

**COMMONWEALTH OF KENTUCKY  
PUBLIC PROTECTION CABINET  
KENTUCKY HORSE RACING COMMISSION  
ADMINISTRATIVE ACTION NO. KHRC-TB-11-005  
OFFICE OF ADMINISTRATIVE HEARINGS FILE NO. HRC-42404-047**

**RICHARD E. DUTROW, JR.**

**COMPLAINANT**

**v.**

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER**

**KENTUCKY HORSE RACING COMMISSION**

**RESPONDENT**

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**INTRODUCTION**

In this case, Complainant, Richard E. Dutrow, Jr., has appealed the denial of his application for a 2011 trainer's license by the KHRC. After discovery, objections and rulings were issued in 2011, both parties noted that there were other license-related proceedings at different points in the process in other states, and requested this matter not proceed at that point to a scheduled hearing. The parties were informed on the record by the hearing officer that the parties should ask for this matter to be docketed when either party wanted to have the hearing scheduled. On April 11, 2012, Dutrow's counsel wrote and requested a hearing schedule, and a status conference was conducted, after which a hearing scheduling order was issued. A hearing was conducted on September 17, 2012, and the transcript was filed on October 5.

The parties had both agreed to post-hearing briefing and submission of proposed findings, after which this matter was submitted for a recommended report. All discovery motions and objections, as well as motions in limine were addressed in previously issued written orders. The rulings are incorporated into this recommended decision, and objections are noted as

preserved for further administrative and judicial review through proper exception and appeal process. *See* KRS 13B.110(4), KRS 13B.120.

Because Complainant is the party proposing that the benefit of a license be granted to him, he had the burden of proof and was afforded the first opportunity to present his case. *See* KRS 13B.090(7).

Dutrow chose not to appear in person at the hearing, and called no witnesses to testify on his behalf.<sup>1</sup> Although the Commission argued Dutrow must appear in person, KRS 13B.080(5), which became law after KRS 61B.080(6), and which is the procedure that controls the hearing, states:

Any party to an administrative hearing may participate in person or be represented by counsel. In informal proceedings, a party may be represented by other professionals if appropriate and if permitted by the agency by administrative regulation.

The express language of the statute authorized Dutrow to appear solely through the presence of his attorney, Hon. Adam Spease. Following opening statements, Dutrow's counsel presented his case exclusively through exhibits. Therefore, the evidentiary record consists solely of documentary evidence introduced by Dutrow's counsel as follows:

1. Transcript of Discovery Deposition of Lisa Elaine Underwood, former Executive Director of the KHRC, taken May 8, 2012 (subject to redactions agreed to by stipulation between the parties);
2. *Lexington-Herald Leader* article titled, "N.Y. bans Dutrow from tracks for a decade," dated October 13, 2011;
3. Respondent's Answers to Interrogatories, Requests for Production of Documents and Requests for Admission, served on May 20, 2011 (without attached documents);

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<sup>1</sup> At the hearing, the KHRC moved for default based upon Complainant's failure to personally appear and participate in the proceedings pursuant to KRS 61B.080(6). The Hearing Officer overruled the KHRC's motion, which is preserved for the record, and the matter was allowed to proceed upon the merits. (*See* Transcript of Hearing ("*Transcript*") at pp. 3-13). The KHRC further noted that such failure to appear may result in a finding of a frivolous appeal under KRS 230.320(5) and 810 KAR 1:100.

4. Electronic mail ("e-mail") dated February 17, 18, and 21, 2011 concerning a press release by the President of the Association of Racing Commissioners International requesting that the New York State Racing and Wagering Board review Dutrow's License;
5. E-mail dated April 7, 2011 concerning Dutrow's background check and application;
6. Transcript of the April 13, 2011 License Review Committee meeting;
7. E-mail dated April 12, 2011 attaching Dutrow's prior Kentucky license applications for the years 2004-2007 and 2009;
8. Letter dated April 13, 2011 from the KHRC to Dutrow giving formal notice of the denial of his application and the grounds therefor;
9. Letter dated April 18, 2011 from KHRC General Counsel, Susan B. Speckert, to prior counsel for Dutrow regarding the present appeal and Dutrow's request for a stay;
10. E-mail dated April 13, 2011 containing the press release concerning the KHRC's denial of Dutrow's application;
11. Letter dated March 29, 2011 from the KHRC to Dutrow advising that he will need to appear before the License Review Committee before his application will be considered;
12. E-mail dated April 1, 2011 concerning Dutrow's horses nominated to race at Keeneland's Spring 2011 Meet;
13. E-mail dated April 7, 2011 from media requesting information regarding Dutrow's application;
14. Letter dated June 9, 2011 from KHRC General Counsel, Susan B. Speckert, to prior counsel for Dutrow advising of the KHRC's denial of his request to withdraw his application; and
15. Respondent's Supplemental Response Interrogatories, served on June 8, 2011.

Upon the introduction of these exhibits, Complainant rested his case. (*Hearing* at p. 45-46). The KHRC moved pursuant to KRS 13B.090(7) for a recommended order in its favor as a matter of law on the ground that Dutrow had failed to satisfy his burden of proof. (*Hearing* at p. 46). After considering the parties' arguments and all of the evidence (*Hearing* at pp. 46-120), the Hearing Officer granted the KHRC's motion, finding that Dutrow failed to meet his burden of proof. (*Hearing* at pp. 121-129).

This decision recommends that the Commission deny Dutrow's appeal of his denial of a trainer's license, and recommends the Commission enter a final order that Dutrow has failed to

meet his initial burden of proof concerning any of the multiple factors that were the basis for his license denial.

