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REGULATION? A.K.A. SAVING SILVERMAN**

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What's Wrong with Racing Regulation?
aka **Saving Silverman**

If people are looking for Exhibit A in the case against existing horse racing regulation, they should look no further than the recently decided case of Capone v. New Jersey Racing Commission <http://lawlibrary.rutgers.edu/decisions/appellate/a4827-01.opn.html>, which was decided on March 18, 2003 by the Superior Court, Appellate Division in New Jersey. The Superior Court, Appellate Division is the state's intermediate appellate court. It hears the appeals from the Racing Commission and other state agencies in quasi-judicial cases.

Capone involved two separate issues. Based on a harness race held at the Meadowlands on March 27, 1998, Mark Capone, the trainer of the horse "Stonebridge Do Run" received a 30-day suspension from the track judges for a reversal of form. Based on that same race, the driver of the horse, Richard Silverman, received a 15-day suspension.

In the second case, driver Silverman allegedly kicked a horse at Freehold Raceway on April 12, 2000. For this offense, the judges suspended Silverman for nine days.

Each case moved slowly through the administrative system even though the court believed that "the records were small and the issues simple in both cases. The administrative hearing took less than a day in the reversal of form case and less than an hour in the horse kicking case."

The Reversal of Form Case

An administrative law judge did not hear the reversal of form case until January 11, 2001- more than 33 months after the actual racing incident. On March 8, 2001 the administrative law judge ruled against the Racing Commission and the harness judges. The administrative law judge ruled that the charges against both Capone and Silverman had not been proven. The case then went to the Racing Commission for its review. The Racing Commission requested an extension of time for rendering a decision from the Director of the Office of Administrative Law. The request was granted, and within the extension period the Racing Commission, at its May 16, 2001 meeting rejected the administrative law judge's decision and reinstated the original suspension. However, the Racing Commission failed to issue a final written decision in this case until October 9, 2001 more than four ½ months after its May 16 meeting. Since the extension that the Racing Commission had been granted by the Office of Administrative Law expired on June 7, 2001, the final agency decision was rendered four months after the expiration of the extension.

The Kicking Case

An administrative law judge heard the Silverman-kicking case on March 12, 2001, nearly a year after the alleged incident. On April 11, 2001, the administrative law judge ruled for Silverman, finding that the charges had not been proven. This matter was referred back to the Racing Commission. Extensions were given to the Racing Commission by the Office of Administrative Law so that the Racing Commission had until August 29, 2001 to issue a decision. On August 15, 2001, the Racing Commission at a meeting rejected the administrative law judge's decision and reinstated the nine-day suspension. Nevertheless, the Racing Commission did not issue its final decision until April 11, 2002, which the court pointed out, was "a full year after the ALJ issued its initial decision."

The Holding

The licensees appealed in both cases. While they posited a series of legal arguments, their main contention was that under New Jersey law, the ALJ decisions were to be "deemed approved" when the Racing Commission failed to issue a final agency decision within the extension period authorized by the Office of Administrative Law.

The court in large measure agreed with the argument of the licensees. It reviewed its precedents on the issue and determined that there were times that an ALJ decision should not be "deemed approved." The ALJ decision should not be deemed approved when the agency's failure to issue a timely decision was a procedural mistake, a non-substantive error or based on a good-faith action. These precedents –which allowed agencies to make decisions after the authorized extension period - did not apply in cases where the delay was in "bad faith, or with inexcusable negligence, or gross indifference." In these "bad faith" style cases, the failure to adhere to the extension period requirements would result in the ALJ decision being deemed approved.

In viewing the two racing violations, the court had little difficulty in finding that the Racing Commission had acted improperly. It found that there was little basis "for concluding that the Commission's failure to issue its final decisions within the time allowed ... was without 'inexcusable negligence' or 'gross indifference' to its responsibilities." The delays were lengthy, and the records were small. The actual issues involved were "solely factual and very straightforward." The court noted that "the Commission has not even undertaken to show that it had a good excuse for failing to issue its decisions in a timely manner." Based on the record that the Racing Commission did not have a good excuse for its delays, the court unanimously overturned the decision of the Racing Commission and found that the decisions of the ALJ's which exonerated the licensees were "deemed adopted."

Conclusions

This was a major defeat for the Racing Commission, but it is a microcosm of what ails racing regulation in America. In one small case, it encompasses all the problems of

the racing regulatory system. It is painfully slow. The “reversal of form” case takes almost three years to even get to an Administrative Law Judge. It takes five years to get to the intermediate appellate court.

The kicking case – which in theory – ought to be as simple as a case could be takes three years to get through an appellate court. If justice delayed is justice denied, you won’t find any justice in horse racing. Even the guiltiest licensee – as long as he or she has deep pockets – can tie up any racing proceeding for years on end.

Whether true or not, the Racing Commission and the state are believed to be indifferent to the rights of licensees and the interests of justice. There really is no telling from the record what happened in these cases at the commission level. Maybe the Racing Commission has no resources and simply could not attend to its duties on a timely basis. That would hardly be illogical in an era where racing provides the states with minimal revenue. Pari-mutuel wagering is hardly a priority in most states. Racing commissions, in this environment can often sound like the Wizard of Oz – emitting lots of sound, smoke and fury - but with little substance behind them. Maybe the Racing Commission was simply following a traditional procedure under which it believed that there was no reason to rush a final decision when there was no prejudice to the affected licensees. Regardless of the legitimacy of the excuses, by finding that the Racing Commission’s decisions showed “inexcusable neglect” and “gross indifference” the court showed its belief that the state was indifferent to the regulatory process.

Finally, throughout the decision the court seems to give the impression that there is a general bias against the licensees. The court cites a prior case where the Racing Commission did nearly the same thing to Silverman. See 303 N.J. Super 293. <http://lawlibrary.rutgers.edu/decisions/appellate/a3389-95.opn.html> The harness judges suspended Silverman for 45 days. The ALJ subsequently reduced the penalty from 45 days to 15 days. The Racing Commission restored the penalty to 45 days and issued its final decision nine months after it overruled the ALJ. The Superior Court then reinstated the ALJ’s decision. It is hard to read the instant case with its citing of the prior Silverman case, and its frequent references to the “inexcusable” nature of the Racing Commission’s delay without getting the impression that the court believed that the Racing Commission was biased.

Here it is in one case. Delay, indifference, and bias. If you want to see why the administrative system is failing in racing, look at this case.

We’ve argued in other contexts that racing needs an arbitration and mediation system for licensees. It is a system that has the potential to provide: (1) speedy, (2) impartial and (3) inexpensive justice for racing. Even if it delivers on one of these three goals, it’s better than our current non-system.

