NJRC challenging the disqualification. 1T.156-10 to 18. No objections were filed after the race by any driver in the race. See, e.g., 2T.114-9 to -12. The symbol "1T.156-10" refers to the December 15, 2021 transcript at page 156, line 10. The symbol "2T.114-9" refers to the January 15, 2022 transcript at page 114, line 9.

Board of Judges followed all applicable NJRC rules and protocols when they posted the "inquiry" sign, reviewed video recordings of the race from multiple angles, determined that Charlie May broke stride and interfered with three horses in the race, disqualified Charlie May, placed him ninth and declared the race to be official.

Exhibit J-1 includes multiple views of the incident on the final turn that were reviewed by the NJRC's judges while simultaneously being made available to the public. 2T.100-20 to 2T.101-12. As discussed above, the video recordings clearly and obviously document Charlie May breaking stride and interfering with the 6, 8 and 10 horses. The record establishes that the Board of Judges took their time in reviewing the video recordings and reached a unanimous decision. See 2T.114-5 to -8. Given the obviousness of the violation and the substantial expertise of the NJRC's judges in officiating races in New Jersey, the Commission finds that the Board of Judges properly conducted the inquiry in accordance with NJRC rules and protocols, reached the correct determination and the procedures the judges used were not flawed.

The NJRC rejects the ALJ's finding that the television broadcast of the race "created additional pressure on the judges to make a fast decision." Initial Decision at 9. Although Petitioner and Arthur Gray, petitioner's expert, speculated that this was the case, see 1T.131-9 to 20; 1T.130-15 to 1T.132-3; 2T.33-24 to 2T.35-25, Presiding Judge Koch refuted this argument. 2T.146-16 to 2T.147-2. Presiding Judge Koch explained that the NJRC's judges took their time with the decision. 2T.114-5 to -6. The judges examined numerous angles on the video and unanimously agreed that Charlie May broke stride. 2T.114-5 to 8.

The NJRC's judges were not required to interview any of the drivers in the race during the inquiry and there was no need for the judges to do so here. N.J.A.C. 13:71-8.23 sets forth the duties of the NJRC's judges and N.J.A.C. 13:71-8.24 sets forth the procedures the NJRC's judges must follow. N.J.A.C. 13:71-8.23(a)(2) states that the judges must "[i]nvestigate any apparent or possible interference or other violation of the rules whether or not a complaint has been made by a driver." The judges must post the inquiry sign on the odds board in the case of a possible rule violation and immediately notify the announcer of the inquiry and the horse(s) involved. N.J.A.C. 13:71-8.24(a)(7). In determining whether interference took place, the judges must "[o]bserve the performance of the drivers and horses closely to ascertain if there are any violations of these rules." N.J.A.C. 13:71-8.23(a)(5).

The NJRC's rules only require the judges to speak to a driver if the driver lodges an objection after the race to complain of "any foul driving or other

misconduct during the race.”<sup>8</sup> N.J.A.C. 13:71-20.7. No objection was lodged after this race.

The Board of Judges may speak with the drivers during an inquiry if they believe it might assist them in their determination.<sup>9</sup> Here, there was no need to interview the drivers during the inquiry. All material and relevant facts are documented clearly and obviously on the video recordings of the race.

In his testimony, Presiding Judge Koch explained that the NJRC’s judges do not routinely talk to drivers during an inquiry because they are making a decision based upon what they observe during the race and during the judges’ video review of multiple angles during the inquiry. 2T.118-6 to -19. He testified that the judges believe that they would receive skewed and biased opinions if they spoke to the drivers because they are involved in the incident.<sup>10</sup> 2T.123-7 to -15. Presiding Judge Koch explained that the judges may speak with the drivers if they have a question regarding broken equipment. 2T.135-9 to-11. However, regarding the actual actions of the drivers and movement of the horses, the judges make the call based upon what they see during the race and what is documented in the video recordings.<sup>11</sup> 2T.135-11 to -13.

At the hearing, petitioner offered the testimony of Arthur Gray, who was accepted as an expert to discuss whether or not the NJRC’s judges “should have interviewed the drivers on the day of the race....” 2T.22-18 to -22; 2T.31-4 to 14.