### **FINDINGS OF FACT**

1. Prior to 2011, Dutrow routinely applied for a new Kentucky trainer's license immediately preceding or during Keeneland Race Course's spring race meeting. (*Hearing* at p. 21; Exhibit 9; Deposition of Lisa Elaine Underwood ("*Deposition*") at p. 106);

2. All applicants for KHRC licenses must sign and date the application form, certifying that all of the information contained on the application form is accurate and complete and acknowledging that any material misrepresentation or omission is grounds for immediate revocation (Exhibit 9);

3. Dutrow signed and certified all of his KHRC license applications (Exhibit 9);

4. For each of the relevant years prior to 2011, the KHRC granted Dutrow a new license.

5. Dutrow normally runs horses during Keeneland's spring race meeting (*Deposition* at p. 106);

6. Prior to applying for a 2011 Kentucky license, Dutrow in fact already had horses nominated to run in Kentucky at Keeneland's spring race meeting on April 14 and 15, 2011 (Exhibit 7; *Deposition* at p.106);

7. In February 2011, the KHRC's Executive Director at the time, Lisa Elaine Underwood ("Underwood"), became aware of a press release issued by the President of the Association of Racing Commissioner's International ("RCI"). The press release consisted of an open letter to the New York State Racing and Wagering Board requesting a review of Dutrow's regulatory record to determine whether his history of violations demonstrated a pattern of

disregard for the rules of racing sufficient to justify action against his New York trainer's license. The press release alleged that Dutrow has incurred sixty-four (64) violations across fifteen (15) racing jurisdictions, including numerous drug violations and giving false and misleading statements (Exhibit 4, marked as *Deposition* Exhibit 20);

8. It was reasonable for the KHRC to anticipate that Dutrow would apply for a Kentucky license for 2011 prior to or during the commencement of Keeneland's spring race meeting;

9. On March 29, 2011, the KHRC informed Dutrow by letter that it understood he intended to apply for a Kentucky license in the near future, and advised him that he will need to appear before the License Review Committee ("Committee") before any such license would be considered (Exhibit 6);

10. The KHRC did afford Dutrow an opportunity to address his application and regulatory record with the Committee; to avoid potential issues that might arise if he waited until after he had horses entered in races and had already arrived on the grounds at Keeneland to apply for a license; to ensure that the Committee meeting could be put together in an orderly manner; and to accommodate Dutrow's schedule. (*Deposition* at p. 56, 91; Transcript of License Review Committee Meeting ("*Meeting*") at p. 62);

11. The KHRC's decision to contact Dutrow in advance of his anticipated arrival and application was reasonable, appropriate, and a benefit to Dutrow;

12. The KHRC did not in any way solicit a license application from Dutrow, and Dutrow had entered horses at Keeneland at the time the KHRC contacted him;

13. The KHRC did not decide to deny Dutrow's license application prior to the meeting;

14. Dutrow had legal counsel representing him as he prepared his application and scheduled his appearance before the Committee (*Meeting* at p. 7, 23);

15. The Committee meeting was conducted as scheduled on April 13, 2011 at 9:00 a.m. in the law offices of Busald, Funk & Zevely, P.S.C., 226 Main Street, Florence, Kentucky (*Meeting* at cover; Exhibit 4, marked as *Deposition* Exhibit 25);

16. Dutrow did not submit his application to the Committee until the afternoon of April 12, 2011 (*Meeting* at 62);

17. Dutrow knew that he had the right to have counsel present during the Committee meeting. (*Meeting* at pp. 10-11). Dutrow had New York counsel present telephonically at the beginning of the meeting. (*Meeting* at p. 11). Later, Dutrow voluntarily chose to appear without counsel (*Meeting* at pp. 10-11);

18. Dutrow knew the subject matter of the Committee meeting was his license application and whether it should be granted or denied. That application form included related topics that were specifically referenced in the application form, such as his criminal history and history of violations and penalties in Kentucky and any other racing jurisdiction;

19. Dutrow signed and certified his application on the morning of April 13, 2011, just prior to the commencement of the Committee meeting (*Meeting* at p. 4);

20. In response to the question on his 2011 license application form whether Dutrow had been arrested for a crime in the last fifteen years and if so, to explain, Dutrow answered "Yes" and "to be discussed" (*Meeting* at pp. 25-26);

21. Dutrow gave differing and inconsistent answers to this question on prior license applications. Dutrow answered "No" in 2004 and 2005; "Yes" in 2006; and "No" in 2009 and 2010 (*Meeting* at p. 28; Exhibit 9);

22. When questioned by the Committee for details about his criminal arrests and an explanation of these inconsistencies, Dutrow was evasive. He denied knowing his own arrest history and did not provide the Committee any specific information or give a complete answer to the application question (*Meeting* at pp. 25-32);

23. Dutrow eventually admitted that he had a felony conviction in 1991 for breaking into a slot machine in Nevada, and that he failed to report that conviction on a subsequent racing license application in 1995. This failure resulted in a \$250.00 fine for making a false statement on a license application (*Meeting* at pp. 85, 89, 90-91);

24. Dutrow violated a Kentucky statute, administrative regulation, or similar rule respecting horse racing and as a result had a license issued by the Commonwealth of Kentucky revoked, suspended, or denied. Specifically, Dutrow's Kentucky license was suspended on June 25, 2008 for a positive finding of the prohibited drug Clenbuterol (Dutrow's Answer to Requests for Admission No. 7, filed August 15, 2011; *Meeting* at p. 65);

25. Despite that, Dutrow falsely stated on his April 8, 2009 Kentucky license application that he had not ever had any license issued by the Commonwealth of Kentucky denied, revoked or suspended (Exhibit 9; *Meeting* at p.38);

26. Dutrow admitted that his 2009 license application was not accurate (*Meeting* at p.63);

27. On numerous occasions, Complainant has violated a statute, administrative regulation, or similar rule respecting horse racing in other jurisdictions, and has had licenses issued by the legally constituted racing or gaming commission of other states suspended. (Dutrow's Answer to Requests for Admission No. 6, filed August 15, 2011). Dutrow admitted to and the evidence includes the following:

a. Dutrow has had at least twenty-seven (27) rulings against him by the New York racing authority, twenty-one (21) of which have occurred since 2000. These rulings include a number of suspensions for drug violations. (*Meeting* at p. 45);

b. Dutrow has been fined by the State of Pennsylvania for violation of racing rules at least once in 2008, and at least twice in 2010 (*Meeting* at p. 51);

c. Dutrow has been fined by the state of New Jersey on multiple occasions for violations beginning in 2001 through June 2010, including a violation on June 20, 2010 for failure to conduct business in a proper manner. Another one of these violations, reflected by Ruling #07-MTD-01, reflects that Dutrow was fined \$5,000.00 and suspended for giving false or misleading statements to the racing authority during the course of an investigation, as well as for conduct detrimental to racing, violation of rules concerning workout programs, and conspiracies governing such conduct (*Meeting* at pp. 52-3);

d. Dutrow has been sanctioned by the State of Delaware for racing violations on numerous occasions beginning in 1997 through May 31, 2010, including drug violations (*Meeting* at p. 57);

e. Dutrow has been suspended by the State of Florida on at least one occasion for a drug violation (*Meeting* at p. 57-58);

f. Dutrow violated Maryland racing rules in 1976 and 1980, each time for possession of marijuana (*Meeting* at p. 64);

g. Dutrow violated racing rules in California by testing positive for marijuana (*Meeting* at p. 70); and

h. Dutrow violated Minnesota racing rules in 2006 and was sanctioned for the drug violation of running a horse on Butazolidin without listing the drug on the entry form (*Meeting* at pp. 71-2).

28. Dutrow only listed his New York violations in his 2011 application and failed to list any of his other violations. Dutrow agreed with the Committee that Dutrow's 2011 application was incomplete and inaccurate (*Meeting* at pp. 78-79);

29. Dutrow voluntarily admitted to the Committee that he committed acts of fraud and misrepresentation with respect to some of the horses he has trained, including Wild Desert and St. Liam. Some of these acts would have been noteworthy as corrupt even in the olden days



of the wild west, and cannot have any allowed place in any modern racing jurisdiction. Dutrow admitted the following facts:

- a. Dutrow has run “many horses” under the name of trainer Robert J. “Bobby” Frankel while Dutrow was under suspension (*Meeting* at p. 101);
- b. In 2005, while serving a sixty (60) day suspension for racing a horse under the name of an owner who did not actually own the horse, Dutrow ran another horse, St. Liam, in a Kentucky race under the name of Bobby Frankel (*Meeting* at pp. 101, 102, 109);
- c. During this period, Dutrow continued to bill the owners of St. Liam for his share of the horse’s winning purse as trainer, and was in fact paid as its trainer (*Meeting* at pp. 109-111);
- d. Also during this sixty (60) day suspension, Dutrow continued to train another horse, Wild Desert (*Meeting* at pp. 54-56, 99-100, 108-109). Because he had been advised by the New York Racing Secretary that Wild Desert would not be allowed on the grounds at Aqueduct Racetrack, where Dutrow trains his horses, Dutrow brought Wild Desert into the gate at Aqueduct under a false name (*Meeting* at pp. 54-56, 99-100);
- e. While training Wild Desert at Aqueduct during this period, Dutrow fabricated a workout for Wild Desert at Monmouth Park Racetrack in New Jersey, although the horse was not at Monmouth and did not train there (*Meeting* at p. 55, 100-101);
- f. After fabricating the workout for Wild Desert and during this suspension, Dutrow sent the horse to Canada and ran it in the Queen’s Plate under the name of Bobby Frankel (*Meeting* at p. 54-56, 108-109); and
- g. During this period, Dutrow continued to bill the owners of Wild Desert for his share of the horse’s winning purse as trainer, and was in fact paid as the trainer (*Meeting* at pp. 109-111).

30. During the Committee meeting, Dutrow admitted to falsifying the name of a horse, continuing to train horses while under suspension, and avoiding the consequences of suspension by running horses in races under the name of other trainers while continuing to act and be paid as the true trainer. This testimony is part of a large volume of fraudulent and otherwise improper conduct with respect to the training and running of horses while under

suspension, and is intentional and deceptive conduct that has disregarded the rules and integrity of horse racing;

31. Prior to the Committee meeting, Dutrow had never informed the KHRC about his conduct in Kentucky regarding St. Liam;

32. Prior to his statements during the Committee meeting, Dutrow had never informed the KHRC about his practice of running “many horses” under other trainers’ names while under suspension;

33. Prior to his statements during the Committee meeting, Dutrow had never informed the KHRC about the facts and circumstances of his conduct regarding Wild Desert while under suspension;

34. At the conclusion of the meeting, the Committee voted unanimously to deny Dutrow’s license application (*Meeting* at pp. 116-118);

