

BEFORE THE HORSE RACING BOARD

STATE OF CALIFORNIA

In the Matter of:

**Appeal of the Board of Stewards Official
Ruling #19, Watch and Wager, LLC-Cal
Expo, dated February 22, 2013**

**BREVATOR J. CREECH, M.D.
CHRB License #119108
CHRB License #239730
Appellant**

Case No. SAC 13-0007
OAH No. 2013060052

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the California Horse Racing Board as its Decision in the above-entitled matter.

The Decision shall become effective on June 24, 2014.

IT IS SO ORDERED ON June 19, 2014.

CALIFORNIA HORSE RACING BOARD
Chuck Winner, Chairman



Rick Baedeker
Executive Director

BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

In the Matter of the Appeal of:

BREVATOR J. CREECH, M.D.

Appellant,

v.

CALIFORNIA HORSE RACING BOARD,

Respondent.

Case No. 13SW-0001

OAH No. 2013060052

PROPOSED DECISION

This matter was assigned to Administrative Law Judge Jonathan Lew, Office of Administrative Hearings, State of California.

Peter D. Halloran, Deputy Attorney General, represented the California Horse Racing Board (CHRB).

Richard J. Molin, Attorney at Law, represented Brevator J. Creech, M.D.

The matter was submitted for Decision on May 23, 2014.

ISSUE PRESENTED

Should Ruling #19, issued by the Board of Stewards (Stewards) on February 22, 2013, be affirmed?

//

//

BACKGROUND¹

Complaint

1. CHRB filed a Complaint dated January 11, 2013 (Complaint), which charged that Brevator J. Creech, M.D. (appellant) violated CHRB Rules 1530 and 1901,² and cases not covered by Rules, based upon the following allegation:

On December 8, 2012, Driver Brevator Creech, acting in the capacity of licensed Physician, completed physical examinations for twenty (20) Drivers at the Cal Expo Race Track, without holding a valid Medical License for the State of California.

2. Rule 1530 provides:

Cases Not Covered by Rules and Regulations

Should any case occur which may not be covered by the Rules and Regulations of the Board or by other accepted rules of racing, it shall be determined by the Stewards in conformity with justice and in the interests of racing.

3. Rule 1901 provides:

Conflict of Interest

The Stewards shall determine matters involving conflicts of interest among competing participants.

Hearing Before the Stewards and Ruling #19

4. On February 14, 2013, the Stewards, consisting of Grant Baker, Will Myers, and Wayne Oke, held a hearing on the Complaint. At that hearing, appellant was present. He was not represented by legal counsel.

5. On March 23, 2013, the Stewards issued a Statement of Decision relating to Ruling #19. The Stewards made the following Findings of Fact:

[¶] ... [¶]

¹ The information set forth in the Background was taken from the administrative record before the Stewards.

² CHRB Rules are found in title 4 of the California Code of Regulations.

IV

On December 8, 2012, Driver/Owner Creech performed physical examinations on twenty (20) drivers at Cal Expo, Sacramento, CA without holding a valid medical license in the State of California.

V

A medical physician is not employed at the current harness racing meet at Cal Expo (Watch and Wager.Com LLC)

VI

Driver/Owner Creech said he was a retired physician and not licensed, but did nothing contrary to the rules of the State Medical Board regarding this matter.

[¶] ... [¶]

IX

Driver/Owner Creech answered "I don't believe so" when asked if he performed vision examinations. He additionally stated he did not perform hearing examinations. Creech stated during the formal hearing that he did not know if his examinations fulfilled the requirements of CHR B Rule #1489³ (Physical Examination).

[¶] ... [¶]

XIII

During the hearing testimony Driver/Owner Creech stated he did perform physical exams here (Cal Expo) "at least five or six different occasions over the last twelve (12), fifteen (15) years."

XIV

On December 14, 2012 CHR B Investigator Carol Ann Nolan spoke with an Investigator with the California Medical Board to verify the license status of Brevator Creech. The Investigator stated to CHR B Investigator Nolan that Creech's license had not

³ The Board of Stewards cited Rule 1489 in error. It should be rule 1498.

been active since March 31, 2005, and therefore he is not allowed to practice medicine in the State of California.