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<sup>8</sup> Pursuant to N.J.A.C. 13:71-20.7, a driver must indicate his intent to file a complaint to the patrol judge before the driver dismounts. The driver must then proceed to the nearest telephone and advise the judges of the complaint or foul involved. *Ibid*. A driver filing an objection could be compared to the coach throwing the red challenge flag during an NFL game. When the coach throws the flag, an official will talk to the coach to ask him the basis of the challenge.

<sup>9</sup> The ALJ allowed hearsay at the OAL which was proffered in an effort to suggest that the NJRC changed this policy after the 2021 Meadowlands Pace to require that the judges must speak to drivers during an inquiry. However, Presiding Judge Koch correctly testified that this policy remains the same. 2T.116-13 to -16. Presiding Judge Koch also explained that the USTA’s rules do not require that judges speak with drivers during an inquiry and the USTA has not changed its rules to require it. 2T.116-10 to -16.

<sup>10</sup> Petitioner’s expert witness also testified that drivers will skew the facts. 2T.124 -24 to 2T.125-2.

<sup>11</sup> In explaining these duties to the ALJ, Presiding Judge Koch made an apt analogy to other professional sports. For example, in baseball, if the officials are using the video replay to determine whether a runner was out when sliding into second base, the officials do not ask the second basemen and the runner for their thoughts as to whether the runner was safe or out. 2T.167-8 to 2T.168-2. As is the case in horseracing, the officials in other professional sports also reach a decision based upon the evidence documented on the video replay without questioning the participants. If there is a turnover in an NFL game because the running back fumbled the ball, the officials review the video replays to see if the runner lost possession of the ball before his knee was down. The officials do not interview the running back or any other player.

Mr. Gray, who has officiated harness races as a judge in New York and as a part-time harness judge in Kentucky and Delaware, did not proffer an opinion or testimony as to whether Charlie May broke and interfered with three other horses. Initial Decision 6. See 2T.23-22 to -25; 2T.38-3 to -10. Mr. Gray has never officiated any races in New Jersey, participated in New Jersey racing nor testified as an expert in New Jersey prior to this hearing. 2T. 23-16 to 21; 2T.25-12 to 2T.26-6.

Mr. Gray testified that the NJRC's judges "failed to fulfill their responsibilities by not exhausting all means possible to safeguard the outcome of the race...." Initial Decision at 6. In offering this testimony, Mr. Gray relied solely upon broad language in USTA Rule 6.11(e), which is inapplicable in New Jersey, that states it shall be the duty of the judges to "observe closely the performance of the drivers and the horses to ascertain if there are any violations of Rule 18; particularly interference, helping or inconsistent racing and exhaust all means possible to safeguard the contestants and the public." Initial Decision at 6. See 2T.54-9 to -17. Mr. Gray interpreted USTA Rule 6.11(e)'s call to "exhaust all means possible to safeguard the contestants and the public" to explicitly require that judges shall interview drivers during an inquiry.<sup>12</sup>

The Commission finds that the OAL record does not support the ALJ's conclusion that "well recognized industry and regulatory standards" require judges to interview drivers during an inquiry. Initial Decision at 13. The ALJ allowed the admission of Mr. Gray's expert report over the objection of counsel for respondent who argued that it was a net opinion. See Exhibit P-1. The expert report asserts, with no support whatsoever for this conclusory statement, that "[w]hen an inquiry is posted before a race is made official it has been standard industry protocol in all facets (harness, thoroughbred, quarter horse) of horse racing to talk to all drivers/jockeys involved." Id. at 1.