35. The Committee’s decision was not based upon his then-pending charges in New York (*Meeting* at pp. 95-96; 116-118);

36. Upon hearing the Committee’s decision to deny his license application, Dutrow stated that, if he had known it would be denied, he would have taken further efforts to hide his training by entering his current horses in another trainer’s name (*Meeting* at p. 121);

37. On April 13, 2011, after the conclusion of the meeting, the KHRC’s Executive Director notified Dutrow and his counsel by letter that his license application had been denied. This letter informed him of his right to appeal, and cited a non-exclusive list of regulatory provisions forming the basis for its decision, consisting of 810 KAR 1:025, Section 14(1)(a), (d), (e), (g), (i), (j), and (q) (Exhibit 4, marked as *Deposition* Exhibit 25);

38. The decision to deny Dutrow’s application was reasonable and proper.

39. After Dutrow's license application was officially denied, Dutrow submitted a request to withdraw his application;

40. On June 8, 2011, the KHRC unanimously voted to deny Dutrow's post-meeting request to withdraw his application (Exhibit 11); and

41. The KHRC was not compelled to allow Dutrow to withdraw his application after it had been voted on and denied. The KHRS's refusal to let Dutrow withdraw his application after it had been denied was reasonable and an appropriate exercise of its regulatory authority. As set forth in the facts above, Dutrow's application merited denial.

### **CONCLUSIONS OF LAW**

1. Under KRS 230.215(1), "it is the policy and intent of the Commonwealth to foster and to encourage the business of legitimate horse racing with pari-mutuel wagering thereon in the Commonwealth on the highest possible plane."

2. Pursuant to KRS 230.215(1), "the participation in any way in horse racing, or the entrance to or presence where horse racing is conducted, is a privilege and not a personal right."

3. KRS 230.215(2) vests the Kentucky Horse Racing Commission with:

...plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth so as to encourage the improvement of the breeds of horses in the Commonwealth, to regulate and maintain horse racing at horse race meetings in the Commonwealth of the highest quality and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices, and to regulate and maintain horse racing at race meetings in the Commonwealth so as to dissipate any cloud of association with the undesirable and maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth.

4. The Kentucky Horse Racing Commission is an independent agency of state government created to regulate the conduct of horse racing and pari-mutuel wagering on horse racing, and related activities within the Commonwealth of Kentucky. KRS 230.225.

5. The Kentucky Horse Racing Commission is vested with jurisdiction and supervision over all persons on association grounds. KRS 230.260(1).

6. All racing licenses are subject to all administrative regulations and conditions as prescribed by the Commission. KRS 230.290(2).

7. Licenses granted by the Commission are subject to denial, revocation, or suspension by the Kentucky Horse Racing Commission in any case where it has reason to believe that any provision of KRS Chapter 230, administrative regulation, or condition of the KHRC affecting it has not been complied with or has been broken or violated. The KHRC, in the interest of protecting the honesty and integrity of horse racing, may promulgate administrative regulations under which any license may be denied, suspended or revoked. KRS 230.320(1).

8. The KHRC is authorized to promulgate any reasonable and necessary administrative regulation for the enforcement of the provisions of KRS Chapter 230 and the conduct of hearings held before it. KRS 230.370.

9. The KHRC acted within its regulatory authority to refer Dutrow to the Committee:

Pursuant to 810 KAR 1:025, Section 13(1), "The executive director, chief racing steward, or director of licensing may refer a license application to the license review committee in lieu of denying." Section 13(3) further states that:

"If a referral to the committee is made, then a license shall not be issued until the committee makes a favorable ruling on the license application. The applicant may

be required by the committee to appear personally. If the committee is unable to make a favorable ruling on the license application, then the committee may give the license applicant the opportunity to voluntarily withdraw his or her license application in accordance with Section 12 of this administrative regulation. If the license applicant does not wish to voluntarily withdraw his or her application, then the committee shall deny the application.”

This regulation does not impose limitations on which license applications should be referred to the Committee. The plain language empowers the executive director, chief steward, and licensing director to refer any application in lieu of simply denying it.

The KHRC’s Executive Director at the time of Dutrow’s application had the discretion under this regulation to deny Dutrow’s application outright when it eventually arrived. She instead exercised her discretion as specifically authorized by regulation to refer the application to the Committee for a more detailed and thorough review with his personal attendance and participation. As a result of this referral, Dutrow was afforded additional opportunities to prepare and discuss his record of violations at length with the assistance of counsel before a final decision was made. This decision was a reasonable and appropriate exercise of the Executive Director’s discretion and authority, and was done consistent with the regulatory authority.

10. Pursuant to 810 KAR 1:025, Section 14(1), the KHRC, executive director, or director of licensing may deny a license application for any one of the following reasons:

- (a) The public interest, for the purpose of maintaining proper control over horse racing meetings or pari-mutuel wagering, may be adversely affected if the license is issued;
- (b) The licensee or applicant has any felony or misdemeanor criminal conviction from any jurisdiction, including having entered into any form of diversionary program, within fifteen (15) years preceding the date of submission of a license application; ...
- (d) The licensee or applicant has had a license issued by the legally constituted racing or gaming commission of a state, province, or country denied, suspended, or revoked;

(e) The licensee or applicant has had a license issued by the Commonwealth revoked, suspended, or denied; ...

(g) The licensee or applicant has made a material misrepresentation, falsification, or omission of information in an application for a license;...

