OAH 80-1008-31374

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of Rances Barthelemy

RECOMMENDED ORDER ON CROSS MOTIONS FOR SUMMARY DISPOSITION

This matter is before Administrative Law Judge LauraSue Schlatter on the parties' Cross Motions for Summary Disposition. Rances Barthelemy (Barthelemy) filed his Motion for Summary Disposition on April 30, 2014. Argenis Mendez (Mendez) and the Respondent Commissioner of the Department of Labor and Industry (Commissioner) each also filed a Motion for Summary Disposition on April 30, 2014. Barthelemy filed a Responsive Memorandum on May 12, 2014, and the Commissioner filed a Responsive Letter Brief on the same date. Mendez filed no responsive pleadings.

Leon R. Margules, Law Office of Leon R. Margules, P.A., Davie, Florida; and Timothy J. Peters, Peters Law PLC, Minneapolis, Minnesota, appeared on behalf of Rances Barthelemy. Patrick C. English, Dines and English, L.L.C., Clifton, New Jersey; and Kevin D. Hoffman, Halleland Habicht, PA, Minneapolis, Minnesota, appeared on behalf of Argenis Mendez. Jackson Evans, Assistant Attorney General, appeared on behalf of the Commissioner of Labor and Industry.

STATEMENT OF ISSUES

1. Did the Commissioner of Labor and Industry have authority to overrule the Referee's determination that Rances Barthelemy knocked out Argenis Mendez with a blow struck before the bell signaling the end of the round?

The Administrative Law Judge finds that the Commissioner had the authority to overrule the Referee.

2. If the Commissioner did have the authority to overrule the referee, is the Commissioner's decision declaring the January 3, 2014 boxing match between Mendez and Barthelemy a No Decision supported by undisputed material facts?

The Administrative Law Judge finds that the Commissioner's decision declaring the January 3, 2014 boxing match a No Decision is supported by undisputed material facts.

Based on the submissions of the parties, and for the reasons set forth in the Memorandum attached hereto, the Administrative Law Judge makes the following:

RECOMMENDATION AND ORDER

IT IS HEREBY RECOMMENDED THAT:

1. Barthelemy's Motion for Summary Disposition be **DENIED**.

2. Mendez' Motion for Summary Disposition be **GRANTED**.

3. The Commissioner's Motion for Summary Disposition be **GRANTED**.

IT IS HEREBY ORDERED THAT:

The prehearing telephone conference scheduled to be held on **June 10, 2014,** in this matter is **CANCELLED**.

Dated: June 9, 2014

s/LauraSue Schlatter
LAURASUE SCHLATTER
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner will make a final decision after a review of the record and may adopt, reject, or modify these Findings of Fact, Conclusions, and Recommendation. The Commissioner shall not issue a final order until at least ten days after the date of this report. Any person aggrieved by this report may, within those ten days, serve written comments on the report. Parties should contact Commissioner Ken Peterson, Minnesota Department of Labor & Industry, 443 Lafayette Road, St. Paul, MN 55155, to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law. If the Commissioner fails to issue a final decision within 90 days of the close of the record under Minn. Stat. § 14.61, this Report becomes a final decision.

MEMORANDUM

I. Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.[1] The Office of Administrative Hearings follows the summary judgment standards developed in judicial courts in considering motions for summary disposition of contested case matters.[2]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. The resolution of a material fact will affect the result or outcome of the case.[3] To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.[4] When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party,[5] and all doubts and factual inferences must be resolved against the moving party.[6] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[7]

II. Undisputed Material Facts

The parties agree on the following undisputed material facts:

On January 3, 2014, a professional boxing event was held at the Target Center in Minneapolis, Minnesota. The main event of the evening was to be a 12-round match for the International Boxing Federation (IBF) Super Featherweight Title between Argenis Mendez, who was the reigning champion, and the challenger, Rances Barthelemy.[8]

Towards the end of the second round, Mendez was knocked down by Barthelemy. Mendez regained his feet within the allotted 10 seconds and the referee, Peter Podgorski (Podgorski), permitted the match to continue.[9]

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[1] *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwgie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985); Minn. R. 1400.5500(K); Minn. R. Civ. P. 56.03.
[2] *See* Minn. R. 1400.6600 (1998).
[3] *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).
[4] *Thiele v. Stitch*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).
[5] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. Ct. App. 1984).
[6] *See, e.g., Celotex*, 477 U.S. 317, 325; *Thompson v. Campbell*, 845 F.Supp. 665, 672 (D. Minn. 1994); *Thiele* at 583; *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971).
[7] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).
[8] Commissioner's Memorandum in Support of Motion for Summary Disposition (Commissioner's Motion), Affidavit of Leanne Liftin, Ex. A (ESPN video). (The same video was submitted by Mr. Mendez, but is more readily viewed on most machines in the format submitted with the Commissioner's Motion.) *See* Mendez Brief in Support of Motion for Summary Disposition (Mendez Motion) at 1 and Barthelemy Memoradum in Support of Summary Judgment (Barthelemy Motion) at 1.
[9] Commissioner's Motion, Ex. A; Barthelemy Motion at 2.