The NJRC rejects the ALJ's determination that USTA Rule 6.11 applies to harness racing in New Jersey and that USTA Rule 6.11(e) establishes an industry standard requiring that judges must speak to drivers during an inquiry. The USTA rules do not apply in New Jersey because the NJRC promulgated rules that establish the judge's duties and procedures. As discussed above the NJRC's rules do not require that the judges must speak to the drivers during an

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<sup>12</sup> After testifying, Mr. Gray sought to withdraw his testimony for undisclosed reasons. Initial Decision at 10. The ALJ accepted post-hearing representations made by petitioner that Mr. Gray sought to withdraw his testimony due to an alleged fee dispute. Id. at 6, 10. Mr. Gray's letter to the ALJ, dated February 16, 2022, states: "Unfortunately, I have reason to question the appellants' reliability. Avoiding a potential incursion on my reputation, I am withdrawing from this and any future litigation regarding this matter." The ALJ allowed the testimony to remain in the record. Initial Decision at 10.

inquiry.<sup>13</sup> See N.J.A.C. 13:71-8.24(a)(7). Most importantly, the Commission finds that there was no need to interview the drivers during the inquiry in the Meadowlands Pace. All material and relevant facts are documented in the video recordings.

Neither Mr. Gray nor petitioner were able to identify any relevant questions that the judges should have asked the drivers or information the judges needed that was not available on the video recording.<sup>14</sup> Mr. Gray suggested that the judges should have generally asked the driver of the 9 horse and the 4 horse what occurred as well as the drivers of the horses behind the 9 “that got interfered with.” 2T.41-7 to -21. On cross-examination, counsel for petitioner suggested that Presiding Judge Koch should have spoken with the driver of the 4 horse to find out why the 4 was slowing down and the driver of the 9 horse to find out why he went around the 4. 2T.131-7 to -14.

None of these questions are necessary or relevant.<sup>15</sup> The pertinent facts, which are documented on the video recordings, are that the 9 horse did, in fact, break stride and interfere with the 6, 8 and 10. It does not matter why the 4 horse was beginning to slow down or why the driver of the 9 decided go around the 4.<sup>16</sup> It was not improper for Charlie May’s driver to move the 9 around the 4. The material and relevant facts are that the 9 broke stride and interfered with the horses behind it. It does not matter why the 9 went off-stride.<sup>17</sup> As correctly

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<sup>13</sup> It bears noting that the USTA’s rules also do not require that the judges must speak to the drivers during an inquiry. USTA Rule 6.12(d), which addresses procedures during an inquiry, like N.J.A.C. 13:71-8.24(a)(7), does not require that the judges must speak with the drivers. Neither USTA Rule 6.11, 6.12 nor any other USTA rule requires that judges must speak to the drivers during an inquiry. Likewise, no NJRC rule requires that judges must speak to drivers during an inquiry.

<sup>14</sup> In his report, Mr. Gray suggests hypothetical conversations the judges could have had with the drivers. Exhibit P-1 at 4-6. Oddly, the report goes on to proffer random thoughts, questions and hearsay about the race, even though Mr. Gray did not ultimately offer any testimony regarding the race, interference or disqualification. See supra p. 7.

<sup>15</sup> Petitioner did not call any driver to testify as a witness at the OAL hearing.

<sup>16</sup> Presiding Judge Koch explained that asking the driver of the 4 why the horse was slowing down would not have changed the judges’ decision. 2T.132-1 to 25. When asked what a driver is supposed to do when the horse in front of his horse is getting tired, Presiding Judge Koch explained that horses tire in races every day, the driver behind goes around the tiring horse and that is what happened in the Meadowlands Pace. 2T.136-5 to -12.

<sup>17</sup> Presiding Judge Koch testified that Charlie May’s hoof may have hit the wheel of the sulky of the 4 horse. 2T.129-10 to -12. He explained that the judges could not confirm that the horse’s hoof hit the sulky’s wheel when they reviewed the videotape and, therefore, could not reach that conclusion. 2T.129-12 to 14. He explained further that the reason the horse went off stride was irrelevant: “Whether he struck his wheel or he didn’t strike his wheel, the horse made a break and that’s what caused the mess behind him.” 2T.129-16 to -18. Revisiting the NFL analogy supra n. 11, it does not matter why the running back may have fumbled the ball; all that matters is whether he did.



explained by Presiding Judge Koch, the NJRC's judges officiate a race on the basis of what they see in the race and on the video recordings and they do not believe that the opinions of the drivers involved in the incident "should have a bearing on the way we see it." 2T.131-15 to -19.

