

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA RACING COMMISSION

In the Matter of the Proposed Rules of
the Minnesota Racing Commission
Minnesota Rules, Chapter 7800.

**ORDER OF CHIEF
ADMINISTRATIVE LAW JUDGE
ON REVIEW OF RULES UNDER
MINNESOTA STATUTES, SECTION
14.26, SUBD. 3(b)**

The Minnesota Racing Commission ("Commission") has adopted the above-entitled rules without a hearing pursuant to Minnesota Statutes, section 14.26. On October 28, 2009, the Office of Administrative Hearings received the documents that must be filed by the Board under Minnesota Statute § 14.26 and Minn. R. 1400.2310. The Commission supplemented the record on November 2, 2009, with the determination required by Minn. Stat. § 14.128. On November 12, 2009, the Administrative Law Judge issued the Order on Review of Rules under Minnesota Statutes, Section 14.26. As set forth in the November 12, 2009 Order, a portion of the rules was disapproved.

Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and the November 12, 2009 Order,

IT IS HEREBY ORDERED: that the findings of the Administrative Law Judge in the November 12, 2009 Order on Review of Rules under Minnesota Statutes, Section 14.26, regarding the disapproval of portions of the rules are approved. The reasons for the disapproval of the rules and the changes recommended to correct the defects found are as set forth in the attached Order.

Dated this 16th day of November, 2009.

_____/s____Raymond R. Krause_____
RAYMOND R. KRAUSE
Chief Administrative Law Judge

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA RACING COMMISSION

In the Matter of the Proposed Rules of
the Minnesota Racing Commission
Minnesota Rules, Chapter 7800.

**ORDER ON REVIEW OF
RULES UNDER MINNESOTA
STATUTES, SECTION 14.26**

The Minnesota Racing Commission ("Commission") is seeking review and approval of the above-entitled rules, which were adopted by the Commission without a hearing. Review and approval is governed by Minn. Stat. § 14.26. On October 28, 2009, the Office of Administrative Hearings received the documents that must be filed by the Commission under Minn. Stat. § 14.26 and Minn. R. 1400.2310. The Commission supplemented the record on November 2, 2009 with the determination required by Minn. Stat. § 14.128. Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

1. The Commission has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with all procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400, with the exception of a timely authorizing resolution for Richard Krueger to issue the Dual Notice of Intent to Adopt Rules With or Without a Hearing. As discussed below, the Administrative Law Judge finds that error on the part of the Commission to be harmless according to the standards of Minn. Stat. § 14.15.
3. The rules are needed and reasonable, with the exception of parts 7877.0175, subpart 13 and 7892.0120, subpart 5. Accordingly, these rule parts are **DISAPPROVED** as not meeting the requirements of Minnesota Rule part 1400.2100, items B or E.

4. Pursuant to Minnesota Statutes, section 14.26, subdivision 3(b), and Minnesota Rules, part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: November 12, 2009

_____/s_ Manuel J. Cervantes_____
MANUEL J. CERVANTES
Administrative Law Judge

MEMORANDUM

Pursuant to Minnesota Statutes, Section 14.26, the agency has submitted these rules to the Administrative Law Judge for a review as to legality. The rules adopted by the Office of Administrative Hearings¹ identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. These circumstances include situations in which a rule was not adopted in compliance with procedural requirements, unless the judge finds that the error was harmless in nature and should be disregarded; the rule is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule; the rule is substantially different than the rule as originally proposed and the agency did not comply with required procedures; the rule grants undue discretion to the agency; the rule is unconstitutional² or illegal; the rule improperly delegates the agency's powers to another entity; or the proposal does not fall within the statutory definition of a "rule."

I. Harmless Error

The Commission passed two authorizing resolutions in this proceeding. The first, passed on November 20, 2008, authorized Richard Krueger, Executive Director of the Commission, to sign the Request for Comments. The second, passed on October 22, 2009, authorized Mr. Krueger to "sign the Order Adopting Rules, to modify the rules as needed to obtain the Revisor of Statutes or the Administrative Law Judge's approval of the rules, and to perform other necessary acts to give the rules the force and effect of law." On the same date, the Racing Commission passed a resolution authorizing Mr. Krueger to give the Commission's Notice of Intent to Adopt, and "to do anything else needed to

¹ Minnesota Rule part 1400.2100.