(i) The licensee or applicant has violated or attempted to violate a statute, administrative regulation, or similar rule respecting horse racing in any jurisdiction;

(j) The licensee or applicant has perpetrated or attempted to perpetrate a fraud or misrepresentation in connection with the racing or breeding of a horse or pari-mutuel wagering; ...

(n) The licensee or applicant has misrepresented or attempted to misrepresent facts in connection with the sale of a horse or other matter pertaining to racing or registration of a thoroughbred;...

(q) The licensee or applicant has engaged in conduct that is against the best interest of horse racing, or compromises the integrity of operations at a track, training facility, or satellite facility;

(r) The licensee or applicant has knowingly entered, or aided and abetted the entry, of a horse ineligible or unqualified for the race entered;... or

(hh) The licensee or applicant has knowingly aided or abetted any person in violation of any statute or administrative regulation pertaining to horse racing.

11. Pursuant to 810 KAR 1:025, Section 12(1), a license applicant may withdraw his or her license application from the license review process, but only “with the approval of the license review committee.”

12. Pursuant to 810 KAR 1:008, Section 5, “no horse in the charge of a trainer whose license has been revoked or suspended, shall be permitted to race during the period of the trainer's suspension.”

13. Pursuant to 810 KAR 1:008, Section 2(1)(d), a holder of a trainer's license “shall not engage in an activity directly or indirectly involving the racing performance of horses on association grounds other than those registered as being in his charge.”

14. KRS 13B.030 authorizes the agency head (in this case, the agency being the KHRC), to exercise all powers conferred on an agency to conduct an administrative hearing, or to delegate those powers to a hearing officer, so long as the agency head does not delegate the power to issue a final order. Subsection 2 allows the agency to contract with another agency, in this case, the Energy and Environment Cabinet's Office of Administrative Hearings, for hearing officers.

15. A hearing officer at the appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, motions, objections, and offers of settlement, and may also give the parties opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed recommended orders. KRS 13B.080.

16. For administrative hearings, findings of fact are based exclusively on the evidence in the record. Evidence may be received in written form if doing so will expedite the hearing without prejudice to the interests of any party. The hearing officer may make a recommended order in an administrative hearing submitted in written form if the hearing officer determines there are no genuine issues of material fact in dispute and judgment is appropriate as a matter of law. KRS 13B.090(1)-(4).

17. Dutrow has the burden of proof in this matter:

KRS 13B.090(7) states:

In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.

This case does not involve the imposition of any fine, suspension or other penalty upon the Dutrow by the KHRC, and it is undisputed that Dutrow was unlicensed in 2011. Pursuant to KRS 230.290(4), no license shall extend beyond the end of the calendar year for which it is issued,<sup>2</sup> which means that no license confers upon the licensee any benefits beyond the calendar year of that license. Applied to this case, Dutrow's 2010 license did not confer upon him any benefits or privileges to participate in Kentucky racing during 2011. Nor did any prior year's license grant such a privilege. Indeed, Dutrow's awareness that he held no such privileges or benefits is evidenced by, among other things, the fact that he knew he had to apply for a 2011 license in the first place. Therefore, this case also does not involve the removal of any existing benefit previously granted.

Rather, in this case Dutrow is the party proposing that the agency take action or grant a benefit. Namely, Dutrow is proposing that the KHRC grant him the privilege of participating in racing within the Commonwealth during 2011 by taking action to approve his license application. Therefore, Dutrow had the burden to show the propriety of being granted a 2011 license as well as the entitlement to that benefit. Moreover, Dutrow also had the burden of going forward – and the ultimate burden of persuasion – on each issue.

18. KRS 13B.090(2) provides that the “hearing officer may make a recommended order in an administrative hearing submitted in written form if the hearing officer determines that there are no genuine issues of material fact in dispute and judgment is appropriate as a matter of law.”

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<sup>2</sup> This provision contains a single exception for licenses that expire on the last date of the birth month of the licensee, but Complainant has neither argued nor presented evidence that this exception applies to him.



19. After carefully considering the case in chief presented by Dutrow, the hearing officer concludes there is no genuine issue of material fact that was raised by Dutrow's evidence presented at the hearing. The motion by the KHRC for judgment was expressly identified as one the hearing officer wanted to give both sides ample time to address in all detail necessary, and was identified as one that may be granted in this matter. After being provided a recess and an opportunity to review the record in detail, both counsel made substantial oral arguments at the hearing about the proof submitted by Dutrow and whether it provided any proof to establish his entitlement to a reversal of his license denial.

20. Dutrow has failed to present any proof in support of his appeal for any of the multiple bases for his license denial. In fact, the proof is that Dutrow does not factually contest any of the bases, but asserts the Commission shouldn't be able to use those to deny his license. Some of the bases for the Commission's denial of his license are among the more potentially destructive to the honesty and reputation of the industry, including the stunning admissions by Dutrow that he not only continued to train Wild Desert while under suspension, but that he fraudulently had a fake workout for Wild Desert entered during that time.

21. Such falsified reported workouts are a danger to the integrity of the wagering public in horse racing, and such conduct is a quite appropriate basis for the Commission to deny a trainer's license, although far from the only basis.

22. This decision must note that Dutrow has challenged the license denial, which was based on several factual components. Theoretically, the Commission's denial could be valid if Dutrow failed to submit proof for even a single one of those bases for the denial. However, that is not an issue here, because in fact, Dutrow has not submitted any factual evidence contradicting

even one of those many factual components that were the basis for the denial, and has made admissions under oath as to the accuracy of many of them.

- A. Dutrow admitted to two (2) separate and independent grounds for denial even before the 13B Hearing.