The bell signaling the end of the second round rang.[10] Podgorski did not immediately step in to end the round. The bell to end the round rang a second time.[11]

At the end of the second round, Mendez was again knocked down by Barthelemy, and Podgorski counted Mendez out. Podgorski ruled Barthelemy was the winner by a knockout and the new World Champion.[12]

Legal Background

Statutes

The Commissioner of Labor and Industry is charged with regulating combative sports in Minnesota. Minnesota Statutes section 341.29(1) provides that the Commissioner has "sole direction, supervision, regulation, control and jurisdiction over all combative sports contests that are held within this state unless a contest is exempt from the application of this chapter under federal law . . . ." The statutes require the Commissioner to develop rules to implement his authority to regulate combative sports, and policies and procedures to regulate boxing.[13]

Rules and Guidelines

The Commissioner has incorporated by reference the Association of Boxing Commission's July 27, 2005 Regulatory Guidelines (ABC Guidelines) into the rules governing boxing in Minnesota.[14] On the opening page of the ABC Guidelines is the following statement:

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[10] Commissioner's Motion, Ex. A; Mendez Motion at 1, Commissioner's Motion at 2.
[11] *Id.*
[12] Commissioner's Motion, Ex. A; Barthelemy Motion at 2.
[13] Minn. Stat. § 341.27(4) and (6).
[14] Minn.R.2201.0100.*See ABC 2005 Regulatory Guidelines* (2005 Guidelines), *http://abcboxing.com/documents/abcboxing_regulatory_guidelines.htm*. Barthelemy attached a copy of the ABC Referree Rules and Guidelines updated March 16, 2011. The Department of Labor and Industry has a link, through the Combative Sports Advisory Commission website, to the ABC's Unified Rules of Boxing, last amended July 24, 2012 (*See http://www.mncombativesports.com/*). Mendez also attached the 2012 version of the ABC Unified Rules at BSR 13-14. While both of these documents have been amended over the years, neither appears to have been modified in 2005 and neither is titled "Regulatory Guidelines." Therefore, neither of these documents is appropriately considered to be the document incorporated by reference by Minn. R.2201.0100, which only incorporated one specific document, not any updated or revised versions. *See In the Matter of the Proposed Rules of the Department of Public Safety Governing Training and Certification of Over-Dimensional Load Escort Drivers,* OAH Docket No. 11-2400-21771, AMENDED ORDER OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON REVIEW OF RULES UNDER MINN. STAT. §14.16, SUBD. 2, AND MINN. R. 1400.2240, SUBP. 4 (Nov. 30 2012) (document incorporated by reference specifically stated to be updated every five to six years and available for viewing and downloading at a particular website address). *See also* Op. Atty. Gen., 59a-9 (July 18, 1967) (uniform housing building code could be adapted by incorporating it by reference into city ordinance but additional amendments would be required to be incorporated by subsequent separate ordinances.)

> The following regulatory guidelines and rules govern all championship professional boxing competitions held within the United States of America . . . .
> In the event of a dispute regarding the guidelines, rules, or any other issue that is not clearly covered under the ABC rules, the supervising Commission of the bout will be the final authority.[15]

In the section titled "Referees," the ABC Guidelines state:

> The referee is the sole arbiter of a bout and is the only individual authorized to stop a contest.[16]

In the section titled "Boxing Rules," under the heading Injuries Sustained by Fouls, the ABC Guidelines state:

> B. Accidental Fouls
>
> If an accidental foul causes an injury severe enough for the referee to stop the bout immediately, the bout will result in a NO DECISION if stopped before three (3) completed rounds in bouts scheduled for four rounds, if a bout is scheduled for more than four (4) rounds and an accidental foul occurs causing an injury severe enough for the referee to stop the bout immediately, the bout will result in a NO DECISION if stopped before four (4) completed rounds.[17]

Grievance Procedure

There is a link to the Office of Combative Sports' website on the Department of Labor and Industry's website.[18] The Combative Sports website includes links to a variety of information, including Boxing Rankings, Rankings Procedures, various physical examination forms, identification applications, etc. There is also a link titled "Grievances" which connects to a Grievance Procedure web page.[19] The Grievance Procedure web page in turn has a link to a Grievance Form.[20]