² To be constitutional, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980).

complete the Notice.” This last authorization was not timely because the Notice of Intent to Adopt was published on August 10, 2009.

The Commission erred when it neglected to timely authorize Mr. Krueger to publish the Notice of Intent to Adopt. However, because this error did not “deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process” and because the Commission took corrective action demonstrating that it clearly intended to give Mr. Krueger the authority he needed to proceed, the Administrative Law Judge finds this omission was harmless error pursuant to Minnesota Statute § 14.15.

II. Defects

Defect in Part 7877.0175, subpart 13

This subpart establishes the times when an outrider must be used. The proposed language states:

Outriders shall be responsible for the orderly conduct of horses on the race course during training and racing hours.

The outriders shall be present on the race course, mounted and ready to assist in the control of any unruly horse or to recapture any loose horse, at all times that horses are permitted on the race course, for thoroughbred, quarterhorse, arabian racing, and for harness racing during racing periods.

The Statement of Need and Reasonableness (SONAR) addresses the purpose of the new language:

The outrider’s responsibility is being redefined as there are now three breeds that race in Minnesota at the two licensed racetracks. There are different requirements of the outriders at the licensed thoroughbred/quarterhorse track from those at the licensed standardbred track.³

The proposed language is ambiguous and does not accomplish the Commission’s stated purpose. The intended change to limit the required presence of outriders at the harness track only to racing periods is not clearly established by simply adding the proposed phrase. This is particularly so given the first sentence in the subpart which establishes a general requirement. Because the language is unclear, it “is not rationally related to the agency’s objective. . .” pursuant to Minn. R. 1400.2100. B and is, therefore, defective.

³ Statement of Need and Reasonableness (SONAR) at page 8 (July 19, 2009)

This defect can be cured by changes which will make the language more explicit and clear. The Administrative Law Judge recommends that the Commission adopt the following language:

Outriders shall be responsible for the orderly conduct of horses on the race course during training and racing hours, as specified in the following paragraph.

At the thoroughbred/quarterhorse track, the outriders shall be present on the race course, mounted and ready to assist in the control of any unruly horse or to recapture any loose horse, at all times that horses are permitted on the race course. , for thoroughbred, quarterhorse, arabian racing, and Outriders are required for harness racing during racing periods but are not required during training hours.

The change is needed and reasonable and would not be a substantial change from the rules as proposed.

Defect in Part 7892.0120, subpart 5

This subpart adds an option for obtaining urine for split sample testing in circumstances where it was not originally requested, or it appeared that there was an insufficient amount to split. The rule as proposed states:

A portion of the sample from each horse tested, after a sufficient amount has been sent to the official laboratory, must be preserved by the commission. In the absence of urine for split sample testing, urine from the original testing laboratory, if available, may be sent to the designated split sample laboratory for analysis. It must be available for testing at the request of a person accused of a violation of chapter 7890.

The new language says “urine from the original testing laboratory, *if available, may be sent . . .*” (emphasis added). But the next sentence says “[i]t *must be available . . .*” (emphasis added). The conflicting “must” and “if available . . .may” create conflicting responsibilities on the part of the laboratories and uncertain rights on the part of the person accused of the rule violation.

The SONAR's discussion of this rule change states:

The amount of urine passed by a particular horse is sometimes not enough to send for a split sample analysis. In that instance, remaining urine held by the original testing laboratory can be sent to the split sample testing laboratory.⁴

Because the proposed language conflicts with the existing language, it creates ambiguity that renders it “not rationally related to the agency’s objective” and unconstitutionally vague, in violation of Minn. R. 1400.2100 B. and E. The Administrative Law Judge recommends that the sentences in the proposed rule be re-arranged as follows:

A portion of the sample from each horse tested, after a sufficient amount has been sent to the official laboratory, must be preserved by the commission. It must be available for testing at the request of a person accused of a violation of chapter 7890. In the absence of urine for split sample testing, urine from the original testing laboratory, if available, may be sent to the designated split sample laboratory for analysis.

