



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DAVID MILLER,

Petitioner,

v.

NEW JERSEY RACING COMMISSION,

Respondent.

OAL DKT. NO. RAC 15043-17

AGENCY DKT. NO. NJRC-2-H-17-MD

BURKE RACING STABLE, LLC, ET AL.,

Petitioner,

v.

NEW JERSEY RACING COMMISSION,

Respondent.

OAL DKT. NO. RAC 17327-17

AGENCY DKT. NO. NJRC-3-H-17-MD

Howard A. Taylor, Esq., for petitioner, David Miller

Timothy M. Donohue, Esq., for petitioner, Burke Racing Stable, LLC

Dominic Giova and **Cameryn J. Hinton,** Deputy Attorney Generals for
respondents (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: September 4, 2018

Decided: December 11, 2018

BEFORE **JEFFREY A. GERSON,** ALJ (Ret., on recall):

STATEMENT OF THE CASE & PROCEDURAL HISTORY

David Miller, a New Jersey Licensed Harness Racing Driver, and Ronald Burke, a New Jersey Licensed Race Horse Owner, filed an appeal of the disqualification of their horse, "What the Hill" as a result of a determination by the New Jersey Racing Commission Board of Judges that "What the Hill" interfered with "Guardian Angel AS" during the home stretch of the 2017 Hambletonian.

The 2017 Hambletonian was held on August 5, 2017 at the Meadowlands Race Track and carried a purse of \$1 million. Burke's horse, "What the Hill", finished first but was disqualified and placed 9th as a result of the Judges concluding that "What the Hill" interfered with "Guardian Angel AS". David Miller was the driver of "What the Hill" and after a hearing he was suspended for 3 days. He filed an appeal.

Miller appealed the Board of Judges decision and the New Jersey Racing Commission Stayed Miller's suspension and transferred the matter as a contested case to the Office of Administrative Law on or about September 19, 2017.

On October 23, 2017, Burke Racing Stable, LLC, directly appealed the matter to the Appellate Division. Pursuant to R. 2:5-5(b) the Appellate Division remanded the matter to the OAL. On October 31, 2017, Burke Racing Stables requested that their case be consolidated with the Miller case. In a letter dated November 13, 2017, the New Jersey Office of the Attorney General contested the consolidation as it was not ripe until the New Jersey Racing Commission transferred the Burke Racing Stable case to the OAL as a contested case. On November 20, 2017, the New Jersey Racing Commission transferred the Burke case to the OAL. ALAJ Candido then consolidated the cases. Order of Consolidation (November 29, 2017).

Since these matters concerned the issue of disqualification and the award of purse winnings, the interests of the #4 horse, "Perfect Spirit" the horse that finished second and

was subsequently placed first were at stake. On February 2, 2018, by Letter Motion, the interested parties of "Perfect Spirit", Owner SRF Stables and Driver, Ake Svenstadt moved to intervene. They were allowed to do so.

TESTIMONY

These consolidated matters were heard on June 28, 2018.

Only two witnesses testified Presiding Judge John Tomasello and the Harness Racing Driver, David Miller.

On the day of the 2017 Hambletonian, John Tomasello was the Presiding Judge at the Meadowlands Race Track. According to Judge Tomasello, he and two other judges officiated the Harness races at the Meadowlands on the day of the Hambletonian and they were charged with enforcing the rules and regulations of the Commission to ensure that the races are contested in a fair and proper manner. The Board of Judges applies the rules and regulations of the Commission to situations as they occur.

For approximately twenty-four years, Judge Tomasello has served with the Racing Commission as a Racing Official. He is licensed by the United States Trotting Association in a capacity of Presiding Judge for Para mutual Racing and is also accredited as a Level I or Senior Racing Official by the Association of the Racing Commissioners International.

Judge Tomasello testified that on the day of the 2017 Hambletonian, he and his two Associate Judges officiated the race from the judges' stand located on the top floor of the Grand Stand Building along the track finish line. He and one other Associate Judge viewed the race through binoculars while the second Associate judge watched the video monitors which provided a view from 4 different angles of the entire race. Video monitors allowed for the live replay and playback of the camera recordings.

Presiding Judge Tomasello described the stretch run of the Hambletonian.

“What the Hill” was in the first lane closest to the rail behind the leading horse, “Perfect Spirit”. The Number 9 horse, “Guardian Angel AS” was on the outside of “What the Hill” with “Guardian Angel AS’s” feet on the outside of the sulky wheel of “What the Hill”. Presiding Judge Tomasello testified that “What the Hill” moved off the rail in an attempt to overtake the leader. As Miller attempted to cross over in front of “Guardian Angel AS”, there was contact between the right sulky wheel of “What the Hill” and the left front foot of “Guardian Angel AS”. “Guardian Angel AS” went off stride and remained off stride through the end of the race. “Guardian Angel AS” finished in 9th place.