The Grievance Procedure website instructs a person who has a grievance "regarding a matter associated with the regulation of Combative Sports" in Minnesota to complete the form, and to describe the complaint. The grievance is filed with the Office of Combative Sports within the Department of Labor and Industry. According to the website, other parties involved with the complaint will be given seven days to respond to

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[15] 2005 Guidelines at 2.
[16] 2005 Guidelines at 21.
[17] 2005 Guidelines at 13.
[18] *See http://www.mncombativesports.com/*
[19] *See http://www.mncombativesports.com/index.php?page=grievances*
[20] *See http://www.mncombativesports.com/pdf/1687753519.pdf*

the grievance, or longer if the Commissioner grants a request for a longer time. Following this, the website states:

> The Commissioner will issue an order within 14 days of the final submission being filed. Prior to doing so, on significant issues, the Commissioner will seek the advice of the Combative Sports Advisory Council as a whole or a designated committee.
>
> The Commissioner is responsible to ensure that all combative sport contests, including but not limited to professional boxing . . . are conducted in a manner that conforms with the law in Minnesota and with all rules and procedures adopted. The Commissioner has sole direction, supervision, regulation, control and jurisdiction over all combative sport contests that are held within the State of Minnesota, unless they are exempt under federal law. Further, the Commissioner has sole control, authority and jurisdiction over all licenses required for combative sports and shall issue, deny, renew, suspend or revoke licenses as appropriate. Minn. Stat. §§ 341.27 to 347.29.
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> If a party wishes to contest a final order of the Commissioner, the party may file a request for a contested case hearing with the Office of Administrative Hearings (OAH). The process for requesting an OAH hearing will be set forth in every final order of the Commissioner regarding grievances.

Procedural Background

On January 9, 2014, the Office of Combative Sports received a grievance and accompanying letter with attachments via e-mail from Mendez' attorney.[21] After receiving notice of the grievance, Barthelemy's attorney filed a response on January 16, 2014.[22] Mendez filed a rebuttal on January 17, 2014, and Barthelemy requested and received permission to file a reply which the Department received on January 21, 2014.[23]

The Commissioner of Labor and Industry issued the final agency decision on January 30, 2014 in this matter.[24] In addition to reviewing the evidence provided to him by the parties, including the ESPN video recording (the Video) of the January 3, 2014 Target Center Championship Match (the Match), the Commissioner obtained and considered a statement from Referee Peter Podgorski, and consulted with members of the Minnesota Combative Sports Advisory Council.[25] The members of the Minnesota Combative Sports Advisory Council whom the Commissioner consulted reviewed all of

[21] *In the Matter of Argenis Mendez and Rances Barthelemy*, Department of Labor and Industry, Order (Department Order) at 1; Mendez Motion, at Bates Stamp Record (BSR) 3-61.
[22] Department Order at 1; BSR at 62-110.
[23] Department Order at 1; BSR at 111-119 and 120-127.
[24] Department Order at 4.
[25] BSR at 128-130.

the evidentiary submissions. In addition, one of the council members was ringside at the match when it occurred.[26]

The Commissioner concluded that Barthelemy threw a combination punch which knocked out Mendez after the bell signaling the end of the second round rang. The Commissioner also concluded that the Referee was not in a position to see and hear everything when the bell rang. Because the knockout punch struck Mendez after the bell rang, the Commissioner concluded that Barthelemy committed an unintentional foul. Based on his own obligation to enforce the plain language of the rules, the Commissioner found that he was obliged to overrule the Referee and change the outcome of the of the Match to a No Decision.[27]

The Commissioner's Order included instructions titled "Requesting a Hearing" stating "Pursuant to Minn. Stat. §§ 326B.082 and 341.27, Respondent shall have 30 calendar days from the date this Order was issued to object to this Order by serving a request for hearing . . . ." The section then provides information regarding contested case procedures set out at Minnesota Statutes, Chapter 14. In a letter dated February 24, 2014, Barthelemy formally objected to the Commissioner's January 30, 2014 Order and requested a contested case hearing.

A prehearing conference was held in this matter on April 16, 2014, and the parties scheduled the instant dispositive motions.

