



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. RAC 07166-21

AGENCY DKT. NJRC-14-H-21-MD

DON TIGER (OWNER),

Petitioner,

v.

NEW JERSEY RACING COMMISSION,

Respondent.

Gilberto M. Garcia, Esq., for petitioner

Eric Reid, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: August 12, 2022

Decided: February 10, 2023

BEFORE **ANDREW M. BARON**, ALJ:

STATEMENT OF THE CASE

Petitioner, licensed owner, Donald Tiger, appeals the decision or ruling of the Board of Judges of the New Jersey Racing Commission (Commission) decision to disqualify the horse, **CHARLIE MAY**, from the 9th race on July 17, 2021 at the Meadowlands Racetrack.

On July 17, 2021, petitioner Don Tiger's horse Charlie May was declared the unofficial winner of Meadowlands Pace Race 9. The winner of this race become eligible to apply to entry in an out of State race known as "Little Brown Jug" in late September.

Shortly after finishing first and being declared the unofficial winner, Charlie May was disqualified for alleged interference with another horse and moved down to ninth (9th) place of nine horses in the race, essentially finishing last.

Petitioner sought Emergent relief in the form of a stay pending a full hearing in this case, so as not to permanently lose the opportunity to enter the horse in another high stakes race, which as a prerequisite requires a first-place finish in the Meadowlands pace Race 9.

Although the stay request was denied at the agency level, once the underlying case was transmitted as a contested case and assigned, the request for Emergent relief was heard as a "stand alone" application, following briefing and argument by both sides.

Following the emergent relief hearing, a determination was made that the applicant could not meet the four prongs of the Crowe case without a full hearing on the merits, resulting in a denial of the request for emergent relief.

Thereafter, a full hearing ensued, which included expert testimony on both sides, as well as several viewings taken from several angles of a tape of the race itself.

PROCEDURAL HISTORY

On July 17, 2021, a horse that goes by the name Charlie May, owned by petitioner Don Tiger was declared the unofficial winner of Meadowlands Pace Race 9. Shortly thereafter, the judges of the race held a hearing and disqualified Charlie May, not the driver and moved him down to finishing ninth (9th) of nine horses, as a result of allegedly interfering with the path other horses were running in. A horse named Lawless Shadow was then declared the winner. Petitioner indicates that the tape of the race shows it was

a third horse, Southwind Gendry whose jockey kicked its earplug out and then moved to the outside to cause the interference.

Petitioner challenged the decision on site and was denied. He then filed an appeal of this determination with the New Jersey Racing Commission on or about July 17, 2021

On August 23, 2021, the New Jersey Racing Commission transmitted the case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

Upon learning which Deputy Attorney General was assigned to the matter, on September 8, 2021, petitioner's counsel sent correspondence seeking a stay of the ruling, until the full underlying case could be heard. Though nothing was sent back in writing, it was communicated that the request for a Consent Order was rejected, and there was no counteroffer.

Thereafter, on September 15, 2021, petitioner's counsel filed a Request for Emergent Relief, simultaneously serving the Executive Director of the Racing Commission, the assigned Deputy Attorney General, and the Office of Administrative Law via e-mail.

Even though the Executive Director was simultaneously served, and due to Covid-19, e-mail service has been accepted throughout the State, the State says this is not good service of the application for Emergent relief, and further, that the Office of Administrative Law does not have jurisdiction to hear the application.

On September 15, 2021 an initial on the record conference was held. On September 17, 2021, an on the record Emergent hearing was held. Following oral argument, the application for emergent relief was denied, as petitioner was unable to demonstrate that without a full hearing on the merits, it could meet all four criteria of the Crowe case.

A full hearing ensued, including experts on both sides, as well as several viewings of a video of the full race, which was captured from several angles.