Prior to the hearing, Dutrow admitted in discovery that he has had both a Kentucky racing license as well as a racing license issued by another state suspended. (*See Dutrow's Answers to Requests for Admission Nos. 6 and 7, filed August 15, 2011*). Either of these admissions is already sufficient grounds to justify the denial of Dutrow's license. 810 KAR 1:025 Section 14(d), (e). Moreover, Dutrow introduced into evidence further proof against himself on this subject: his own statements to the Committee wherein he admitted to not just one but numerous suspensions in other racing jurisdictions. Even without considering any of Dutrow's many other incriminating admissions, Dutrow's proof on this subject alone established that the denial of his application was appropriate as a matter of law.

- B. Dutrow admitted to repeated fraud and misrepresentation in connection with the racing of thoroughbred horses.

810 KAR 1:025, Section 14(j) permits denial of a license to one who has perpetuated fraud and misrepresentation in connection with the racing of a horse. Similarly, Section 14(n) calls for denial of one who misrepresents facts in connection with a matter pertaining to the racing of a thoroughbred. Rather than satisfy his burden to prove he was entitled to a license, Dutrow instead introduced evidence proving such an extensive pattern of fraudulent conduct that the denial of his application was the only responsible decision that could have been made under the circumstances.

During his appearance before the Committee, Dutrow freely admitted that he "has run many horses" under the name of another trainer while he was under suspension and that when he

engages in this activity he continues to bill and be paid as trainer by the horses' owners. Such conduct actively deceives not only the racing authorities who would otherwise believe that he is complying with their suspension orders, but also the race tracks that are deceived into accepting the misleading entry as well as the members of the wagering public who rely on having accurate and truthful information about the horse before placing their bets. Such conduct constitutes fraud.

Dutrow also described to the Committee how he also Wild Desert onto the grounds at Aqueduct under a false name and falsified a workout for the horse at Monmouth, a track where it did not exercise. Race tracks rely on published works when determining if a horse is eligible to enter a particular race, and the wagering public relies on published works when handicapping races. To falsify a work is to commit a fraud upon and threaten the integrity of the sport. In this case, Wild Desert was preparing to run in stake race competition at horse racing's highest level, while having falsified workout times used to deceive the betting public.

Dutrow's own admissions justify the Committee's denial of his license application. Appearing before the Committee, Dutrow also blithely justified his deceptive conduct as necessary and appropriate:

"I mean, I needed to get [Wild Desert] to Aqueduct to get the horse right. That's where my help is. That's where we do our work."

"But if I didn't bring [Wild Desert] into Aqueduct, I couldn't – I couldn't get the horse right anywhere else by Aqueduct Racetrack. That's where my – my blacksmith works. That's where my vet works. That's where I work."

(*Meeting* at pp. 54-55). Dutrow showed blatant disregard for the rules of racing. When he learned that his license had been denied by the Committee for this very conduct, he expressed frustration that if only he had known, he would have entered his current horses under the names

of false trainers as well. (*Meeting* at p. 121). Dutrow's license was properly denied under both 810 KAR 1:025, Section 14(j) and (n).

C. Dutrow admitted to repeated violations of statutes, administrative regulations or similar rules respecting horse racing.

In addition to the foregoing regulatory grounds for denial already addressed, Dutrow also proved that the KHRC was correct to rely upon 810 KAR 1:025 Section 14(i). Specifically, Dutrow's admissions regarding each of his prior suspensions not only constitute grounds for denial under 810 KAR 1:025 Sections 14(d) and (e), they also by definition establish that he violated racing statutes, regulations or similar rules regarding horse racing in Kentucky and many other racing jurisdictions. Dutrow's admissions regarding the running of "many horses" under the names of false trainers, and his numerous admissions regarding other violations in other states for which he was merely fined but not suspended,<sup>3</sup> each independently constitute grounds under Section 14(i) for the Committee's denial of his 2011 license application.

D. Dutrow has made numerous material misrepresentations or omissions of information in his Kentucky license applications.

Dutrow's Kentucky license applications that were reviewed by the Committee contain numerous inconsistent answers and omissions. With respect to his criminal history, Dutrow's applications gave alternating answers within the same time period regarding whether or not he had recent convictions and, even when he answered affirmatively in 2011 and represented that he would discuss that history before the Committee, he was evasive and refused to provide an explanation to the Committee without repeated questioning. Likewise, his 2011 application only contained violations from New York, and omitted his lengthy history of other violations and suspensions.

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<sup>3</sup> For example, Complainant specifically admitted to various fines in Pennsylvania, New Jersey, Delaware, Minnesota, and elsewhere. (*See Meeting* at pp. 51-53, 57, 71-72, and Findings of Fact #29 above).

Dutrow agreed with the Committee that these responses, and applications, were incomplete and incorrect. Dutrow's errors and omissions regarding his true criminal history and prior violations – the two most important areas of concern in the review of his license – were substantial and material. Accordingly, each of his errors and omissions constitute grounds under 810 KAR 1:025 Section 14(g) for the denial of his 2011 license application.

- E. Dutrow has engaged in conduct that is against the best interest of horse racing and compromises the integrity of operations at a track or other facility.

Dutrow's cumulative regulatory record, admissions during the meeting, lack and of remorse or culpability for past violations evidence a general disregard for the rules of racing and a pattern of conduct that threatens the integrity of racing and, thus, is against the best interest of racing and constitutes grounds for the denial of his license application under 810 KAR 1:025 Section 14(q). This conclusion is supported by case law from numerous other racing jurisdictions that have enforced similar licensing rules against "conduct detrimental to the best interests of racing." For example, in Kulick v. Pennsylvania State Horse Racing Commission, 540 A.2d 620, 622 (Pa. Cmwlth. 1988), the Court addressed the type of conduct that would warrant such a label:

"As we stated in Helad Farms v. State Harness Racing Commission, 470 A.2d 181, 184 (1984), the Act's 'overriding purpose [is] to foster an image of horse racing that would make the image of that 'industry' an irreproachable one, even in the eyes of the skeptical public.' To that end, the Commission must discourage conduct which undermines public confidence and respect in the sport. (Citation omitted). Such proscribed conduct 'need not be criminal in nature nor proved beyond a reasonable doubt. It is sufficient that the complained-of conduct and its attending circumstances be such as to reflect negatively on the sport.' (Citation omitted). The Commission's articulation of the burden of proof as entailing a demonstration only of the *appearance* of impropriety thus embodies the purpose of the Act. Such appearances indeed do reflect negatively on the sport and impair the public's perception of its integrity."

Id. at 623. Based on this rationale, the Pennsylvania Court in Bensalem Racing Ass'n v. State Horse Racing Comm'n, 645 A.2d 933 (Pa. Cmwlth. 1994) later upheld the ejection of a trainer from race track grounds based on his extensive prior record of criminal convictions and other past conduct. The Court held that “[a]llowing Sipp to train and race thoroughbred horses at the respective tracks is detrimental to the best interest of horse racing,” and that the trainer had “voluntarily pursued a course of conduct which erodes public confidence in the industry and frustrates the legislative purpose requiring licensing.” Id. at 939.

In the present case, the stated policy and intent of the Commonwealth in enacting the subject racing statutes and regulations is to “foster and to encourage the business of legitimate horse racing with pari-mutuel wagering thereon in the Commonwealth on the highest possible plane.” KRS 230.215(1). Accordingly, the second paragraph of that statute requires the KHRC to “regulate and maintain horse racing at horse race meetings in the Commonwealth of the highest quality and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices, and to regulate and maintain horse racing at race meetings in the Commonwealth so as to dissipate any cloud of association with the undesirable and maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth.” KRS 230.215(2).

The conduct described above is inconsistent with honest regulation by the KHRC because it includes chronic rule breaking, fraud and other unprincipled practices. Therefore, Dutrow has engaged in conduct that is against the best interest of horse racing and compromises the integrity of operations at a track or other facility.

- F. The public interest in proper control over horse racing would be adversely affected if a license had been issued to Dutrow.

Finally, for the same reasons as those discussed in the preceding section, the KHRC properly relied upon 810 KAR 1:025 Section 14(a) to deny Dutrow's license. The Dutrow's record indicates a consistent and egregious lack of respect for and disregard of the rules of racing, thereby adversely affecting the public interest in the proper control of horse racing. The KHRC is charged with protecting the public's interest in the honesty and integrity of horse racing and is statutorily mandated to maintain and promote horse racing of the highest possible quality and free of any corrupt or dishonest practices. *See* KRS 230.215 (2). Based on the substantial and blatant nature of Dutrow's record and admissions, the Committee properly concluded that in order to fulfill its statutory mandate, Dutrow's license application must be denied under 810 KAR 1:025 Section 14(a).

Finally, although Dutrow did not contest any of the factual bases relied on by the KHRC in its denial of his license, Dutrow nonetheless argues the Commission must be estopped from relying on "information which it ignored for years as a pretextual reason to deny Dutrow's license application." Dutrow cites *Laughhead v. Commonwealth of Kentucky, Dept. of Transportation et al*, 657 S.W.2d 228, 230 (Ky. 1983).

Dutrow is correct in stating that the fact that the Commission is an agency of the Commonwealth doesn't bar the application of equitable estoppel against it. However, equitable estoppel applies to governmental agencies only in exceptional circumstances. In *Laughhead*, for example, a ferry operator that had been seeking compensation due to a new bridge opening. The state denied, claiming the statute was unconstitutional. The operator then let its operation lapse. After that, the state denied because the operator had not met the "continuously operating" requirement. In that case, the ferry owner was "lulled into inaction" by the state's initial response. More common scenarios for administrative equitable estoppel require some sort of

action or reliance by the party seeking to assert it. See *Urban Renewal and Community Dev. Agency of Louisville v. Goodwin*, 514 S.W. 2d 190 (Ky. 1974).

Even viewed in the most favorable light to Dutrow, there is no reliance by Dutrow here upon some sort of previous response or promise by the Commission. The only action the Commission took was making a decision each year about whether to license Dutrow.

In addition to the high standard required from Kentucky caselaw to find equitable estoppel against an administrative agency such as the KHRC, the applicable regulation and statute also support the conclusion that the Respondent is not equitably estopped from relying upon Dutrow's violations occurring prior to his receipt of preceding Kentucky licenses.

Dutrow asserts that the KHRC, having previously granted him licensing privileges in the past despite allegedly knowing his regulatory record, is now equitably estopped from relying upon those violations to deny him any subsequent license. By implication, he argues that the KHRC is limited to considering only violations that have occurred since the grant of his last license. However, 810 KAR 1:025, Section 14(1) is devoid of any language limiting the grounds for denial to such a narrow time frame. Dutrow has presented no valid legal precedent applying equitable estoppel to the enforcement of an unambiguous regulation by a governmental regulatory body such as the one at issue. Dutrow's theory also ignores the plain language of KRS 230.290(4), which states:

The racing commission may renew any license and any renewal shall not be construed to be a waiver or condonement of any violation which occurred prior to renewal and shall not prevent subsequent proceedings against the licensee therefor.

This provision is unequivocal, and clearly intended to preempt the very argument now posed by Dutrow.

23. Dutrow has not been deprived of any due process or right to notice:



Dutrow knew he had the right to have an attorney present to represent him at the Committee meeting and at all other stages of this matter. The transcript of the Meeting reflects that he was actively assisted by legal counsel in the preparation and submission of his 2011 license application and that legal counsel participated on his behalf at the beginning of the Meeting.

There is no evidence Dutrow was misled by the KHRC concerning the nature and purpose of the meeting or what matters would be discussed. The purpose of the Committee is clearly described in 810 KAR 1:025 along with the various factors that may be considered when weighing an applicant's license application, and the application form itself reveals the subject matter relevant to every applicant for a license. 810 KAR 1:025, Sections 13 and 14; KHRC 25-01 (7/10), incorporated by reference into 810 KAR 1:025, Section 23(1)(a); *See also* Exhibit 9. The notion that Dutrow, who was assisted and advised by counsel throughout the application process, was unaware of the purpose of the Committee meeting is contradicted by the evidence and is simply not credible.

Dutrow was not entitled to a formal written notice similar to that required for an administrative hearing prior to his license being reviewed is not supported by any regulatory reference or statute. In fact, Dutrow has been accorded quite clearly articulated procedural due process in the review of his license denial through his right to notice and be heard through KRS Chapter 13B, Kentucky's version of an Administrative Procedures Act. KRS 13B repeatedly specifies not only less formal proceedings at the previous administrative level, but also provides an administrative due process safety net at every step of the administrative hearing proceeding to insure participants have adequate notice and a chance to be heard in the administrative appeal process. *See* KRS 13B.050, KRS 13B.070, KRS 13B.090, KRS 13B.110, and KRS 13B.120.

Further, even at the stage of the Meeting, Dutrow knew that the subject matters referred to in his application questions would be the subject of the hearing. Therefore, Dutrow failed to prove that he was deprived of any notice due or of the opportunity to fully participate in the meeting with the assistance of counsel.

Dutrow's claim of due process violations overlooks the reality that the April 13, 2011 Committee meeting was not a hearing in the first place, and that he is currently prosecuting an administrative appeal under KRS 13B of the KHRC's licensing decision. He has been given the right to appeal, and is exercising that right, along with his right to counsel, a formal hearing, and chance to present evidence. Dutrow has received and continues to enjoy due process, and his argument to the contrary is without merit.

24. The KHRC properly denied Dutrow's request to withdraw his application:

Dutrow argued at the hearing that he should have been allowed to withdraw his license application and that Respondent improperly denied his request to do so. However, no provision in either KRS Chapter 230 or 810 KAR Chapter 1 creates a right to withdraw an application once it has been submitted. On the contrary, the provisions relied upon by Dutrow, 810 KAR 1:025, Sections 12(1) and 13(3), explicitly make withdrawal contingent upon the prior approval of the Committee. Inferring a right as argued by Dutrow would invalidate the entire regulatory process if any applicant could eliminate a license denial by invoking an absolute right to retroactively withdraw his application after the adverse decision. The authorization to allow withdrawal of an application is within the KHRC's discretion.

In this case, the KHRC did not abuse its discretion by choosing not to approve Dutrow's request to withdraw. At the time of his request, Dutrow's application had already been processed and voted upon by the Committee. The Executive Director had already issued to

Dutrow official notice that his application had been denied, and there was therefore nothing left to withdraw. Moreover, the Committee was not deadlocked, but had made a unanimous decision that his application should be denied. His application still was appropriately denied by the Committee for the bases set forth above.

25. Based on the above findings of fact and conclusions of law, this order recommends that the KHRC issue a final order affirming the denial of Richard E. Dutrow's 2011 license application.

#### **NOTICE OF EXCEPTION AND APPEAL RIGHTS**

Pursuant to the authority of KRS 13B.110(4), each party shall have a period of fifteen (15) days from the mailing of this recommended order within which to file exceptions to the recommendations with the agency head, the Executive Director of the Kentucky Horse Racing Commission. A failure to timely file exceptions to this report with the agency head may constitute a waiver of appeal rights to the extent the agency head adopts the recommendations of the Hearing Officer in the agency's final order. See *Rapier v. Philpot*, 130 SW3d 560 (Ky. 2004).

Pursuant to the authority of KRS 13B.140, all final orders of agencies are subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue within thirty (30) days after the final order is mailed or delivered by personal service. Some courts, pursuant to the language of KRS 23A.010(4) which requires that an appeal to circuit court be docketed as an original action, require that a summons be served when filing the appeal petition in said Circuit Court.

KRS 230.330 states: Any licensee or any applicant aggrieved by any final order of the authority may appeal to the Franklin Circuit Court in accordance with KRS Chapter 13B.

**DATE OF ORDER: FEBRUARY 4, 2013**

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ROBERT LAYTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
35-36 FOUNTAIN PLACE  
FRANKFORT, KENTUCKY 40601

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OFFICE OF ADMINISTRATIVE HEARINGS  
35-36 FOUNTAIN PLACE  
FRANKFORT, KENTUCKY 40601

CERTIFICATE OF SERVICE


I certify that a true and accurate copy of the foregoing ORDER, was on this 4<sup>th</sup> Day of February, 2013 emailed and mailed by first class mail, postage prepaid to:

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DOCKET COORDINATOR