Barthelemy's Arguments

Barthelemy states that the underlying dispute is whether Referee Podgorkski's decision that Barthelemy won the bout by a knockout was wrong. Barthelemy emphasizes that the Commissioner was not present at the Match and that no one from the Department questioned the result of the Match at ringside. In his underlying arguments to the Commissioner, Barthelemy questioned the accuracy of the timekeeper, whether the Referee or participants heard the 10-second warning and why the timekeeper rang the bell twice.[28] While he did not explicitly raise these issues in this appeal, the Administrative Law Judge presumes that Barthelemy sees these as disputed issues of material fact for the purposes of Mendez' summary disposition motion. Additionally, through a Declaration of an Oklahoma boxing official attached to

[26] Department Order at 2.
[27] Department Order at 3.
[28] BSR at 66. Barthelemy also raised some questions about why Mendez' trainer, Mr. Jackson, was apparently permitted to climb onto the apron while Mendez was being counted out. However, he did not state how or why those questions are pertinent to this matter and the Administrative Law Judge is unaware of a connection between Mr. Jackson's alleged presence during the count and the question of whether the fight was properly determined by Referee Podgorski.

his Motion, Barthelemy raises questions, but presents no specific facts, about why questions were not asked on the night of the Match.[29]

In addition, Barthelemy argues that the Commissioner lacked the authority to overturn the Referee's decision after watching the video replay of the match because, under the ABC rules, the Referee is the sole arbiter of the match and the only person with the authority to determine whether a punch is a foul. Based on this legal argument, Barthelemy moves for summary disposition asserting that the Commissioner had no jurisdiction to change the result of the match, especially because Minnesota has no video replay rule. In the alternative, Barthelemy argues that, if the Administrative Law Judge finds the Commissioner had the authority to review the Referee's determination, Barthelemy is entitled to an evidentiary hearing at which the Administrative Law Judge conducts a *de novo* review of the evidence.[30]

Barthelemy argues that he has a right to a hearing in this matter, rather than a paper review "based on written letters and hearsay documents." He contends that his right to an objective and neutral hearing was violated because the videotapes that were viewed were not authenticated and "no evidence has ever been presented to or admitted by a trier of fact."[31] Barthelemy invokes procedural due process in arguing that the Commissioner's authority, if it is broad enough to overturn the Referee's decision, does not permit the Commissioner to make final fact determinations without a full evidentiary hearing.

Mendez' Arguments

Mendez cites Minn. Stat. § 14.63, maintaining that the Administrative Law Judge should function as an appellate court in this situation. Pursuant to section 14.63, Mendez urges the Administrative Law Judge to apply a substantial evidence test to the Commissioner's factual conclusions while applying a *de novo* review to the Commissioner's statutory legal analysis.

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[29] Barthelemy Motion, attached Declaration of Gary Steven Ritter in Support of Motion, ¶ 10. Mr. Ritter loses some credibility in paragraph 9 of his Declaration, where he states, with no support, "In the Referee's mind at that time, he made the right decision and he still believes he made the right decision." While Podgorski's statement indicates he thought he was right at the time of the Match, it also clearly says that that the video replay made him realize he had misperceived the situation. *See* BSR at 138.

[30] Barthelemy cites Minn. Stat. § 14.63 and cases where the Minnesota appellate courts have found that an agency has exercised its will and not its judgments, or where the decision is unsupported by substantial evidence. *See*, *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457 (Minn. 2002), *In re Eller Media Company's Applications for Outdoor Advertising Device Permits*, 642 N.W.2d 492, 498 (Minn. Ct. App. 2002) and *J.R.B. v. Dep't. of Human Services*, 633 N.W.2d 33, 37 (Minn. Ct. App. 2001). As discussed in the Analysis section below, Barthelemy confuses the substantial evidence test with *de novo* review – neither of which applies in this situation.

[31] Barthelemy Opposition to Mendez' Motion for Summary Disposition at 2 (May 12, 2014).

Mendez then analyzes each of the factors under Minn. Stat. § 14.69, which are the standards a judicial court uses to review an administrative law decision appealed pursuant to Minn. Stat. §§ 14.63 to 14.68.[32]

Mendez concludes that, because there was ample opportunity for each side to present their respective positions to the Commissioner, and they did so, there was no violation of a constitutional provision. Citing the Commissioner's statutory authority over combative sports contests, Mendez maintains that the Commissioner acted within his statutory authority and the jurisdiction of the agency when he acted on Mendez' grievance. Mendez also cites a number of instances in professional boxing where state commissions have overruled referee decisions. Mendez argues that the procedure used was lawful, in accordance with the Department's posted grievance procedure, and that there was no error of law.