TESTIMONY AND DISCUSSION

Petitioner Donald R. Tiger, II, testified that he was the owner of a horse whose name is Charlie May. Mr. Tiger, who is an avid race fan testified that he is a successful mortgage banker and financial planner who has watched over 115,000 races in his lifetime. As a horseracing enthusiast, he has owned several horses, including Charlie May.

In 2021, when the dispute giving rise to this appeal occurred, Mr. Tiger testified that Charlie May was a three year old horse, who was often entered in races otherwise known as “trotters.” With a ranking at the time of 11th in the country, and 9th place in earnings, Charlie May was accepted for a race known as the Meadowlands Pace, which was scheduled to run on July 17, 2021, with a projected purse of close to \$300,000.

According to Mr. Tiger, the Meadowlands Pace is one of the most prestigious horse trotting races in the country, and if Charlie May had won the race, the horse would have gained automatic eligibility to run in the “Little Brown Jug” race in Ohio, which carried a projected purse of \$700,000.

On the day of the race, Charlie May was scheduled to be driven by experienced trotter driver, Brent Miller, who is respected throughout the industry, with no violations of record on his horse driving history.

Following the normal protocol for such an important race, according to Mr. Tiger, a panel of three track side judges led by Peter Koch, was to observe the race and be available should any challenges or unusual incidents occur.

Being one of the most important races of the year, there was a nationally televised broadcast, with analysis provided by long time race veterans Dave Brower and Dave

Little, with announcing by Ken Workington. This is noted here, because a tape of the race was played several times during the course of the hearing to show whether or not the alleged interference by Charlie May, which led to the disqualification from its first place finish, actually occurred. (The tape has six camera angles and was stopped and started several times during the hearing in an effort to try to locate and see the basis of the disqualification).

Although a large purse was at stake, Mr. Tiger indicated that after Charlie May was initially declared the winner, it was learned there was a challenge, (otherwise referred to as an enquiry) and the matter was sent to the track side judges to make a determination concerning whether or not Charlie May interfered with one or more horses during the race.

After what Mr. Tiger stated was an unusually short period of time of only six and a half minutes, Mr. Tiger learned that the track side judges, led by Mr. Koch, unanimously ruled that there had been interference, and Charlie May's first place finish was changed to a 9th place disqualification.

The tape, which was shown several times throughout the course of the hearing, and stopped and started often, not only does not show any interference by Charlie May, but in fact shows that the horse in front of Charlie May slowed down drastically, with its driver looking backwards, so if anything, it looks like Charlie May's driver moved the horse slightly outside to avoid a major accident which would have involved several of the horses that were running in the race.

The track side judges ruled otherwise, and indicated that in their opinion, Charlie May had "broken stride" which was against the rules. However, it is undisputed that no effort was made by the judges to interview others involved in the race itself prior to issuing their decision.

Arthur Gray was called to testify as an expert witness on behalf of Mr. Tiger. Mr. Gray, who was also a licensed trainer, had served as a race judge in at least three states, New York, Kentucky and Delaware, though he had not served in that capacity in New

Jersey. In his professional opinion, after viewing the race several times together with other related materials, the track judges failed to fulfill their responsibilities by not exhausting all means possible to safeguard the outcome of the race for its contestants and the public at large.

Among other things, in Mr. Gray's opinion, before issuing their ruling, (which in his opinion was delivered in a very short time lacking due diligence and due process), at a minimum, the track judges should have interviewed the drivers of several of the other horses, especially in a situation where interference on the part of the winning horse is alleged.

Of interest towards the end of Mr. Gray's testimony was the fact that at a meeting of regional race officials that took place four months after Charlie May was disqualified, the officials in attendance agreed and adopted something now referred to as the "Charlie May rule," which calls on race officials in their due diligence when the outcome of a race is called into question when interference is alleged, to interview as many drivers and others involved before rendering a decision that may result in disqualification of a winning horse.

Mr. Gray, who served for sixteen years as the Chief Race Judge for the State of New York, confined his testimony to the role, duties and obligations of a race judge, and did not offer an opinion on whether or not Charlie May interfered, since he was not on site when the infraction allegedly occurred.