XV

Driver/Owner Creech said he knew physical exams needed to be done periodically on drivers. He said "most of the people 'on the track' are good friends of his and most of them can't afford to pay fifty (50), seventy (70) bucks to get a physical exam."

6. In the Discussion section of Ruling #19, the Stewards found that appellant gave credible testimony and had "good intentions in his mind, by trying to save his fellow drivers money by giving them a free physical examination." However, the Stewards determined that his actions involved a conflict of interest, reasoning as follows: "A long time Driver/Owner performing physical examinations on twenty (20) of his fellow drivers with a focus on how much money he can save them as opposed to focusing on the quality and legality of exams is an obvious conflict of interest to this Board of Stewards. A California driver competing in a pari mutual race against an unlicensed physician/driver who has either passed or failed them concerning a physical exam is not in the best interest of the California or worldwide wagering public."

7. In Ruling #19, the Stewards concluded that appellant had violated Rule 1530 (Cases Not Covered by Rules and Regulations). The Stewards fined appellant the sum of \$500. In explaining its actions the Stewards made the following observations:

This case is somewhat of uncharted water for this Board of Stewards. We feel strongly Brevator Creech should have known he couldn't legally perform physical exams without being properly licensed by the California Medical Board. Additionally, and also very significantly, a driver (Creech) performing exams on fellow/rival drivers is a clear conflict of interest. The stewards feel a license suspension is more significant on licensee's ruling history than a fine would be. If Creech was receiving money for performing these exams a license suspension could most definitely have been entertained. The stewards feel a five hundred (\$500.00) dollar penalty in this matter is fair and reasonable after consideration of the complaint, testimony, ruling history of Driver/Owner Creech, intent, and reviews [sic] of documents.

//

//

8. The Stewards' factual findings set forth above in Finding 5 are largely undisputed. The administrative record of the proceedings was considered,⁴ along with the legal briefs filed by the parties.⁵

DISCUSSION

Standard of Review

9. Pursuant to Rule 1761, every decision of the Stewards, except a decision concerning disqualification of a horse, may be appealed to the Board. Pursuant to Business and Professions Code section 19517, subdivision (a), the Board may overrule a Stewards' decision if a preponderance of the evidence shows the Stewards mistakenly interpreted the law, if new evidence of a convincing nature is produced, or if the best interests of racing and the state may be better served.

In an appeal following a Stewards' hearing, the standard of review to be applied is the substantial evidence test, akin to the role of the superior court when reviewing an administrative agency's decision under Code of Civil Procedure section 1094.5, subdivision (c). Under the substantial evidence test, the evidence is not reweighed, nor may the reviewing court substitute its findings or inferences for those of the administrative agency (or in this case, the Stewards); it is for the agency to determine the weight to be given the conflicting evidence.⁶ The issues to be determined are whether the record contains substantial evidence to support the Stewards' findings, and whether those findings support the Stewards' decision.⁷ "Courts may reverse an agency's decision only if, based on the

⁴ The parties agreed that the following documents comprised the administrative record in this case: 1) May 22, 2013 Certification of Administrative Record; 2) CHR B letter dated April 8, 2013, acknowledging receipt of Creech's appeal; 3) Undated letter from appellant to Ms. Jolly purporting to provide additional evidence to support his appeal; 4) February 23, 2013 letter from appellant to Ms. Jolly requesting appeal; 5) February 22, 2013 Official Ruling #19, of the Board of Stewards; 6) March 23, 2013 Statement of Decision of the Board of Stewards; 7) Hearing Transcript from February 14, 2013 Board of Stewards hearing; and 8) Governing Procedures for Hearing Before Board of Stewards. A certified copy of the Administrative Record was marked and received in evidence as Exhibit 1.

⁵ Appellant's Opening Brief was received on April 11, 2014, and marked as Exhibit 2 for identification. CHR B's Opposition Brief was received on April 30, 2014, and marked as Exhibit 3 for identification. Appellant's Closing Brief was received on May 23, 2014, and marked as Exhibit 4 for identification.

⁶ *Sierra Club v. California Coastal Commission* (1993) 12 Cal.App.4th 602, 610.