The primary legal dispute, according to Mendez, is whether the Commissioner had authority to overrule the referee's determination. In addition to his arguments, discussed above, that the Commissioner's authority derives from state statute and is consistent with boxing practice, Mendez included with his pleadings a Certification from Timothy J. Lueckenhoff, President of the Association of Boxing Commissions, the group that promulgated the Uniform Rules of Boxing.[33] Mr. Lueckenhoff states that the language "The referee is the sole arbiter of a bout . . ." is not intended to prevent a boxing commission or a commissioner from reviewing a referee's decision and that many jurisdictions do so in the event of a protest claiming an error in the application of the rules. Mr. Lueckenhoff further states that the quoted language was intended to cover "in-ring situations and scoring during a bout."

Finally, Mendez argues that the Commissioner's findings were supported by substantial evidence and were neither arbitrary nor capricious. To support this argument, Mendez relies on the ESPN video of the match, along with Referee Podgorski's statement. Mendez cites and attaches a statement the Referee provided to the Association of Boxing Commissions, which is somewhat more expansive than the

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[32] Mendez only refers to section 14.63, which authorizes an appeal from a contested case proceeding. The factors Mendez analyzes in his argument are set forth in section 14.69, and discussed in numerous cases that cite section 14.63 because they were appealed pursuant to that statute. While these standards are not the correct standards to apply in this matter, the Administrative Law Judge will discuss Mendez' argument in terms of the factors set forth in section 14.69 only because that is the context in which he framed his arguments. *See In the Matter of the City of Lake Elmo's Comprehensive Plan,* OAH Docket No. 1-7600-15193-3 (2003), FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDED DECISION at 20. Pursuant to section 14.69, a reviewing court considers whether the agency decision is

(a) in violation of constitutional provisions; or
(b) in excess of the statutory authority or jurisdiction of the agency; or
(c) made upon unlawful procedure; or
(d) affected by other error of law; or
(e) unsupported by substantial evidence in view of the entire record as submitted; or
(f) arbitrary or capricious.

[33] Mr. Lueckenhoff's Certification has attached to it the Association of Boxing Commissions Uniform Rules of Boxing (amended July 24, 2012). These rules are not quite identical to the 2005 Guidelines which are the applicable rules in Minnesota. *See* note 14, above. But the key language of Rule 2 regarding the referee's authority is the same.

statement Podgorski provided to the Commissioner. In this statement, Referee Podgorski says "With the advantage of the replay, I see that maybe I should have called the last punch an *unintentional foul,* ruled it a 'no knock-down,' and given Mendez up to 5 minutes to recover . . . ."[34] Mendez argues that the evidence supporting the Commissioner's decision was substantial. There is no evidence, Mendez maintains, to indicate that the Commissioner's decision reflected his will rather than his judgment, or that the decision is arbitrary and capricious.

Commissioner's Arguments

Relying on Minn. Stat. § 341.29, the Commissioner argues that his statutory authority over all combative sports contests held in Minnesota provides him with ultimate authority over such a contest. This authority, the Commissioner asserts, overrides the authority of a referee. The Commissioner relies on a plain meaning analysis of the statutory language. Specifically, the Commissioner points out that the term "jurisdiction" means "authority to hear the dispute."[35] In addition, the Commissioner maintains, the dictionary definitions of the terms "direction, supervision . . . [and] control" demonstrate a strong intent on the part of the legislature to give the Commissioner authority to manage, direct, and exercise authority over combative sports contests in Minnesota.

In addition, to the extent that there appears to be a conflict between the statute and the ABC Guidelines, the Commissioner contends that there is no such conflict because the Guidelines deal with the relationship between the referee, the judges and the participants during the bout, but do not address the role of authorities such as the Commissioner, or other states' authorities, or organizations such as the IBF. The Commissioner notes that to find otherwise would be to exclude him from his appropriate oversight role and undermine his ability to combat misconduct and enforce the rules. If the statute and the rule do conflict, the Commissioner maintains that the statute must prevail over the rule, because an agency lacks authority to promulgate a rule that conflicts with a statute.[36]

The Commissioner also notes that, even if he generally lacks authority to overrule a referee's erroneous decision, he still has authority, under Minn. Stat. § 341.27, to enforce rule violations that the referee failed to call. The Commissioner argues that Referee Podgorski failed to call the unintentional foul and resulting no-decision and therefore failed to enforce a rule provision. As a result, the Commissioner asserts, he has the authority to enforce the rule the Referee failed to enforce.

In response to Barthelemy's argument that no Minnesota Combative Sports officials took any action at the time of the Match, the Commissioner states that only the Commissioner has authority to take any action, and that members of the Advisory

[34] BSR 138.
[35] *Federated Retail Holdings, Inc. v. County of Ramsey,* 820 N.W.2d 553, 558 (Minn. 2012).
[36] *Dumont v. Comm'r. of Taxation*, 278 Minn. 312, 315-316, 154 N.W.2d 196, 199 (Minn. 1967).