The Commission rejects the ALJ's finding that "the outcome of the short track side appeal, which was upheld by the State Racing Commission, was anything but thorough, was arbitrary and capricious and fatally flawed." Initial Decision at 11. A clear preponderance of the credible evidence in the OAL record establishes that the NJRC's judges followed the proper procedure during the inquiry and reached the correct determination. The video recordings clearly and obviously document that Charlie May broke, went off-stride and interfered with three horses during the race.

The NJRC also rejects the ALJ's conclusion that the decision of the NJRC's judges "was fatally flawed due to a conflict of interest that existed on the part of Mr. Koch himself." Initial Decision at 12. According to the ALJ, Presiding Judge Koch's spouse "works for a company that held an interest in two other horses who were entered in the race..." *Id.* at 9. The ALJ concluded that Presiding Judge Koch "should have known that recusal in this situation was the only proper course of action for him, and as such, his credibility as a witness must be called into question, regardless of and especially due to his years of experience in the industry. Simply put: He should have stepped aside." *Id.* at 12 (emphasis omitted).

Although the record establishes that Presiding Judge Koch's wife owns a staking company, the Commission rejects the finding that the spouse held an interest, financial or otherwise in two horses that were entered in the race.

A staking company processes necessary paperwork on behalf of horses' owners and forwards nominating and sustaining fees paid by the owners to the entity that own the rights to a stakes race. 2T.147-19 to 2T.148-3. The staking company does not own an interest in the horse, enter the horse into the stakes race nor receive any payment should the horse win purse money in the race. 2T.142-23 to 2T.143-13; 2T.147-19 to 2T.148-20. An owner pays the staking company a fee to take administrative actions to ensure that a horse is nominated to and remains eligible for one or more stakes races. 2T.147-19 to 2T.148-9. These services do not give the staking company any interest in the horse. By way of example, a staking company has no more financial or other interest in a particular horse than a hired transportation service that transports a horse to the racetrack prior to a race has in the horse. Accepting a fee to facilitate a horse's ultimate participation in a race in these tangential ways does not give the facilitator an interest in the horse.

Moreover, the OAL record does not establish that Presiding Judge Koch's wife's company did, in fact, process stakes paperwork and submit fees on behalf of the owners of two horses in the race. This uncorroborated assertion was proffered by petitioner's counsel when cross-examining Presiding Judge Koch and the ALJ allowed petitioner's counsel to continue this line of questioning over the objection of counsel for respondent. 2T.142-4 to -14. Presiding Judge Koch heard this assertion for the first and only time in questions asked on cross-examination. 2T.166-2 to -9.

Nevertheless, even if the assertion were true, the Commission rejects the ALJ's finding that the performance of staking services for the owners of horses gives the staking company an interest, financial or otherwise, in the horses. The Commission also rejects the ALJ's finding that "whether or not a real conflict existed, once Mr. Koch learned there was a challenge to the outcome of the race in which Charlie May was declared the winner, Mr. Koch should have recused himself from participating in the appeal with the two track side judges." Initial Decision at 9.

For the reasons set forth above, the Commission rejects any finding that the services of the staking company, even if Presiding Judge Koch's spouse performed them for two horses in the race, created a real or apparent conflict of interest. Moreover, the record establishes that Presiding Judge Koch only learned of this assertion on cross-examination at the hearing.<sup>18</sup> 2T.166-2 to -9. The Commission rejects the ALJ's conclusion that Presiding Judge Koch was required to or should have recused himself.<sup>19</sup>

Because he believed that Presiding Judge Koch should have recused himself, the ALJ decided his testimony "was significantly diminished, and devalued, by virtue of his lack of credibility." Initial Decision at 8. The ALJ also criticized Presiding Judge Koch for appearing uncomfortable during his testimony on the Zoom platform, looking away from the camera, several of his answers were evasive, repeating the question "every time a question was posed" and for conducting a hearing for driver Brett Miller two weeks after the disqualification. *Id.* at 6-7. Although the ALJ recognized that "[h]aving been admitted as an expert, I cannot disregard or throw out [Presiding Judge Koch's] entire testimony based upon his obvious credibility challenges," the ALJ diminished and devalued Presiding Judge Koch's testimony. *Id.* at 8.