Although Mr. Gray later sought to withdraw his testimony over an unrelated fee dispute with Mr. Tiger, his testimony throughout his entire time "on the virtual witness stand" was very credible. (His request to withdraw his testimony was disallowed).

The only witness called by the State in support of the disqualification with Peter Koch, the chief track side judge on July 17, 2021.

While Mr. Koch's years of experience in the racing industry are well respected, for reasons unknown it appeared throughout his entire time testifying, even over a virtual

Zoom platform that he was uncomfortable, was looking away from the camera and several of his answers were evasive.

For example, every time a question was posed, he repeated the question before giving an answer, whereas most witnesses who are confident in what they are saying would simply go ahead and answer the question.

Curiously, Mr. Koch's answers to why he and other judges elected not to interview any of the drivers or interested parties, was at best, suspect. His answer to why he didn't conduct a more thorough investigation repeatedly was that he didn't believe the drivers would give honest answers, or that their version of events would be biased.

Though Mr. Koch knew the purse in the race Charlie May initially won was significant and a disqualification would bar Charlie May from entering the even more lucrative Little Brown Jug race in Ohio, he still did not deem it necessary or spend more than six and a half minutes on the issue, before the three-judge panel which he headed that day, issued its disqualification ruling.

Most troubling of all regarding Mr. Koch's testimony however, was the fact that he claimed that he learned "for the first time after the race, that his wife, who was involved in a horse staking business, had an interest in the outcome of the race with two other horses that had been entered. Curiously, he kept saying when questioned about this" "That's her business, that's her business." He seemed completely unaware, that just the appearance of potential conflict itself should have been sufficient cause for him to step aside as the chief judge handling the track side appeal.

Further troubling about Mr. Koch, was that two weeks after the disqualification, he called for a panel investigation of Charlie May's driver Brett Miller, (who had never been the subject of an investigation) to determine if he should be penalized or suspended on top of the horse being disqualified.

Having been admitted as an expert, I cannot disregard or throw out his entire testimony based on his obvious credibility challenges that were evident throughout his testimony, and through his evasiveness in answering questions.

However, given Mr. Koch's body language and manner of answering questions, coupled with the potential conflict of his wife having an interest in two other horses in the race. **I DO FIND** that the testimony of Mr. Koch, who was the only witness produced by the State, was significantly diminished, and devalued, by virtue of his lack of credibility. Despite years of experience in the industry, it seems clear Mr. Koch knew or should have known that the panel of judges which he led on that day should have done more due diligence prior to issuing its ruling, and/or he should have disqualified himself to avoid the appearance of impropriety and a potential conflict.

FINDINGS OF FACT

Based on the argument the parties provided, together with the documents the parties submitted, and my assessment of their sufficiency, **I FIND**:

1. Petitioner Don Tiger is the owner of a horse known as "Charlie May," who is ranked as the number four (4) three-year-old standard bred horse in the country.
2. The New Jersey Racing Commission is the agency responsible for oversight, licensing, disputes, and regulation of the horse racing industry in the State of New Jersey.
3. On July 17, 2021, Charlie May was entered as a contestant in Meadowlands Pace Race 9, and was declared the unofficial winner of the race, which is a prerequisite to applying for admission to participate in a high stakes out of state race known as "Little Brown Jug."
4. There is a tape of the race, which with the timing of the application, time did not permit the viewing of same by all parties at the same time.