Council act in an advisory role only.[37] In addition, the Commissioner notes that Barthelemy failed to cite any legal authority for the notion that a reversal of the Referee's decision would have been acceptable on the night of the Match but not later.

The Commissioner argues, as Mendez did, that his decision was supported by substantial evidence as shown in the video and supported by Referee Podgorski's written statement.

ANALYSIS

Basis for a Contested Case

The Commissioner of Labor and Industry offers a grievance procedure for matters associated with the regulation of combative sports in Minnesota. As part of that procedure, on the Combative Sports website the Commissioner makes a contested case with the Office of Administrative Hearings available to a party dissatisfied with the outcome of a grievance. In this case, the Commissioner's Order closed with a paragraph stating that a hearing could be requested pursuant to Minn. Stat. §§ 326B.082 and 341.27.

As discussed above, Minn. Stat. § 341.27 requires the Commissioner to develop policies and procedures for regulating boxing.[38] It also requires the Commissioner to "issue, deny, renew, suspend, or revoke licenses."[39] The only mention in section 341.27 of contested case procedures is at 341.27(7) and (8), which exclude medical suspensions and rest suspensions from contested case procedures. The reference to section 341.27 in the "Requesting a Hearing" section of the Commissioner's Order in this matter can only be for the purpose of acknowledging the Commissioner's general authority to offer a contested case proceeding as part of his policies and procedures for regulating boxing.

The reference to Minn. Stat. § 326B.082 is somewhat more problematic. Section 326B.082 deals generally with the Commissioner's enforcement authority. Section 326B.082, subdivision 1 provides:

> The commissioner may enforce all applicable law under this section. The commissioner may use any enforcement provision in this section, including the assessment of monetary penalties, against a person required to have a license, registration, certificate, or permit under the applicable law *based on conduct that would provide grounds for action against a licensee*, registrant, certificate holder, or permit holder under the applicable law.
>
> …

[37] Minn. Stat. § 341.221.
[38] Minn. Stat. § 341.27(6).
[39] Minn. Stat. § 341.27(1).

Emphasis added. This subdivision does not apply to this proceeding because the Commissioner has not taken any enforcement action against a licensee. There has been no allegation that any licensee engaged in any conduct that would provide grounds for licensing action against a licensee. The most that has been alleged has been an unintentional foul on the part of Barthelemy and an innocent mistake on the part of Referee Podgorski.

Minnesota Statutes section 326B.082, subdivision 7 authorizes the Commissioner to issue administrative orders:

> (a) The commissioner may issue an administrative order to any person who the commissioner determines has committed a violation of the applicable law. The commissioner shall issue the administrative order by serving the administrative order on the person. The administrative order may require the person to correct the violation, may require the person to cease and desist from committing the violation, and may assess monetary penalties. The commissioner shall follow the procedures in section 326B.083 when issuing administrative orders. Except as provided in paragraph (b), the commissioner may issue to each person a monetary penalty of up to $10,000 for each violation of applicable law committed by the person. The commissioner may order that part or all of the monetary penalty will be forgiven if the person to whom the order is issued demonstrates to the commissioner by the 31st day after the order is issued that the person has corrected the violation or has developed a correction plan acceptable to the commissioner.

Assuming for the purpose of this analysis that Barthelemy committed an unintentional foul, and that the Referee erred in failing to rule that Barthelemy committed an unintentional foul, neither of those acts appears to rise to the level of a violation of law as contemplated by section 326B.082, subdivision 7. The Commissioner's No Decision Order did not require Mendez, Barthelemy or even Podgorski to take any action or to pay a fine.

Furthermore, when the Commissioner issues an administrative order, he must follow the procedures in Minn. Stat. § 326B.083. Subdivision 2 of that section specifies that an administrative order contain, in addition to a summary of the facts that constitute the violation or violations and a reference to the applicable law that has been violated, a statement of the person's right to request a hearing. In this case, the Respondent (Barthelemy) was given the hearing right. Yet Barthelemy was not alleged to have violated a rule. He was alleged to have committed an unintentional foul. Although the Commissioner's Order did disadvantage Barthelemy, the Order was not in the nature of a penalty or an enforcement action by the Commissioner.

Minnesota Statutes section 326B.082 would apply if someone had made a complaint regarding the Match that involved an allegation that a person subject to licensure by the Commissioner was violating a law or rule. The Commissioner might

have investigated that person's actions, the applicable law or rule, and decided that the person's alleged violation warranted disciplinary action. The Order coming out of such a proceeding would properly be reviewed pursuant to Minn. Stat. § 326B.082.