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<sup>18</sup> The ALJ acknowledged that at the hearing, Presiding Judge Koch "seemed completely unaware of the assertion that his spouse allegedly performed staking services for two horses in the race." *Id.* at 7.

<sup>19</sup> The decision to disqualify Charlie May for interference was a unanimous decision of Presiding Judge Koch, Associate Judge Larry Julian and Associate Judge Mickey Peterson. Although the ALJ found that Presiding Judge Koch should have recused himself, the ALJ's initial decision fails to address the fact that two other NJRC judges also determined that Charlie May must be disqualified for interference.

The Commission is mindful of the deference that is usually afforded to an ALJ's determination of credibility. However, the Commission rejects his credibility findings because they are arbitrary, capricious and unreasonable and they are not supported by sufficient, competent and credible evidence in the record.

Presiding Judge Koch may have appeared "uncomfortable" testifying on a Zoom platform and he may not have been looking at the camera.<sup>20</sup> The NJRC asked the OAL for a video recording of the testimony on the Zoom platform. By email dated February 14, 2023, Thomas Harris, OAL Manager, Division of Administrative Rules, informed the NJRC that the "OAL does not keep or provide the video." However, the ALJ clearly erred when he asserted that Presiding Judge Koch repeated the question "every time a question was posed." The transcript documents that Presiding Judge Koch was asked more than 250 questions at the hearing. He repeated a question only six times and he asked to have a question clarified ten times. 2T.81-2 to 2T.171-25. Also, in reviewing the transcript, the NJRC does not find Presiding Judge Koch's answers to be evasive.

Most importantly, the NJRC was able to otherwise evaluate the ALJ's credibility finding and determine that the finding is not supported by sufficient, competent, and credible evidence in the record. Presiding Judge Koch testified regarding an in-race incident that is recorded on video. The video recordings of the race, Exhibit J-1, gives the NJRC the ability to directly assess the truth and accuracy of Presiding Judge Koch's testimony. The Commission can also directly assess his testimony regarding the procedures followed by the Board of Judges, which procedures are also known to the Commission.

Presiding Judge Koch's testimony regarding the break and interference was clear, truthful and accurate. His testimony identified several times the precise moment Charlie May broke stride. See, e.g., 2T.109-10 to -13; 2T.109-25 to 2T.110-9. When the ALJ paused the video at 4:51, Presiding Judge Koch directed the ALJ's attention to the horse's front two legs, which were up in the air. 2T.109-25 to 2T.110-2. Presiding Judge Koch explained that the legs are "not in the normal pacing gait. He's off stride right here." 2T.110-3 to -4. Presiding Judge Koch testified that there was not any doubt in the three judges'

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<sup>20</sup> Presiding Judge Koch may have been uncomfortable during his testimony partly because the ALJ did not allow him to control the video during his testimony as the ALJ had allowed petitioner to do. See, e.g., 2T.93-3 to -11; 2T.94-5 to -6. See also 1T.54-19 to -21. Presiding Judge Koch was forced to continuously ask the ALJ to pause the videotape which, due to delayed response, repeatedly necessitated having to rewind the video and replay it. See 2T.95-3 to -10; 2T.96-8 to -19; 2T.101-25 to 2T.102-20. Counsel for respondent asked the ALJ to allow him or Presiding Judge Koch to control the video as the ALJ had allowed petitioner. 2T.106-11 to -13. Nevertheless, the ALJ, who did not respond to or grant counsel's request, continued to control the race video. See 2T.106-14 to -25.

“minds that the horse was off stride and these three drivers behind him all had to alter their course and two of them ended up making breaks. It’s plain as day right there.” 2T.109-24 to 2T.110-9. See also 2T.112-2 to -6 (Presiding Judge Koch testified Charlie May “broke stride as he went three wide and interfered with the three horses behind him. I couldn’t be any more clear than that. There isn’t any doubt the horse made a break and bothered the horses behind him.”); 2T.125-21 to -22 (“We’re 100% certain that Charlie May went off stride.”).