⁷ Cf. *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 514-515.

evidence before the agency, a reasonable person could not reach the conclusion reached by the agency.”⁸

Appellant's Contentions

10. Appellant has indicated that his appeal is primarily based on the failure of due process in the use of Rule 1530, which he contends is “so vague that men of common intelligence [must] necessarily guess at its meaning and differ as to its application.” (*Connally v. General Construction Company* (1926) 269 U.S. 385; *International Harvester Co. v. Kentucky* (1914) 234 U.S. 216, 221; *Collins v. Kentucky* (1914) 234 U.S. 634, 638.) He bases his appeal on the following grounds: 1) the proceedings violated his right to due process; 2) he was not given notice of the charges against him; 3) there was insufficient evidence to support the ruling of the Board that appellant had violated Rule 1530 and the imposition of a \$500 fine; 4) CHRB lacked jurisdiction over the conduct complained of; and 5) appellant’s conduct was not based on his conduct as a CHRB licensee.

Applicable Law

11. Appellant makes a constitutional challenge the centerpiece of his appeal, contending that Rule 1530 is so vague as to be unconstitutional and/or unenforceable. As noted in Finding 2, Rule 1530 recites as follows: “Should any case occur which may not be covered by the Rules and Regulations of the Board or by other accepted rules of racing, it shall be determined by the Stewards in conformity with justice and in the interests of racing.”

The Office of Administrative Hearings (OAH) is acting as CHRB’s designee in hearing this appeal under Business and Professions Code section 19517. As noted in Finding 9, a Stewards’ decision may be overruled only where a preponderance of the evidence shows the Stewards mistakenly interpreted the law, if new evidence of a convincing nature is produced, or if the best interests of racing and the state may be better served. Section 19517 does not expressly allow CHRB or OAH to declare a statute or regulation unenforceable on constitutional grounds. Only the courts can declare a statute unconstitutional. (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1083.) Importantly, California Constitution, Article III, section 3.5, provides that administrative agencies have no power to declare a statute unenforceable, or refuse to enforce a statute, on the basis of its being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional.

12. Appellant has suggested that the Article III, section 3.5 prohibition on administrative agencies is limited to statutes, which are made by the legislature. Because regulations are established by administrative agencies, appellant contends that CHRB is not precluded from looking at the constitutionality of its own regulation. Appellant is correct. Unlike a situation where a statutory challenge is raised, an agency has the power to adopt,

⁸ *McMillian v. American General Finance Corp.* (1976) 60 Cal.App.3d 175, 186.

amend, or repeal regulations. For example, appellant might raise this same challenge by petitioning CHRB to amend or repeal Rule 1530 under authority of Government Code sections 11346 et seq. That an administrative agency may refuse to enforce its own rules on constitutional grounds also finds support in dicta in a California Supreme Court decision, which noted: "Article III, section 3.5 of the state Constitution, added thereto as a result of approval by the voters at the primary election held June 6, 1978, places certain restrictions on administrative agencies relative to their refusal to enforce *statutes* on constitutional grounds. It does not affect their enforcement of their own rules or their competence to examine evidence offered before them in light of constitutional standards." (*Goldin v. Public Utilities Commission* (1979) 23 Cal.3d 638, 669, fn. 18. Italics in original. See also *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Board* (1982) 136 Cal.App.3d 829, 840, fn. 12.) Relying upon *Goldin*, the Federal Ninth Circuit Court of Appeal, confirmed that Article III, section 3.5 merely "places restraints on administrative agencies relative to their refusal to enforce statutes on constitutional grounds; it does not affect their enforcement of their own rules or their competence to examine evidence before them in light of constitutional standards." (*Dash Inc. v. The Alcoholic Beverage Control Appeals Board* (1982) 683 F.2d 1229, 1234.)

13. For the above reasons it is determined that CHRB may properly consider whether its own rules are being interpreted and/or enforced in a constitutional manner. Thus, CHRB is not prohibited from determining whether enforcement of Rule 1530 in this case, and evidence in support of its violation, pass constitutional muster. It may also be prudent to do so where it is unclear⁹ whether appellant must exhaust administrative remedies in bringing a constitutional challenge to an agency regulation, and thereby preserve the constitutional issue for further court review.