In this case, the Commissioner has the authority, under his general jurisdiction over combative sports, along with his broad responsibility to develop policies and procedures for regulating boxing, to offer the opportunity for a contested case hearing when a party is dissatisfied with the Commissioner's decision regarding a grievance in a combative sports matter. Minnesota Statute section 14.57 requires an agency to initiate a contested case proceeding "when one is required by law." When an agency is not required by law or constitutional principles to initiate a contested case, it is permitted to offer a "gratuitous hearing."[40] This hearing is offered by the Commissioner, not because he is required to offer it, but because he chose to offer it.

Statutory Authority

The Commissioner's jurisdiction to hear matters as necessary to regulate combative sports is clear under Minn. Stat. §§ 341.27 and 341.29. The ABC Guidelines, as incorporated by reference into Minnesota law by Minn. R. 2201.0100, complement rather than conflict with the Commissioner's jurisdiction. While the Commissioner has "sole direction, supervision, regulation, control and jurisdiction over all combative sport contests" held within the state, it would not be appropriate or practical for the Commissioner to literally referee each match held in Minnesota.[41]

The 2005 Guidelines place responsibility for the conduct of a boxing match in the hands of the referee with the "sole arbiter" language. This does not establish a conflict with the Commissioner's authority. The referee is the sole arbiter during the match, and is the only person authorized to stop a match. Understanding these Guidelines to apply to the contest in real time makes sense, especially when read in the context of the other Referee Guidelines, which address a referee's specific responsibilities before, during and after the bout. For example, referee responsibilities after the bout include duties such as picking up scorecards from the judges and turning them into the commission, and maintaining control of the ring until the winner has been announced and everyone has exited the ring. Viewed from this perspective, the "sole arbiter" language is logically interpreted to be limited to the "sole arbiter" of the match at the time the match is being fought. This understanding of the Guidelines is supported by the examples cited in Mendez' Memorandum of the other commissions in other states that have overruled referee decisions after-the-fact.[42]

It is also supported by Mr. Lueckenhoff's Certification, attached to Mendez' Motion. Barthelemy did not challenge Lueckenhoff's Certification. Therefore, the Administrative Law Judge accepts the statements in the Certification. Even without

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[40] *Setty v. Minnesota State Coll. Bd.*, 305 Minn. 495, 235 N.W.2d 594, 596 (1975), *see* Beck, MINNESOTA ADMINISTRATIVE PROCEDURE § 4.2 (2008 Edition).
[41] Minn. Stat. § 341.29.
[42] Mendez Memorandum at 7-9.

Lueckehoff's Certification, the result would be the same. Between the language of the Guidelines themselves and the evidence of how they have been implemented in other states, the Administrative Law Judge is persuaded that the Guidelines and the statute are not in conflict.

If the "sole arbiter" language only speaks to the authority of the referee in the ring, then there is no conflict between that language and the authority of the Commissioner to review a referee decision, especially where there is a claim that the referee failed to follow the rules. This allows the Commissioner to fulfill the oversight role the legislature has assigned to him while recognizing the validity of the Guidelines. This is not a matter of the Commissioner's substituting his judgment for the Referee's. It is a situation where the Commissioner is enforcing a rule the Referee did not enforce.

Even if the "sole arbiter" language conflicts with the Commissioner's statutory jurisdiction over combative sports, the Commissioner's authority prevails over the 2005 Guideline language, which was adopted through a rule. The Commissioner's legal argument that an agency lacks authority to promulgate a rule that conflicts with a statute is correct.[43] If the two provisions cannot be reconciled, the statute must prevail.

Barthelemy also argued that the Commissioner could not reverse his decision based on a review of the video because Minnesota has no video replay rule. Barthelemy is correct that Minnesota does not have a rule regarding video replays. However, the Commissioner has an affirmative duty to conform to the rules he has adopted governing boxing.[44] Once a possible violation of a rule has been pointed out to him, if evidence placed before him is in the form of a video recording of a boxing match, there is no reason why he should not consider that evidence if he considers it otherwise reliable. Given his broad authority under Minn. Stat. § 341.29 to develop policies and procedures governing boxing, the Commissioner has authority to choose to watch a video replay of a match in the context of reviewing a properly filed grievance in a combative sports event.

Because Minn. Stat. § 341.29 gives the Commissioner statutory jurisdiction over all combative sports contests held within the state, and Minn. Stat. § 341.27 requires the Commissioner to develop policies and procedures for regulating boxing, the Commissioner had authority to develop and implement the grievance procedure which led to his Order overturning Referee Podgorski's determination of the Match. Therefore, the Administrative Law Judge denies Barthelemy's motion for summary disposition as to the question of the Commissioner's authority to issue the underlying Order in this matter.