This change establishes the official testing laboratory as an option for obtaining a split sample for further testing when a violation of rules is alleged and eliminates the confusion between “must” in the second sentence and “may” in the third sentence. The change is needed and reasonable and would not be a substantial change from the rules as proposed.

III. Recommended Technical Corrections

The Administrative Law Judge recommends several technical corrections to the rules. The technical corrections are not defects in the rules, but are recommendations for corrections to the rules that the agency may adopt if it chooses to do so to aid in the administration of the rule. Each of the changes recommended below is needed and reasonable and would not be a substantial change from the rules as proposed.

Part 7890.0120, subpart 1

This rule deals with a form that must be prepared and filed by a treating veterinarian reporting all horses the veterinarian treats on a daily basis. The new language states that the form is considered “confidential.”

⁴ SONAR at page 10.

The SONAR states that the “rule change . . . is needed to bring us into compliances with the statutes and rules of the Minnesota Board of Veterinary Medicine regarding the confidentiality of medical records.”⁵

The Board of Veterinary Medicine’s rules require that the “[c]ontents of medical records must be kept private . . .” Minn. R. 9100.0800, subp. 4.F. This language is consistent with the Minnesota Data Practices Act, under which “private” data is available to the subject of the data while “confidential” data is not.⁶

The Administrative Law Judge recommends that the word “confidential” in this subpart be changed to “private.” This will maintain consistency with both the Data Practices Act and the Veterinary Board rules.

7897.0100, subpt. 20.A

The new language in this rule includes a prohibition of possession or use “of a drug, substance, medication, biological product, or venom on the premises of a facility under the jurisdiction of the commission . . . the use of which may adversely affect the integrity of racing.”

The SONAR states “[t]his rule needs to be added as it is found elsewhere in the rules (chapter 7890).”⁷ While there is somewhat similar language at Minn. R. 7890.0110, subp. 6, there is nothing that parallels the broad language: “use of which may adversely affect the integrity of racing.”

The Administrative Law Judge recommends that that this language be deleted because it is overbroad. Any drug or substance, even an approved one, can adversely affect the integrity of racing, if it is not used correctly. Since this is a prohibition of possession or use, not a rule that governs how substances are used, this very broad language could easily be misapplied.

7897.0100, subpt. 20.B

The proposed wording of this provision is:

No person may possess or use a drug, substance, medication, biological product, or venom on the premises of a facility under the jurisdiction of the commission that has not been approved by the USDA or FDA for any use in human or animal without prior permission of the stewards and commission veterinarian.

5 SONAR at page 9.

6 Minn. Stat. § 13.02 (2009).

7 SONAR at page 10.

The Administrative Law Judge recommends rearranging the words in this provision to clarify its meaning, as follows:

No person may possess or use, on the premises of a facility under the jurisdiction of the commission, a drug, substance, medication, biological product, or venom that has not been approved by the USDA or FDA for any use in human or animal without prior permission of the stewards and commission veterinarian.

7897.0150, subp.4

This rule part deals with Disciplinary and Appeal Procedures. The changes to subpart 4 are meant to expand the authority of the Director or Deputy Director to initiate an appeal of a steward's ruling, rather than simply file a complaint with the Commission.⁸ In making this change, the Commission deleted references to its own authority to initiate a review of a steward's decision, although it left intact subpart 9 of the rule which sets forth the procedure to be followed "[w]hen the commission institutes an appeal on its own motion"

To clarify that the Commission retains the authority to initiate a review or an appeal, the Administrative Law Judge recommends adopting the following language in subpart 4:

Review or Appeal by Commission, Director or Deputy Director. Nothing in this chapter precludes the commission, the director or deputy director from instituting proceedings to appeal a steward's decision; or the commission from instituting proceedings to review a steward's decision on its own motion.

M.J.C.

⁸ SONAR at page 11.