14. Here, appellant contends that Rule 1530's vague reference to the standard as "determined by the stewards in conformity with justice and the interests of racing" provided him no guidance in advance of his alleged misconduct. The "vagueness doctrine" is a staple of analysis of governmental rules concerning the conduct of people, and to that end the rule must inform people of what acts are included or what acts are prohibited. (*U.S. v. Cardiff* (1952) 344 U.S. 174.) The rule must provide definite guidelines in order to prevent arbitrary and discriminatory enforcement. (*People v. Heitzman* (1994) 9 Cal.4th 189, 199.) Appellant notes that it is a violation of due process for CHRB to use a rule which terms "are so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." (*Connally v. General Const. Co.*, *supra*, 269 U.S. 385.) He suggests that Rule 1530 penalizes individuals who have not violated any CHRB rule or "other accepted rules of racing," and that the decision as to what the offense would or should be, and how it is defined, noticed and proved is "left to the whim" of those making the allegations in this case. He contends that the conduct complained of in this case was not proscribed by any cognizable rule or regulation, and that the rule itself is so vague and ambiguous as being incapable of providing notice of any proscribed conduct.

⁹ See California Administrative Hearing Practice (Cont.Ed.Bar 1997), § 8.114, p. 435.

15. CHRБ notes that California case law has found similar statutes seeking to conform professionals to industry standards to be constitutional. For example, in *Hand v. Board of Examiners in Veterinary Medicine* (1977) 66 Cal.App.3d 605, a veterinarian was disciplined for his lack of treatment of a dog in his care. The Board of Veterinary Medicine acted pursuant to Business and Professions Code section 4882, subdivision (k), which provided that discipline could be imposed for “[c]onduct reflecting unfavorably on the profession of veterinary medicine.” (*Id.* at n 3.) The Court of Appeal rejected the challenge that this language was unconstitutionally vague. Rather, it determined that the statute was sufficiently clear in the context in which it was enacted, the regulation of a specific vocation, and that common knowledge of members of the vocation should be able to agree upon what those words mean. (*Id.* at pp. 622-623.) The Court relied upon holdings of prior cases involving similarly broad statutes. (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214; *Parea v. Fales* (1974) 29 Cal.App.3d 939.) The California Supreme Court in *Morrison* rejected the argument that Education Code section 13202, authorizing discipline for “immoral conduct,” “unprofessional conduct,” and “acts involving moral turpitude” was unconstitutionally vague. (*Morrison v. State Board of Education, supra*, 1 Cal.3d at p. 230.)

The Supreme Court explained:

The prohibitions against immoral and unprofessional conduct and conduct involving moral turpitude by a teacher constitutes a general ban on conduct which would indicate unfitness to teach. This construction gives section 13202 the required specificity. Teachers, particularly in the light of their professional expertise, will normally be able to determine what kind of conduct indicates unfitness to teach.

(*Id.* at p. 233.)

16. Similarly, the Court of Appeal has reviewed the constitutionality of a rule providing for discipline for “conduct unbecoming an officer” and determined that “the required certainty may be provided by common knowledge of members of the particular vocation when the regulation does not itself contain specific standards.” (*Parea v. Fales, supra*, 29 Cal.App.3d at p. 942.)

Here, Rule 1530 is a regulation governing a vocation, the horse racing profession. Like members of the veterinary, teaching or other professions, the Board of Stewards can determine the standards for the “best interests of racing.” This is the standard set forth in Business and Professions Code section 19517, which language appellant is not challenging. Yet, such language is really no different than the “in the interest of racing” language contained in Rule 1530 that appellant is challenging.

17. Importantly, in determining whether Rule 1530 is unconstitutionally vague, it must be read in context of other applicable CHRБ rules. (See *City of Costa Mesa v. Soffer* (1993) 11 Cal.App.4th 378, 387. “A statute will be upheld against a claim of vagueness if its

terms can be made reasonably certain by reference to other definable sources.”) Licensees are presumed to know the rules. (Cal. Code Regs., tit. 4, § 1510.) Appellant is a CHRB licensee and is presumed to have knowledge of all CHRB rules, including Rule 1498, which provides: “All jockeys, apprentice jockeys, and drivers must pass a physical examination at least once a year before the commencement of the first race meeting of the year in which such jockey, apprentice jockey or driver intends to participate, or at such other time as the Board may direct. Such examination will be given by a doctor designated or approved by the Board, and the examination shall include a visual acuity examination and a hearing examination.” (Cal. Code Regs., tit. 4, § 1498, subd. (a).)