Due Process

The Commissioner provided both Mendez and Barthelemy, each of whom was represented by counsel, with opportunities to present evidence and argument, including

[43] *Dumont v. Comm'r. of Taxation*, 278 Minn. 312, 315-316, 154 N.W.2d 196, 199 (Minn. 1967).
[44] Minn. Stat. § 341.27(5).

rebuttal evidence and argument. In addition, although no statute or rule requires a contested case hearing for a party dissatisfied with the outcome of a combative sports grievance filed with the Commissioner, the Commissioner provided that process to the parties as well. In the administrative law context, agency review followed by a contested case procedure is all of the process that can be provided.

Whether Barthelemy is entitled to an evidentiary hearing at this point is not a question of his constitutional right to due process. Instead, it is a question of whether the case presents genuine issues of material fact or whether the record, as presented to the Administrative Law Judge by the parties on these motions, is sufficient to decide the case as a matter of law.

Genuine Issues of Material Fact

The remaining questions on the parties' cross-motions for summary disposition are whether there are any genuine issues of material fact, and, if not, which party is entitled to summary disposition. The Administrative Law Judge finds that there are no genuine issues of material fact and that Mendez and the Commissioner are entitled to summary disposition in this matter.

During the proceeding before the Commissioner, Barthelemy raised the specter of disputed facts. He questioned the accuracy of the timekeeper, asked whether the Referee or participants heard the 10-second warning and why the timekeeper rang the bell twice. In his pleadings in this proceeding, he questions why the dispute was not raised for resolution on the night of the Match.

> The party opposing the motion may not rely upon mere general statements of fact, but 'must demonstrate at the time the motion is made that specific facts are in existence which create a genuine issue for trial.'[45]

Barthelemy offers no evidence to show that the timekeeper was inaccurate, or why the timekeeper rang the bell twice, or even why the dispute was not raised on the evening of the Match. The only evidence regarding the 10-second warning was in Referee Podgorski's statement (submitted by Mendez), in which the Referee said "I believe I heard the 10 second warning canvass (sic) pat, but I was not positive because I heard a similar pounding sound just before the first knockdown."[46] This is insufficient to raise questions of genuine issues of material fact regarding the timing of the round, the 10-second warning or the meaning of the second bell ringing.

The undisputed material facts in this matter are that the Match occurred, that Barthelemy knocked Mendez to the mat once during the second round before the bell rang, that Mendez got up under his own power before the bell rang and that Barthelemy knocked Mendez to the mat a second time. It is also undisputed that Referee Podgorski

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[45] *In the Matter of Assessments Issued to Leisure Hills Health Care Center*, 518 N.W.2d 71, 75 (Minn. 1992), *quoting Hunt v. IBM Mid Am. Employees Fed. Credit Union,* 384 N.W.2d 853, 855 (Minn.1986).
[46] BSR 137.

failed to stop the fight when the bell first sounded. Barthelemy does not dispute Referee Podgorski's statement that, on reviewing the video replay, he saw that maybe he "should have called the last punch an unintentional foul. . ." and that he "could have deducted 1 point from Barthelemy, even though the foul was unintentional, due to the severe affect (sic) of the last punch on Mendez."

The ESPN video recording of the Match provides a compelling record of the key moments of the Match. Barthelemy argues in his Opposition Memorandum that the video was never authenticated. But Barthelemy never objected to the video when it was presented to the Commissioner. As Mendez points out in his Memorandum, Barthelemy indicated early on that he himself intended to introduce into evidence the same video in the grievance proceeding before the Commissioner, but opted not to because Mendez already had.[47] The ESPN video, professionally shot and broadcast, and also available via the internet, has many indicia of reliability. Barthelemy alleged no specific basis for questioning its authenticity or reliability. Therefore, the Administrative Law Judge finds no reason to exclude the video from consideration.

Even finding all doubts and factual inferences in Barthelemy's favor, the Administrative Law Judge finds that the Commissioner and Mendez have shown, by a preponderance of the evidence, that Referee Podgorski failed to stop the Match at the time the first bell rang, that the bout continued, and that the knockout blow that sent Mendez to the mat struck him after the bell rang. Therefore, the Commissioner correctly determined that the Referee failed to see that Barthelemy committed an unintentional foul. The Commissioner properly ordered that the outcome of the match be changed to a No Decision.

L.S.

[47] Mendez Memorandum, n.6.