5. Shortly after the race, the judges of the race determined that Charlie May had interfered with the path of another horse, thereby disqualifying Charlie May, not its driver, and moving the horse down to ninth (9th) which was last place in the race.
6. Petitioner immediately contested this determination, which was upheld by the judges, after only a few minutes of review.
7. The race was being nationally televised, which created additional pressure on the judges to make a fast decision.
8. The head judge, Peter Koch, who would later testify as a fact and expert witness for the State, is married to an individual who works for a company that held an interest in two other horses who were entered in the race that Charlie May was ultimately disqualified as the winner due to “breaking stride.”
9. At no time did Mr. Koch consider, and/or seek to be recused as a track side judge from the race in question. **I FIND** that whether or not a real conflict existed, once Mr. Koch learned there was a challenge to the outcome of the race in which Charlie May was declared the winner, Mr. Koch should have recused himself from participating in the appeal with the other two track side judges.
10. Petitioner then filed a formal appeal with the Racing Commission, which did not overturn the decision of the track side judges, transmitted the case to the Office of Administrative Law.
11. As a result of the determination of the trackside judges that Charlie May had “interfered” with the progress of another horse, the initial determination that Charlie May finished in first place was changed to a 9th place finish.
12. A close and lengthy review of the tape of the entire race which took over an hour during the hearing clearly shows that just before the alleged incident that gave rise to the disqualification, the horse immediately in front of Charlie May

started slowing down, with its driver looking back to see how many horses were behind it.

13. Based on the video and the testimony of the petitioner and his expert, **I FIND** that even if Charlie May did slightly “break stride” at that point of the race, it was a safety measure only to ensure that a major collision could be avoided with several of the horses, which would have been a catastrophe for everyone involved. Including viewers watching this nationally televised race at home. **I FURTHER FIND** that the actions taken by Charlie May’s driver, which had to be made in a split second as shown on the video, were appropriate under the circumstances and did not interfere with the progress of any other horses in the race, which the track side judges improperly determined.
14. Due to this determination by the track side judges, **I ALSO FIND** that Charlie May and its owner were prejudiced by the premature release of the sizable purse from the race while an appeal was pending, as well as the fact that the horse became ineligible to apply for entry into the out of state high stakes “Little Brown Jug” race, the deadline for which was Monday September 20, 2021.
15. Had Charlie May’s original finish remained undisturbed, the horse would have won a \$299,000 purse, with automatic eligibility for a \$700,000 purse in the Little Brown Jug race.
16. Arthur Gray, who served and testified as petitioner’s expert, sought to have his testimony withdrawn subsequent to the hearing for undisclosed reasons. Petitioner later explained in a subsequent proceeding on this limited issue, that they were in a fee dispute following his testimony, and Mr. Gray took his unilateral and unprofessional action based on that situation alone.
17. Though Mr. Gray subsequently sought to withdraw his testimony after the hearing, **I FIND**, that his testimony on the substantive aspect of the case was credible based on his experience in the racing industry, and an unrelated fee dispute he was having with petitioner does not constitute sufficient grounds to disregard his testimony.

18. **I FURTHER FIND** that the appeal conducted by the track side judges was flawed, in that it was rushed, due in part to the race being broadcast to a national television audience on Fox Sports, and, among other things, they failed to follow protocols, including but not limited to conducting interviews with several of the parties involved in the race prior to determining that Charlie May should be disqualified. With such a large purse at stake, as well as eligibility for an even larger purse through automatic entry in another out of state race, **I FIND** the outcome of the short track side appeal, which was upheld by the State Racing Commission, was anything but thorough, was arbitrary and capricious and fatally flawed.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 5:5-30 provides that all harness races shall be subject to reasonable rules and regulations as prescribed by the United States Trotting Association, (USTA). Where there is a conflict between the Commission's rules and those of the USTA, the rules of the Commission shall govern. See: N.J.A.C. 13:71-1.1 (b).

Due to the strong public interest in the honesty of horse racing and gambling, New Jersey courts have often recognized and upheld the Commission's broad regulatory powers and have determined that strict and close regulation of the horse racing industry is appropriate. See: Maietta v. N.J. Racing Comm'n. 93 N.J. 1 (1983) See also: Jersey Downs v. N.J. Racing Comm'n. 102 N.J. Super. 451 (App. Div. 1968). And see: De Vitis v. State. 159 N.J. Super. 533 (App. Div. 1978). All of these cases emphasize the importance of protecting the sanctity and the integrity of each race for the sake of the participants, the owners and the wagering public.

When the outcome of a race is called into questions, N.J.A.C. 13:71-8.23 calls for track side judges to investigate any apparent or possible interference or other violation of the rules whether or not a complaint has been made by a driver, to observe the performance of the drivers and the horses closely to ascertain if there are any violations

of the rules, and...to exhaust all means possible to safeguard the contestants and the public (emphasis added).

Our entire system of justice, whether in the civil, criminal, or regulatory forum is based on the fundamental rights and protections afforded to an individual, organization and/or business under the due process clause. Such rights include the ability to confront witnesses or other parties involved in any form of dispute. See: AB v. YZ 184 N.J. 599 (2005) See also: Chapman v. California386 U.S. 18) 1967, and see: Barry v. Barchi 443 U.S. 55 (1979).

Here, with the high stakes involved, including but not limited to a purse of \$299,000, and a large number of bets from the wagering public, the track side judges did the expedient thing, instead of conducting due diligence. It is undisputed the judges failed to question any drivers, or other parties involved in the race for that matter, and after conferring for only a few minutes, disqualified Charlie May and allowed the purse to be distributed to another horse and its owner.

Finally, **I ALSO CONCLUDE** that the decision of the track side judges, of which Peter Koch was one of three members, and which was not overturned by the Commission was fatally flawed due to a conflict of interest that existed on the part of Mr. Koch himself. Mr. Koch, who served as the presiding judge that day, is married to a woman who is part of a staking company, which staked two other horses in the same race as Charlie May. Though he stated during his testimony that he was unaware of this situation until after the race dispute was decided, it strains credibility and common sense that he was completely unaware her company had an interest in other horses who were racing that day. Once the outcome of the race was called into question, the proper course of action should have been for Mr. Koch to recuse himself as a race judge. He chose not to, and as a result, while I am unable to completely disregard his expert and factual testimony, **I DO CONCLUDE** that he could have and should have known that recusal in this situation was the only proper course of action for him, and as such, his credibility as a witness must be called into question, regardless of and especially due to his years of experience in the industry. Simply put: **He should have stepped aside.** (emphasis added)

From all of the foregoing, I **CONCLUDE** that the Petitioners have demonstrated that they were prejudiced by the disqualification of Charlie May after winning the race I **CONCLUDE** that the determination of the track side judges, which essentially disqualified Charlie May as the winner of the race, was not conducted in accordance with well recognized industry and regulatory standards and was arbitrary and capricious and must be **REVERSED** and Charlie May should be reinstated as the winner of the Meadowlands Pace which took place on July 17, 2021.

ORDER

I hereby **ORDER** that the determination of the track side judges which was sustained by the Racing Commission must be **REVERSED**, as it was arbitrary, capricious and unjust, and violated petitioner's fundamental due process rights, and the rights of the wagering public, whose interests the track side judges, and the Racing Commission are supposed to protect as well. I **FURTHER ORDER** that Charlie May should be reinstated as the winner of the Meadowlands Pace which was held on July 17, 2021.

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.

February 10, 2023
DATE


ANDREW M. BARON, ALJ

Date Received at Agency:

February 10, 2023

Date E-Mailed to Parties:

February 10, 2023

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APPENDIX

WITNESSES

For Petitioner:

Donald Tiger, II

Arthur Gray

For Respondent:

Peter Koch

EXHIBITS

For Petitioner:

P-1 Expert report of Arthur Gray

For Respondent:

R-1 Peter Koch C.V.

R-2 Meadowlands Pace Race card 7/17/21

R-4 Photo (no R-3)

Joint Exhibits

J-1 Video on CD and flash drive

J-2 Gray C.V.

J-3 Koch C.V. (also marked as R-1)