As a result of Presiding Judge Tomasello observations of the race along with the corroboration of the other two Associate Judges, an inquiry was initiated. Presiding Judge Tomasello’s view of the race from different angles on the 65 Inch Video Monitors at the Meadowlands Race Track led him to the conclusion that “What the Hill” attempted to enter the second lane in front of “Guardian Angel AS” with insufficient clearance which ultimately caused “Guardian Angel AS’s” break. Presiding Judge Tomasello testified that “What the Hill” did not have full clearance when he changed his position to occupy the path that was the same as “Guardian Angel AS”.

Presiding Judge Tomasello’s testimony was accompanied by the videos of the race made available on screen at the hearing. There was no doubt that there was contact between the sulky wheel of Miller’s horse and the left front leg of “Guardian Angel AS”.

The Three Judge panel unanimously determined that “What the Hill”, Miller’s horse, who went on to win the race, should be disqualified for interference and placed 9th behind “Guardian Angel AS”. The second-place finisher, “Perfect Spirit” was declared the winner.

The next witness to testify was David Miller.

Miller has been a Licensed Harness Driver for Thirty-three years. He estimated that over the course of his career, he has won approximately 12,400 races. He was at the time of the hearing, the fifth all time winning harness racer. He has driven in approximately 73,000 races. He was Inducted in the Harness Racing Hall of Fame in 2014. He estimated that he had driven in approximately 15 or 16 Hambletonian Races.

Miller, while viewing the video, testified that at the time he decided to pull out from behind "Perfect Spirit" in order to contest for the victory, he had ample room in front of "Guardian Angel AS" because he thought "Guardian Angel AS" was tiring. As Miller moved off the rail, he contends that "Perfect Spirit" bore out a bit from the rail and that "Devious Man", who was on a path outside "Guardian Angel AS" started to bear in, causing him to be "squeezed" resulting in contact between his sulky wheel and "Guardian Angel AS's" front leg. According to Miller, at the time he made his move to come out, there was room for him to get out. Right before he was able to get completely out, the contact occurred. Miller testified that at the time he started his move out from behind "Perfect Spirit", "Guardian Angel AS" had started to bear out before he had gotten completely out, "Guardian Angel AS" started to bear in.

Miller, as Presiding Judge Tomasello had done, viewed the videos at the hearing and described what he saw.

THE LAW

The Administrative Procedure Act provides generally for the hearing and the decisional phases of Administrative adjudications to be handled separately. ALJs preside over the hearings in contested cases, while the agency head retains the exclusive right to make final decisions upon review of Administrative Law Judges recommendations. See N.J.S.A. 52:14B-10; In Re Uniform Administrative Procedural Rules, mainly New Jersey 85, 91 (1982).

Contested cases transferred to the OAL from the New Jersey Racing Commission do not place the ALJ in the position of an Appellate Court in reviewing the decision made by the Track Judges. See Berrone v. New Jersey Racing Commission, 92 N.J.A.R. 2d (RAC) 16 (Final Decision July 15, 1992). The ALJ is to develop the record under this standard and review the New Jersey Racing officials decision based on a fair preponderance of credible evidence. N.J.S.A. 52:14B-10; In re Polk License Revocation, 90 N.J. 550, 560 (1982); See also In Re Suspension or Revocation of License of Kerlin 151 N.J. Super 179, 184 n.2 (App. Div. 1977);” There it was said that “It is only necessary to establish the truth of the charges by a preponderance of the believable evidence . . .” Thus, an ALJ may hear testimony from the judge or steward and pay deference to their expertise unless their decision is manifestly incorrect, or the agency’s hearing violated the petitioner’s due process rights. See N.J. Racing Commission v. Silverman, 303 N.J. Super 293, 302 (App. Div. 1997). In consideration of the evidence, the ALJ should pay substantial deference to the findings of the Board of Judges. Dare v. State 159 N.J. Super 533, 537 (App. Div. 1978). If an ALJ finds that the testimony presented by the New Jersey Racing Commission is credible, the ALJ should affirm the findings of the Board of Judges unless their decision is clearly wrong. Draken v. New Jersey Racing Commission, RAC 6729-05 Initial Decision (April 28, 2006).

Under the N.J.A.C. paragraph 13:71-20.6:

Although a leading horse is entitled to any part of the track except after selecting his position in the home stretch, neither the driver or the first horse nor any other driver in the race shall:

1. Change either to the right or left during any part of the race when another horse is so near him that in altering his positions he compels the horse behind him to shorten his stride, or causes the driver of such other horse to pull him out of his stride;
- . . .
8. Commit any act which impedes the progress of another horse or causes him to “break”.

Where the ALJ finds that testimony is credible and supported by corroborating proofs, such evidence as video tapes, the Racing Commission will have met its burden. See Initial Decision (2005 N.J. Agen. Lexis 570). Adopted New Jersey Racing Commission v. Doherty, OAL DKT. No. RAC 8778-04, 2005 N.J. Agen. Lexis 1478 Final Decision (Nov. 15, 2005) (Concluding that the Racing Commission met its burden of proofs by a preponderance of the competent evidence where review of video tapes exhibit clearly showed that the driver's horse entered the extended inside lane to a point that prohibited access by other drivers.)

DISCUSSION

Presiding Judge Tomesello testified that Miller did not have "sulky clearance" to move "What the Hill" in front of "Guardian Angel AS" because he would be moving into the stride of "Guardian Angel AS" and that's what caused "Guardian Angel" to go off stride. Miller on the other hand contends that competing horses interfered with his move to make a lane change. Miller contends that he had room to make the move, but that it was "Guardian Angel AS's" bearing in that caused the clearance to evaporate.

A review of the video tape from different angles convinces the undersigned that Miller undoubtedly violated N.J.A.C. paragraph 13:71-20.6 when he changed lanes and caused "Guardian Angel AS" to break stride.

At the hearing, Presiding Judge Tomasello indicated that as a Racing Commission Judge, it was his responsibility to protect the integrity of Racing as a whole. He was asked "you spoke about integrity, why is that particularly important for horse racing in Jersey? Answer: It is important because without integrity, our business would not exist.

This distinguishes Presiding Judge Tomasello from the parties involved and the participants in the Racing industry. He perceived his job to fairly apply the regulations of the Commission and reach unbiased factually supported decisions. He has no rooting

interest or financial interest in the result. Both his opinion and his testimony were credible and more than sufficiently corroborated.

Presiding Judge Tomasello's credible unbiased evaluation of the facts in this matter clearly outweigh the testimony of Mr. Miller who not only has a financial interest in the outcome, but also has an owner and trainer who suffered a substantial financial loss as a result of the Judges' decision. Miller's testimony could have best been categorized as pretextual. It appeared to be a desperate defense to author a conclusion that his lane change in the 2017 Hambletonian was something other than careless and caused "Guardian Angel AS" to go off stride. His testimony seemed contrived and was neither compelling or convincing.

The Judges' decision to suspend Miller for three days which was the minimum penalty they could invoke given that they concluded he had violated N.J.A.C. 13:71-20.6(a)1, 2, 8 and 10 was appropriate.

Based on presiding Judge Tomasello's expertise and very credible testimony accompanied by a very compelling explanation for his reason for the disqualification, I agree with and affirm his decision to disqualify "What the Hill".

ORDER

It is **ORDERED** that David Miller be suspended for three days. It is further **ORDERED** that the disqualification of "What the Hill" is upheld and that the portion of the Hambletonian purse of 2017 be distributed in accordance with this decision.

I hereby **FILE** my initial decision with the **NEW JERSEY RACING COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **NEW JERSEY RACING COMMISSION**, which by law is authorized to make a final decision in

this matter. If the New Jersey Racing Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **CHAIRMAN OF THE NEW JERSEY RACING COMMISSION, 140 E. Front Street, PO Box 088, Trenton, New Jersey 08625-0088**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 11, 2018



DATE

JEFFREY GERSON, ALJ (Ret., on recall)

Date Received at Agency:

December 11, 2018

Date Mailed to Parties:

December 11, 2018

sej

APPENDIX

WITNESSES

For Petitioner

David Miller

For Respondent

John Tomasello, Presiding Judge

EXHIBITS

- J-1 Video of Hambletonian Race
- J-2A Program
- J-2B Hambletonian Race Book
- J-3 8-5-17 Article
- J-4 Notice of Purse Hold and Release
- J-5 Driver License Application
- J-6 Meadowlands Ruling

For Petitioner

- P-1 Still Photo Time 4:26

For Respondent

- R-1 John Tomasello's Resume
- R-2 Still Photo Time 7:37
- R-3 Rules
- R-4 Still Photo