As detailed in this final decision, having conducted a careful review of the video recordings, the Commission finds that Presiding Judge Koch’s testimony is correct and accurate. Presiding Judge Koch correctly testified to Charlie May’s break and interference. Presiding Judge Koch accurately explained the procedures utilized by the NJRC’s Board of Judges and why there was no need to interview a driver. The Commission finds his testimony to be credible and accurate.

The Commission also rejects the ALJ’s suggestion that holding a hearing for Mr. Miller, Charlie May’s driver, two weeks after the race was “troubling.” Initial Decision at 7. Conducting the hearing, which resulted in a determination that the driver did not commit a driving infraction, was thorough and proper.

The NJRC’s judges must determine the correct placing of the horses before they declare the race results to be official. N.J.A.C. 13:71-8.24(a)(7). If an incident happens during the race, the judges review the video recordings of the race to determine if interference occurred and, if so, whether a horse should be disqualified and placed behind the unoffending horses. This must be done immediately after the horses cross the finish line, during the inquiry and before the race can be declared official. Ibid.

During the inquiry, the NJRC’s judges do not decide if a driving infraction occurred during the race, and the judges cannot impose a fine or suspension on a driver during the inquiry. When there is a disqualification in a race, the judges may thereafter conduct a hearing to determine if the actions of the driver contributed to the disqualification in a way that the driver’s actions violated the NJRC’s rules. After the race, the judges must issue a notice of hearing to the driver and schedule a hearing to review the videotape of the race and hear testimony. See N.J.A.C. 13:71-8.23(a)(6). The disqualification of the horse, which must be made prior to the race being declared official, is not at issue in these hearings. The focus of the hearing is to determine if the driver committed an infraction during the race that violated the NJRC’s rules and should be penalized. It is not unusual for the NJRC’s judges to schedule a hearing for the driver after the race. See, e.g., Initial Decision in Miller v. New Jersey Racing Commission, OAL Dkt. No. RAC 15043-17 (affirming imposition of a three-day suspension of driver for violation of N.J.A.C. 13:71-20.6); Burke Racing Stable, LLC, et al. v. New Jersey Racing Commission, OAL Dkt. No. RAC 17327-17

(affirming disqualification of “What the Hill” in 2017 Hambletonian) (Consolidated), 2018 N.J. Agen. Lexis 673 (December 11, 2018).

After the race, the NJRC’s judges conducted a hearing for Mr. Miller, the driver of Charlie May. At the hearing, the judges also accepted the testimony of Yannick Gingras, the driver of the 4 horse as well. 2T.137-14 to -23; 2T.138-9 to -19. The judges determined that Mr. Miller did not commit a driving infraction during the Meadowlands Pace. 2T.138-9 to -19. When asked why the hearing for Mr. Miller was held 10 to 14 days after the race, Presiding Judge Koch explained that the judges must send the driver a written notice of the hearing, it cannot be done on the day of the race and it is not unusual to conduct a hearing 10 to 14 days after a race for a driver. 2T.138-21 to 2T.139-1; 2T.140-3 to -22; 2T.147-14 to -18. Despite this clear and accurate explanation, the ALJ erroneously found that the hearing was “troubling.”

The NJRC rejects the ALJ’s finding that “even if Charlie May did slightly ‘break stride’ at that point of the race, it was a safety measure only to ensure that a major collision could be avoided with several of the horses....” Initial Decision at 10. According to the ALJ, the video recording “does not show any interference by Charlie May, but in fact shows that the horse in front of Charlie May slowed down drastically, with its driver looking backwards, so if anything, it looks like Charlie May’s driver moved the horse slightly outside to avoid a major accident....” *Id.* at 5.

The video recordings do not support any of these findings, which were assertions advanced by petitioner, and the Commission rejects them. The video recording establishes that although the 4 horse was beginning to tire, it did not slow down drastically or nearly cause an accident. It was not unusual or improper for the driver of Charlie May to move the horse out to go around the 4. When Charlie May moved out, the horse broke stride and impermissibly interfered with the 6, 8 and 10.

The NJRC accepts and agrees with Presiding Judge Koch’s testimony that the driver of the 4 horse never grabbed up his horse and the 4 was not slowing down drastically. 2T.135-24 to 2T.136-3. Presiding Judge Koch testified that the 4 was starting to get tired. 2T.136-5 to -6. When asked what the trailing drivers are supposed to do when a horse in front of them is starting to get tired, Presiding Judge Koch explained that “[t]hey go around him.” 2T.136-7 to -9. There is nothing improper in going around a horse that is tiring. The disqualification occurred because Charlie May went off stride, interfered with the three trailing horses and was placed behind the furthest finishing horse. 2T.146-8 to -11.

The NJRC also rejects several of the ALJ’s findings that are not material to the case. The NJRC rejects the ALJ’s finding that Charlie May “was declared the

unofficial winner of the race.” Initial Decision at 8. Although the horse crossed the finish line first, Charlie May was not the unofficial winner of the race. There are no winners in a race until the judges post the order of finish and the “Official” sign on the tote board. See N.J.A.C. 13:71-8.24(a)(7); N.J.A.C. 13:71-27.22.

The NJRC rejects the ALJ’s finding that petitioner “immediately contested” the disqualification of Charlie May.” Initial Decision at 9. No objection was filed after the race and petitioner submitted a letter dated July 19, 2021, two days after the race, to appeal the disqualification of the horse.

The NJRC rejects the ALJ’s finding that “[p]etitioner then filed a formal appeal with the Racing Commission, which did not overturn the decision of the track side judges....” Ibid. When petitioner notified the NJRC that he wished to appeal the decision to disqualify his horse, the Commission transmitted the matter to the OAL as a contested case. See Petitioner’s Letter, dated July 19, 2021. After the issuance of the initial decision, having reviewed the OAL record and having determined that a preponderance of the evidence in the record supports the judges’ disqualification of the horse, the Commission now affirms the decision of the Board of Judges.

The NJRC rejects the ALJ’s finding that petitioner was “prejudiced by the premature release of the sizable purse from the race while an appeal was pending...” Initial Decision at 10. When petitioner filed an appeal with the NJRC, he asked the Commission “to hold the audio and video tape of the race for evidence as well as [the] judges telephone call log on that day.” Petitioner’s Letter, dated July 19, 2021. Petitioner did not ask for the purse to be held. Ibid.

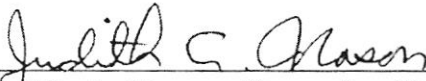
For the reasons set forth above, the NJRC rejects the ALJ’s conclusion that the inquiry of the NJRC’s Board of Judges “was not conducted in accordance with well recognized industry and regulatory standards and was arbitrary and capricious and must be reversed and Charlie May should be reinstated as the winner of the Meadowlands Pace which took place on July 17, 2021.” Initial Decision at 13. The Commission rejects the ALJ’s order reversing the Board of Judge’s disqualification because “it was arbitrary, capricious and unjust and violated petitioner’s fundamental due process rights, and the rights of the wagering public.” Ibid. The NJRC rejects the ALJ’s order that Charlie May should be reinstated as the winner of the 2021 Meadowlands Pace. Ibid.

The Commission finds that the Board of Judges properly conducted the inquiry during the 2021 Meadowlands Pace and there was no need to interview any driver. The Commission affirms the Board of Judges’ determination that the horse Charlie May broke stride during the race and, in doing so, impermissibly interfered with 6, 8 and 10, causing their drivers to grab up their horses and causing the 6 and 8 to break stride. The Commission affirms the Board of Judges’ disqualification of Charlie May for interference and the placement of the

horse ninth behind all of the unoffending horses in accordance with N.J.A.C. 13:71-20.9.

The Commission hereby rejects the ALJ findings, initial decision and order to modify the placement of these horses. The Commission upholds and affirms the order of finish in the 2021 Meadowlands Pace declared "official" by the Board of Judges.

NEW JERSEY RACING COMMISSION

  
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Judith A. Nason, Executive Director

Dated: April 11, 2023