As noted by CHRB, Rule 1498 is designed to enhance safety of the sport of horse/harness racing. Race horses weigh over 1,000 pounds and serious injury could result if an unfit driver steers a horse into the lane of another driver. Thus, Rule 1498 sets forth the requirement for a doctor to perform vision and hearing examinations as part of the physical examination. Rule 1498 is consistent with and serves the “best interest of racing.” Accordingly, Rule 1530, read in conjunction with Rule 1498 and other CHRB rules, adds the requisite certainty in this case to a constitutional challenge to Rule 1530 based upon vagueness.

18. Appellant issued doctor’s authorizations to harness drivers. He was not a licensed physician at the time he performed the examinations, and therefore was not authorized to perform these physical examinations on the drivers’ behalf. He acknowledged that he only gave brief, cursory examinations. He testified that he did not believe he performed vision examinations, and he additionally stated he did not perform hearing examinations.¹⁰ Appellant further acknowledged that he did not know if his examinations fulfilled the requirements of Rule 1498. He was complicit in the Rule 1498 violation by the drivers. His ignoring the rules, and enabling drivers to race after only a cursory examination, was not in the best interests of racing. As CHRB noted, horses travel at great speeds and if a driver has bad hearing or vision, he or she could easily steer a horse directly into the lane of another driver causing a collision with a risk of serious injury or death.

19. Appellant suggests that there is no requirement for “licensure” as a physician in Rule 1498 and that it is undisputed that appellant had a 30-year career as a physician and surgeon. As a one time driver, appellant believes he knows more about what was physically required of a driver than most doctors who might otherwise conduct the examination. Appellant also believes *Hand v. Board of Examiners in Veterinary Medicine* is inapposite to the facts because CHRB controls only horseracing, not the practice of a physician.

20. Appellant’s arguments and the record as a whole have been considered. Rule 1530, read in conjunction with Rule 1498 and other CHRB rules, is reasonably certain and

¹⁰ Given these admissions by appellant, it is unnecessary to consider appellant’s further arguments that the testimony of Investigator Nolan about the identity of the person who complained about the examinations should be excluded.

not unconstitutionally vague. The record supports the Stewards' determination that appellant violated Rule 1530 when he performed cursory physical examinations at a time when he was not licensed to do so. His doing so was not in the "best interest of racing." The Stewards properly determined that the best interests of racing are served by requiring examinations by licensed doctors who perform the full gamut of examinations, including vision and hearing, consistent with Rule 1498. Appellant failure to do so violated Rule 1530.

21. CHRB has jurisdiction to impose the \$500 fine in this case. Appellant is a licensee, and is presumed to know the CHRB rules which give CHRB jurisdiction to impose penalties. Rule 1527 provides: "[t]he stewards have general authority and supervision over all licensees and other persons attendant on horses...." (Cal. Code Regs., tit. 4, § 1527.) Rule 1528 further provides: "The stewards may suspend the license of anyone whom they have the authority to supervise or they may impose a fine or they may exclude from all enclosures in this State or they may suspend, exclude and fine. (Cal. Code Regs., tit. 4, § 1528.) By being a CHRB licensee, the CHRB had authority to fine appellant for conduct detrimental to the interests of racing.

LEGAL CONCLUSIONS

1. Pursuant to Business and Professions Code section 19517, subdivision (a), the Board may overrule a Stewards' decision if a preponderance of the evidence shows the Stewards mistakenly interpreted the law, if new evidence of a convincing nature is produced, or if the best interests of racing and the state may be better served.

2. The matters set forth in Findings 5 through 21 have been considered. The record contains substantial evidence to support the Stewards' findings, and those findings support the Stewards' decision. The Stewards did not mistakenly interpret the law. New evidence of a convincing nature was not produced. It would be in the best interests of racing to affirm Ruling #19. (Bus. & Prof. Code, § 19517, subd. (a).)


ORDER

The Board of Stewards' Ruling #19, and the Statement of Decision of the Board of Stewards dated March 23, 2013, against Brevator J. Creech are AFFIRMED.

DATED: June 2, 2014

RECEIVED
CHRB

2014 JUN -9 AM 11:12



JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings