IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO
GENERAL DIVISION

J. FREDERICK HUFF,	**:**	**CASE NO. 15 CV 1225**
APPELLANT,	**:**	**JUDGE KIMBERLY COCROFT**
vs.	**:**	
OHIO STATE RACING COMMISSION,	**:**	
APPELLEE.	**:**	

DECISION AND ENTRY

COCROFT, J.

This case involves the R. C. 119.12 administrative appeal filed by Appellant, J. Frederick Huff, from a January 26, 2015 Adjudication Order issued by Appellee, Ohio State Racing Commission ("Commission").

As background, the horse (Bell Flower) trained by appellant, finished first in the Ohio Sires Stakes race for 2 year old fillies at Scioto Downs. The race was held on July 18, 2014. On July 31, 2014, in ruling #14-056, the Scioto Downs Judges determined that appellant did not comply with post-race testing procedures. Appellant appealed this decision and a hearing was held on October 20, 2014.

Thereafter, on December 11, 2014, Hearing Officer Chet Lyman issued his Report and Recommendation. The hearing officer concluded that under the Ohio Rules of Racing, appellant, as trainer, was responsible for controlling his horse and for submitting his horse for proper testing after the race, according to Commission rules and regulations. Thus, appellant violated O.A.C. 3769-18-01, 3769-18-02, 3769-18-03 and R.C. 3769.091.

On January 21, 2015, the Commission adopted the December 11, 2014 Report and Recommendation of the hearing officer. The Notification of Adjudication sent to appellant from William Crawford, Executive Director of the Ohio Racing Commission, provides, in relevant part:

1. The Ohio State Racing Commission issued a license to you for calendar years (sic) 2014 as an owner/driver/trainer.

2. On July 31, 2014 in Scioto Downs ruling #14-056 the Judges ordered the return of the purse from the 1st race at Scioto Downs on July 18, 2014. The ruling was based on the fact you did not comply with OSRC post-race testing procedures. You failed to return your horse "Bell Flower" for the blood-gas testing as directed by the Judges and the state veterinarian. Bell Flower was disqualified and placed last. You were listed as the "trainer" of "Bell Flower."

3. You appealed this ruling on August 4, 2014.

4. The Ohio State Racing Commission Case #2014-17 was heard by a Hearing Officer on October 20, 2014.

5. On December 11, 2014, the Hearing Officer in his Report and Recommendation stated Under (sic) the Ohio Rules of Racing, you as trainer were responsible for controlling your horse and for submitting your horse for proper testing after the race, according to Commission standards.

   Because you failed to do so in the Ohio Sires Stakes for 2-year old fillies race at Scioto downs (sic) on July 18, 2014, you are liable for the indicated violations of the Commission's rules: specifically, you violated provisions of OSRC 37-18-01, 3769-18-02, and OSRC 3769-18-03 as well as ORC 3769.091. The Hearing Officer agrees with the Judges' determination that the horse should be disqualified from its finishing place.

   The penalties issued by the judges this ruling (sic), allowable under the Rules of the Commission (see OSRC 3769-18-99) should be affirmed herein for the violation in this matter. As the finding is that you did violate the Commission rules as alleged, it is further recommended that the appeal herein be dismissed as being denied.

6. On January 21, 2015, The Ohio State Racing Commission unanimously voted to adopt the Report and Recommendation of the Hearing Officer.

January 26, 2014 Adjudication Order.

In his December 11, 2014 Report and Recommendation, the hearing officer set forth the following Findings of Fact which were adopted by the Commission:

1. At all times referenced herein, Mr. Huff was licensed as an owner/trainer/driver by the Ohio State Racing Commission in 2014, with license number #9354. *(State Exhs. E, F)*

2. Mr. Huff's horse had finished first in the Ohio Sires Stakes 2-year-old fillies' race on July 18, 2014 *(State's Exh. G)*.

3. Mr. Huff's horse, Bell Flower, was brought into the barn for post-race testing, provided a urine sample, but left the testing barn prior to the required draw of blood for TCO2 testing *(Testimony of Dr. McQuinn; see State's Exh H, I, J; Resp. Exh 14).*

4. Bell Flower left the testing area prior to being released by the veterinarian. *(Testimony of Dr. McQuinn)*

5. The Judges at Scioto Downs held a hearing with Mr. Huff on or about July 31, 2014, and Mr. Huff was present and participated at the hearing. *(see, State Exh. D1).*

6. The Scioto Downs Judges Board issued Ruling Number 2014-056 on July 31, 2014, finding Mr. Huff in violation of its rules for failing to cause the horse to be submitted for proper testing, and therefore disqualifying the horse, Bell Flower, from that race and placing it last, effecting a forfeit of its share of the purse. *(Stipulted, copy not attached; but see Exh. A).*

7. Mr. Huff promptly and timely filed a Notice of Appeal from that ruling. *(State's Exhs. A, D1).*

8. Mr. Huff has no apparent previous history of riding infractions, as no such evidence was offered to that effect.

9. Although Mr. Huff provided some plausible explanations for not understanding what tests were needed, in what fashion, and why he failed to follow the procedure, the Commission offered reliable, probative and substantive evidence in the preponderance for its determination of Mr. Huff's liability. *(see, State's Exhs. I, J; Respondent Exh. 14; testimony of Mr. Huff).*

   See December 11, 2014 Report and Recommendation; see also January 21, 2015 Minutes of the Ohio Racing Commission.

Standard of Review

This Court must affirm the order of the Commission if the order is supported by reliable, probative and substantial evidence and is in accordance with law. R.C. 119.12; *Univ. of Cincinnati v. Conrad*, 63 Ohio St. 2d 108, 111, (1980). That quality of proof was defined by the Ohio Supreme Court in *Our Place v. Liquor Control Comm*., 63 Ohio St. 3d 570, (1992), as follows:

> (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.
>
> (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.
>
> (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

Appellant's Seven Assignments of Error

Appellant sets forth the following seven assignments of error:

First Assignment of Error: The Commission Order is not in accordance with law because the Commission enforced an unpromulgated rule.

Second Assignment of Error: The Commission's Order is not based upon reliable, probative, and substantial evidence because the hearing examiner made multiple inaccurate statements in his report, to Mr. Huff's detriment.

Third Assignment of Error: The Commission Order is not in accordance with law because Mr. Huff's Due Process rights were violated.

Fourth Assignment of Error: The Commission Order is not in accordance with law because it determined Mr. Huff was in violation of Rules 3769-18-01, 3769-18-02, and 3769-18-03.

Fifth Assignment of Error: The Commission Order is not in accordance with law because (sic) Commission did not consider the objections.

Sixth Assignment of Error: The Commission Order is not based upon reliable, probative, and substantial evidence because the hearing examiner incorrectly determined the veterinarian's and vet assistants testimonies were most persuasive.

> Seventh Assignment of Error: The Commission Order is not based upon reliable, probative, and substantial evidence and is not otherwise in accordance with law because the hearing examiner kept vital information from the Commission by failing to recounts (sic) witness testimony that did not support the hearing examiner's theory of the case.

Law and Argument

In his first assignment of error, appellant asserts that the Commission's Order is not in accordance with law because the Commission enforced an "unpromulgated" rule. O.A.C. 3769-18-01(B)(8) and (14) notify appellant and others that horses, such as Bell Flower, will be tested. Specifically, appellant was on notice that TCO2 testing would take place post-race. Tr. 261; Exhibit J; O.A.C. 3769-18-01(B)(4)(d). Thus, appellant could not remove his horse from the test barn until all required specimens were taken and the state veterinarian released the horse. O.A.C. 3769-18-02(A); O.A.C. 3769-18-03(A). The fact is undisputed that appellant failed to present Bell Flower, the horse trained by him, for full and complete post-race testing procedures after winning a race on July 18, 20134 at Scioto Downs.

Appellant argues that Hearing Exhibit J purports to promulgate a "new" rule. Hearing Exhibit J provides, in pertinent part:

> To: Horsemen, OHPBA, OHHA, Standardbred Judges, Thoroughbred Stewards, Racetrack General Managers, State Veterinarians
>
> From: William Crawford, Executive Director
>
> Subject: Post Race Carbon Dioxide (TCO2) Testing
>
> Effective January 1, 2014, the standard operating procedure (SOP) for carbon dioxide (TCO2) testing will change. The blood sample will be taken post race. The winning horse and a horse that has a special by the judges or stewards must remain in the testing barn one and half hours after the race. A representative must be with the horse at all times. The horse will be released by only the state veterinarians after the specified time period.

***

See Hearing Exhibit J.

Upon review, the content of Hearing Exhibit J does not expand what can be tested, in light of O.A.C. 3769-18-01(B)(4)(d) and (19(a), which require TCO2 testing. The content in Hearing Exhibit J interprets and explains the implementation of rules that were already in place, and to which appellant had or should have had notice. The only change set forth in Hearing Exhibit J was placing the relevant parties on notice that the TCO2 testing would take place post-race. Pursuant to the rules, this testing had to take place post-race. Appellant did not offer any contrary evidence, and there is nothing in the record, indicating that the TCO2 test was administered to Bell Flower on July 18, 2014. The undisputed fact is that appellant failed to present Bell Flower for full and complete post-race testing, which violated the Commission's rules and regulations.

Accordingly, appellant's first assignment of error is not well-taken and is hereby **OVERRULED**.

In his second assignment of error, appellant asserts that the Commission's Order is not based upon reliable, probative and substantial evidence because the hearing examiner made multiple inaccurate statements in his report.

Appellant asserts that it is incorrect that appellant is a licensed "trotter owner/driver/trainer." December 11, 2014 Report and Recommendation; see also Exhibit E. The parties stipulated that appellant was the trainer. Tr. 13-14. The transcript demonstrates as follows on direct examination:

Q. Are you currently licensed by the Ohio State Racing Commission?

A. Yes, I am.

Q. And what license do you hold?

A. Owner/driver/trainer.

Tr. 251. See also Exhibit E.

Additionally, appellant asserts that the hearing officer's statement that Scioto Downs is located in Grove City, Ohio was also to his detriment. Clearly, these alleged misstatements were not dispositive of the germane issues in this case.

Appellant asserts that the hearing officer misstated what the judges found. However, the transcript demonstrates that the parties stipulated to the judges' ruling.

> Mr. Izzo: Sure. In conversations with the Attorney General's Office, we agreed that this hearing is a de novo hearing based upon the appeal of a judge's ruling that was issued in this matter. As such, there are several stipulations that we agreed to in regards to what the purpose of the hearing is today. And unless I've said anything wrong so far, I'll just keep going.
>
> Mr. Kulwinski: Yeah. No, so far I would agree.
>
> Mr. Izzo: Okay. For purposes of the hearing today, we agree that Mr. J. Frederick Huff, Jr. is a trainer, that he was the trainer of Bell Flower on the 18th of July 2014, and that Bell Flower did finish first in Race 1 on July 18th, 2014.
> So far so good, Paul?
>
> Mr. Kulwinski: Yup.
>
> Mr. Izzo: The purposes, therefore, of this hearing are to determine the violations of the following rules of racing: Rule 3769-12-05, 3769-18-29, 3769-18-01-3769-18-02, 3769-18-03, and 3769-18-99.
> The basis for these violations deal with allegations that Mr. Huff did not comply with Ohio State Racing Commission post-race testing procedures. That Mr. Huff—we'd say that's one, I guess in ordinal numbers;
> Two, that Mr. Huff failed to return for the blood gas testing as directed by the judges and state veterinarian;
> and three, as a result, it was appropriate that Bell Flower be disqualified and placed last in the race, and that as a resultof being disqualified and placed last, the earned purse money would be forfeited and returned.
>
> Mr. Kulwinski: And we would agree with those statements.
>
> Hearing Officer: Okay. Do we have the determination of the judges?
>
> Mr. Kulwinski: No. The stipulations, we're in agreement in lieu of submission of

that document.

Tr. 13-14.

When considering that the parties agreed that the hearing was a de novo hearing, and the parties' stipulations were submitted in lieu of the document setting forth the judges' ruling, appellant has not demonstrated how, nor to what extent, he was prejudiced, particularly in light of the undisputed fact that appellant did not fully and completely comply with post-race testing procedures.

Appellant asserts that the hearing officer notes that Ms. Barbara Roth, a Commission employee, testified at the hearing. December 11, 2014 Report and Recommendation. The relevant part of the December 11, 2014 Report and Recommendation provides as follows:

> Barbara Roth, Director of Licensing for the Ohio State Racing Commission ("OSRC"), was the first witness called. She is responsible for maintenance of the books and records of the OSRC, keeping minutes, issuing notices and other orders, scheduling and other duties. She testified as to the procedural documents, that is, documents setting forth the procedures, including but not limited to: notices, responses, judges' documents, appeals, and other instruments setting forth the chain of custody of documents kept in the ordinary course of business of the OSRC. As custodian of the records, she identified documents labeled as Exhibits A through P, and these items were stipulated to by counsel of record for the parties.

A review of the record demonstrates that Barbara Roth, a representative for the Commission, was present at the October 20, 2014 hearing. Tr. 2. Attorney Paul Kulwinski stated as follows:

> Mr. Kuwinski: Sure. Paul Kulwinski, Assistant Attorney General, on behalf of the Ohio Racing Commission. Along with me, Andromeda Morrison, with the Attorney General's office, also on behalf of the Racing Commission. And I have Barb Roth here as a Commission representative.
>
> Hearing Officer: Okay. Will she be offering testimony today?

> Mr. Kulwinski: I don't believe so. It will only be necessary on documents; although, I think, which we'll get into in a minute, I think all the documents are going to be stipulated to on both sides, so I don't believe there will be a need for her to testify.
> Tr. 7.
>
> ***
>
> Mr. Kulwinski: Okay. And then additional to that, Attorney Izzo and I have gone through several of the documents, at least I believe the State's documents, which a copy was provided to Mr. Izzo along with the Hearing Officer, which are marked State's Exhibit A through, I believe, P, and I don't believe there are any objections to either the authenticity or the admissibility of those documents from Mr. Izzo.
>
> Mr. Izzo: That is correct. There are no objections.
>
> Tr. 9.

A further review of the transcript demonstrates that the parties stipulated to the admission of all documents submitted. Appellant argues that this was error and was to Mr. Huff's detriment. However, appellant has not demonstrated how he has been prejudiced by the admission of documents which his attorney, John Izzo, stipulated to on his behalf, negating the need for Ms. Roth to testify regarding the authenticity of those documents.

Appellant next asserts that the hearing officer is incorrect in that Dr. McQuinn sent an investigator to check for the horse to determine its whereabouts. The December 11, 2014 Report and Recommendation states, in relevant part:

> She indicated that there was another horse in the stall after Bell Flower, and she sent an investigator to check for the horse to determine its whereabouts, as she cannot leave the barn to looker for it.

The transcript of Dr. McQuinn's testimony demonstrates in pertinent part:

> Q. Okay. That's a great segue to my next question. How did you realize the horse was no longer there.

A. It was Ms. Moss that noticed. I'm continually sealing samples. If you can see, I would being sealing samples at 8:06, 7:30, 7:42.
So when Ms. Moss finished taking her break, got her paperwork together, did all of her paperwork, filled out the boards, was waiting across the aisleway, she looked over to the stall where Bell Flower had been, and Mrs. Huff had actually kept the door closed because the filly was nervous, and I just assumed had not been out there, she was still in there with the filly.
Well, Renee had asked me, she's like that's not Bell Flower. I'm like what do you mean it's not Bell Flower. So we checked all the stalls and we founds that Mrs. Huff had left with the horse.

Q. What did you do next?

A. I notified Randy that she had left. I tried to find her to get her to come back to the test barn so that we could complete the sample and I failed to find her, and I left it in the hands of the investigator to try to locate them.

A. Who was the investigator?

Q. Is he an inspector or investigator?

A. I think his title is an investigator. I don't know his correct title.

Q. What efforts did you take to try to find Bell Flower?

A. We checked the stalls to make sure she wasn't put in a different stall. I went out—I cannot leave the test barn, so my limits were at the end of the test barn. If I didn't see her within eyeshot, I couldn't do anything. I immediately called Randy and he started making phone calls and he's the one that had to leave the paddock on foot to try to locate the horse.

Q. Did you go with Randy?

A. No.

Q. So you don't know what Randy did.

A. No, I don't.

***

Q. Did you speak to Mrs. Huff after she left?

A. I didn't speak to her after she left. I didn't speak to anyone, but the owner, after we were trying to locate them.

Q. Okay. You said you spoke to the owner?

A. I think it was 7:45, 7:50. And at that point I had a full barn and, like I said, my samples are one after another, so I left it in Mr. Lane's hands and the owner and Mr. Huff. And I never had seen the horse—once the horse was off the grounds, it was a moot point to try to bring it back.

Tr. 136-138.

Upon review, this issue is not determinative of the ultimate issue in this case which is an undisputed fact. Exhibit I. Additionally, appellant takes issue with the fact that the hearing officer incorrectly said that Ms. Moss is a former veterinary assistant, or a technician. Ms. Moss testified on direct examination as follows:

Q. And what is your occupation, Ms. Moss?

A. Currently, right now, I'm unemployed.

Q. Okay. Did you previously work with the Racing Commission?

A. Yes, I did.

Q. In what capacity was that?

A. I was a vet assistant in the test barn.

Q. Okay. And what location did you work out of?

A. Scioto Downs.

Q. Okay. Did you work there last year—this year, I should say, 2014?

A. Yes.

Q. Okay. What were your duties while you worked at Scioto as a vet assistant?

A. My duties was a urine collector.

***

Q. Okay. And when you refer to "this," what is that?

A. That's my license. It has my name and it says vet assistant of the test

barn.

Tr. 67-69.

Upon review, this issue is not determinative of the ultimate issue in this case which is an undisputed fact. Moreover, pursuant to OSRC 3769-18-02, it was the trainer's (appellant's) responsibility to ensure that Bell Flower submitted to full and complete post-race testing.

Next, appellant takes issue with the hearing officer's referring to the stick that is used to collect a horse's urine as a "reflective" stick. December 11, 2014 Report and Recommendation. Again, this issue is not determinative of the ultimate issue in this case which is an undisputed fact.

Appellant next takes issue with the hearing officer's statement that Ms. Moss called upon Randy Lane. Again, this issue is not determinative of the ultimate issue in this case which is an undisputed fact. Moreover, it is irrelevant in light of OSRC 3769-18-02.

Appellant also asserts that he was prejudiced when the hearing officer incorrectly stated that "Crawford" was called out of order. It is appellant's contention that William Crawford was called in order by his counsel. This issue is not determinative of the ultimate issue in this case which is an undisputed fact.

Appellant asserts that the hearing officer incorrectly stated that Crawford sent Exhibit J by regular mail and email to affected parties described. William Crawford testified as follows:

> Q. So how were the horsemen notified then if they weren't snail-mailed, emailed, or handed a copy of this directive?

A. They were notified and it was posted. I know that it was on our website. I believe it was posted on the Ohio Harness Horsemen's website. I know veterinarians were instructed to post it at the test barn. They also were instructed to tell the horsemen, you know, the time they have to stay.

Tr. 177; see also Tr. 26-27, 28, 39-41, 42, 74.

The record also demonstrates that as Bell Flower's trainer, appellant is the absolute insurer of, and responsible for, the condition of the horse. O.A.C. 3769-18-02. Moreover, O.A.C. 3769-18-02 provides, in relevant part:

> Permit holders, other than county or independent fairs, shall provide and maintain a state testing area to include a group of stalls for the accommodation of the horses as are designated in rule 3769-18-01 of the Administrative Code, and **such horses shall remain in the state testing barn until required specimens have been obtained by the veterinarian and until he shall have released such horses.** (Emphasis added.)

O.A.C. 3769-18-02.

The absolute insurer rule, O.A.C. 3769-18-02, imposes strict liability on a trainer for the presence of drugs in a horse. *Cowans v. Ohio State Racing Commission*, 2014-Ohio-1811. The record demonstrates that appellant, Bell Flower's trainer, did not remain in the testing barn with the horse after the July 18, 2014 race.

Q. And how long did you remain in the testing barn?

A. Well, we bathed the horse, took the harness off, I helped do that, bathe the horse, and I'm taking everything out, and I'm probably in there maybe 10-20 minutes, I don't know, I'm not sure. I get the harness off, gather it up, so I clean, get the buckets and whatever.

Q. Were you there when blood was drawn?

A. No.

Q. Okay. Did you have any conversations with the veterinary assistant, the catcher?

A. No. The only conversation I had, and I don't remember which one it was, they asked what she was bedding on. If you bed on sawdust or straw they try

to convenience you with, you know, because horse will feel more relaxed and they'll urinate better. And I told her it was sawdust. And we walked down and looked at the stall. And that's the only conversation I have with either of them.

Q. Okay. Then you left the test barn.

A. I took all the harness, picked all the harness up, the buckets, and I went back to the ship-in barn where we were stabled at.

***

Q. Okay. So I guess what I'm trying to make sure I understand is you mentioned you came in with the horse, you helped bathe the horse, take some of the items off the horse, then did you leave the test barn and not return at that point?

A. After I left, I did not return.

Q. Okay. So you were not there when any of these documents were signed.

A. No.

Q. When any urine was taken.

A. No.

Q. Were you there when there was any conversations between your wife and—

A. No.

Q. And that would be, for the record, Dr. McQuinn or the vet tech.

Tr. 251-263.

The record also demonstrates that appellant's last commercial race was in 2012. Tr. 254. The record shows that appellant obtained his license for the July 18, 2014 race the morning of the race. Exhibit E and I; Tr. 256. Appellant testified that as a licensee of the Ohio State Racing Commission he is responsible to know the rules:

Q. And would you agree with me that as a licensee from the State Racing Commission, that you are responsible to know the rules that you're subject to?

A. Yes.

Tr. 262.

The letter sent from William Crawford advising the racing community about the change in the TCO2 testing from pre-race to post-race is dated December 6, 2013. The evidence demonstrates that the July 18, 2014 race was the first commercial race appellant had participated in since 2012, and that he obtained his license the morning of the race. Exhibit E. Appellant acknowledged on the record that it is incumbent upon him to know the rules of racing. Tr. 261-262. Thus, it was not Mr. Crawford's responsibility or anyone else's to *personally* inform appellant on July 18, 2014 of a testing change that had been implemented and in effect for over six months. Moreover, the notice was posted in the testing barn. Exhibit J; Tr. 26-27, 28, 39-41, 42, 74.

Appellant also takes issue with the hearing officer's reference to Mr. Crawford's testimony regarding (1) a groom's request for a TCO2 split test, (2) referring inaccurately to Exhibit J as an "Executive Order" and (3) stating that the state rested after Mr. Crawford's testimony. It is Attorney Izzo's contention that the hearing officer paid no attention to what occurred at the hearing.

The record demonstrates that the October 20, 2014 hearing transcript in this case consists of 285 pages. The record also includes numerous documents, all of which have been stipulated to by the parties' attorneys. Mr. Izzo argues that the hearing officer did not pay attention to what occurred at the hearing. Appellant's Reply Brief, p.5. This argument is incongruent with Mr. Izzo's argument that "Mr. Huff was denied the opportunity to have a meaningful hearing, as the hearing examiner conducted direct examination of the Commission's witnesses and cross-examined Mr. Huff's witnesses."

Appellant's Brief, p. 14. On the one hand, Mr. Izzo accuses the hearing officer of not paying attention to what occurred at the hearing, and then criticizes the hearing officer for becoming overly engaged in the hearing by asking questions of the witnesses.

First, Mr. Izzo provides no legal authority holding that an administrative hearing officer is prohibited from asking witnesses questions to clarify certain testimony. Secondly, Mr. Izzo arguments are *ad hominem* attacks on the hearing officer and are inappropriate in a legal brief. The transcript demonstrates that Hearing Officer Lyman did ask appropriate questions, some to which Mr. Izzo objected, and these objections were duly noted. The undisputed evidence (the hearing officer asking questions of some of the witnesses throughout the transcript) demonstrates that the hearing officer was fully engaged in the proceedings and that appellant was provided with a meaningful hearing.

Next, appellant takes issue with the hearing officer's statement regarding John Fairchild. The hearing officer stated "[H]e also acknowledged at the appeal hearing before this hearing officer, however, that he has had some difficulty hearing, and that he had previously had a stent in his ear. Tr. 212.

Q. Do you have any hearing problems?

A. No.

Q. No?

A. If I do, I'll ask you, but not—not what you would call a hearing problem, no.

Q. Okay. How would you describe it?

A. Well, I've been a construction worker for 30 years, so it kind of does away with your hearing a little bit. I'm not a perfect person by no means.

Q. Have you had your ears tested?

A. Yes.

Q. When?

A. Been about a year ago. I had a stent put in one.

Q. A stent?

A. Yes.

Q. In which ear?

A. The right ear.

Q. Has your hearing been decreased any?

A. No.

Q. Okay. What was the stent for then?

A. I bursted this eardrum so they had to put a stent in it.

Tr. 211-212.

The hearing officer had an opportunity to observe this witness's demeanor on the stand and judge his credibility. Again, no matter what impression the hearing officer may have had of Mr. Fairchild's sight and/or hearing ability, what Mr. Fairchild saw or heard has no effect on the ultimate issue in this case, which is an undisputed fact. Exhibit I.

Appellant asserts that the hearing officer was incorrect when he allegedly stated that Mrs. Huff washed the stall in the test barn. He also asserts that the hearing officer incorrectly stated that she threw her hands up to no one in particular. These statements do not affect the ultimate issue in this case which is an undisputed fact.

Appellant also takes issue with the hearing officer's (1) description of Exhibit H, (2) a blood draw, and (3) the fact that Mr. Huff does not ride horses. These alleged inaccuracies have absolutely no effect on the ultimate issue in this case, which is an undisputed fact.

Although appellant does not articulate it as such, it appears that he is arguing that the cumulative effect of these alleged inaccuracies somehow make the hearing officer's report unreliable. These complaints by appellant, for the most part, are based on his interpretation of the facts which are different from the hearing officer's interpretation. December 11, 2014 Report and Recommendation. However, the hearing officer is the trier of fact and rendered his Report and Recommendation to the Commission. The Commission had the authority to reverse, vacate or modify the hearing officer's recommendation. In the case *sub judice* the Commission affirmed the findings of fact and conclusions of law set forth in the Report and Recommendation after considering the entire record and concluding there was reliable, probative and substantial evidence to support the recommendation and concluding that it was in accordance with law. R.C. 119.12. To the extent appellant's criticisms can be interpreted as an allegation of bias on the part of the hearing officer, a presumption of honesty and integrity on the part of the administrative body exists, absent a showing to the contrary, which appellant has not demonstrated in the case *sub judice*. *Ohio State Bd. of Pharmacy v. Poppe*, 48 Ohio App.3d 222, 229 (1988).

Based on this Court's review of the record, there is reliable, probative and substantial evidence to support the Commission's January 26, 2015 Adjudication Order, given the undisputed evidence that appellant failed to comply fully and completely with the post-race testing procedures. Tr. Exhibit H, I and K; Tr. 32, 37, 39-40, 42, 62-63, 74, 82-83, 89, 93, 96, 97, 102, 105, 111, 131-132, 136, 140-141, 150-151, 197-198, 206, 221, 22, 229, 232, 240. The twenty or so alleged inaccuracies depicted by appellant do not legally challenge that undisputed fact. Exhibit I.

Where extraneous information contained in a report and recommendation is not dispositive of appellee's decision and does not affect appellant's substantial rights, this court does not err in affirming the Commission's order containing those extraneous statements. Even where a hearing officer's report is less than exemplary, the Ohio State Racing Commission has extensive authority to review and resolve independently evidentiary conflicts in the record. *Roy v. Ohio State Med. Bd.,* 80 Ohio App.3d 675, 686 (1992); see also *Bharmota v. State Medical Bd. Of Ohio,* 1993 Ohio App. LEXIS 5858 (Dec. 7, 1993).

Upon review, even in light of the alleged inaccuracies in the hearing officer's December 11, 2014 Report and Recommendation, there was the requisite amount of reliable, probative and substantial evidence to support the Commission's order, in light of the undisputed fact that appellant failed to comply fully and completely with post-race testing procedures. Exhibit H, I and K; Tr. 32, 37, 39-40, 42, 62-63, 74, 82-83, 89, 93, 96, 97, 102, 105, 111, 131-132, 136, 140-141, 150-151, 197-198, 206, 221, 22, 229, 232, 240. Accordingly, appellant's second assignment of error is not well-taken and is hereby **OVERRULED**.

In his third assignment of error, appellant asserts that his due process rights were violated. Appellant asserts that he was denied a meaningful hearing because the hearing officer denied his request for the hearing officer to view the test barn. However, appellant provides no case law demonstrating that the hearing officer is constitutionally mandated to view a test barn in such instances. Appellant does not demonstrate how he was prejudiced by the hearing officer not viewing the test barn, and does not explain how this affects the ultimate issue that is

substantiated by an undisputed fact. There is no evidence demonstrating that appellant's horse, Bell Flower, had a TCO2 test post-race on July 18, 2014, as required by the Commission's rules.

Appellant also asserts that he was never placed on notice that he may have violated R.C. 3769.091. R.C. 3769.091, the provision for imposing fines and suspensions, provides:

> The state racing commission may delegate to the stewards and judges of racing meetings under the jurisdiction of the commission the power to suspend licenses for not to exceed one year and to impose fines not to exceed one thousand dollars **for any violation of the rules or orders of the commission,** provided that tow of such officials shall concur in such suspension. Any suspension of a license by such officials is valid even though the suspension extends beyond the period of the racing meeting for which such officials have been appointed. The suspension shall be effective at all other race meetings under the jurisdiction of the commission. Any fine or suspension may be appealed to the commission. Such appeal shall stay the fine or suspension until further action by the commission. (Emphasis added).
>
> R.C. 3769.091.

The triggering event for R.C. 3769.091 is "any violation of the rules or orders of the commission." The fact is undisputed that appellant failed to comply fully and completely with post-race testing procedures. Pursuant to certain statutes, state agencies promulgate rules and regulations, i.e. administrative law. The purpose of administrative rule-making is to facilitate the administrative agency's placing into effect the policy declared by the General Assembly in the statutes to be administered by the agency. In other words, administrative agency rules are an administrative means for the accomplishment of a legislative end. *Nelson v. Mohr*, 2013-Ohio-4506 citing *Carroll v. Dept. of Adm. Servs.*, 10 Ohio App. 3d 108, 110 (1983). Consequently, in the case *sub judice*, R.C. 3769.091 is triggered by appellant's violation of the rules and invests the Commission with authority to impose fines and suspensions.

The phrase "due process" expresses the requirement of "fundamental fairness." In defining the process necessary to ensure "fundamental fairness," the United States Supreme Court has recognized that the clause does not require that the procedures used to guard against an

erroneous deprivation be so comprehensive as to preclude any possibility of error, and in addition, the Supreme Court has emphasized that the marginal gains from affording an additional procedural safeguard may be outweighed by the societal cost of providing such a safeguard. Thus, an appellant must make a showing of "identifiable prejudice." See *Haj-Hamed v. State Medical Board*, 2007 Ohio App. LEXIS 2335.

Upon a review of the entire record, the evidence supports that once the appellant was placed on notice, he was given the opportunity to, and did, request a hearing. The record reflects that the appellant had an opportunity to be heard at the July 31, 2014 hearing. Additionally, appellant had an opportunity to be heard at the October 20, 2015 hearing, where he was represented by counsel, testified on his own behalf, presented other witness testimony, and had his counsel cross-examine other witnesses on his behalf.

Thus, there is no issue regarding procedural due process since the record shows that appellant had notice and an opportunity to be heard. Moreover, the record demonstrates that appellant knew of the precise charges against him, knew of the hearing dates and participated, and had his counsel call witnesses on his behalf and cross-examine other witnesses. *Little v. State Med. Bd. Of Ohio*, 2010-Ohio-5627. Accordingly, appellant has not demonstrated the requisite "identifiable prejudice" and thus, his unsupported constitutional assertions must fail.

Accordingly, appellant's third assignment of error is not well-taken and is hereby **OVERRULED**.

In his fourth assignment of error, appellant asserts that the Commission's Order is not in accordance with law because it determined that Mr. Huff was in violation of Rules 3769-18-01, 3769-18-02, and 3769-18-03. Appellant asserts that he could not have been in violation of O.A.C. 3769.01 since there was no lab report upon which to base any violations. He also asserts

that he could not have violated O.A.C. 3769-18-02(A) since there was no chemical or other analysis of urine or blood that proved positive. Additionally, appellant asserts that he could not have violated O.A.C. 3769-18-03(A) for his mere failure to have his horse present at testing. He also asserts that he is not responsible because he wasn't in the test barn and the horse was his wife's (the groom's) responsibility. Appellant asserts that "the mere failure to have a horse present at testing is not a violation of this rule." Appellant's Brief, p. 16.

Appellant fails to distinguish how his argument reconciles with O.A.C. 3769-18-03. O.A.C. 3769-18-03 provides, in pertinent part:

> …Willful failure to be present at, **or** a refusal to allow, **or any act** or threat **to** impede or **prevent or otherwise interfere with, the taking of any such test sample shall subject the licensee guilty thereof to immediate suspension by the judges, and the matter shall be referred to the commission for its consideration…** (Emphasis added.)
>
> O.A.C. 3769-18-03.

Appellant's argument only focuses on the word "willful" in the rule, and completely ignores the rest of the rule's context, written in the conjunctive. The language of the rule *does indeed* provide for a violation for the mere failure to have a horse present at testing. See *Quesenberry v. Ohio State Racing Commission*, 1985 Ohio App. LEXIS 9742.

Moreover, appellant provides no case law for his assertion that the mere failure to have a horse present at testing is not a violation of any rule. The record is replete with reliable, probative and substantial evidence that appellant failed to fully and completely comply with post-race testing procedures. Exhibit H, I and K; Tr. 32, 37, 39-40, 42, 62-63, 74, 82-83, 89, 93, 96, 97, 102, 105, 111, 131-132, 136, 140-141, 150-151, 197-198, 206, 221, 22, 229, 232, 240.

The reason that no lab report exists for the required TCO2 testing for Bell Flower is because appellant failed to have his horse remain in the test barn until this test could be completed. Thus, appellant violated the Commission's rules. O.A.C. 3769-18-03; Exhibit I. It

is disingenuous for appellant to argue that the lack of a lab report for the required TCO2 testing excuses him from any violations of the rules. Accordingly, appellant's violations of O.A.C. 3769-18-01, 3769-18-02, and 3769-18-03 are in accordance with law. Thus, appellant's fourth assignment of error is not well-taken and is hereby **OVERRULED**.

The fifth assignment of error asserts that the Commission's Order is not in accordance with law because the Commission did not rule on appellant's objections.
In this case, any issues raised by appellant's objections could have been determined through a review of the material the Commission had before it, such as the transcript of the October 20, 2014 hearing, the stipulated exhibits, etc. Appellant did not affirmatively show that the objections were not considered by the Commission.

Where the record is silent, courts must presume the Ohio State Racing Commission reviewed appellant's objections before adopting the hearing officer's report and recommendation, absent an affirmative showing to the contrary. *Perry v. Joseph*, 2008-Ohio-1107 citing *Matter of Herman*, 1995 Ohio App. LEXIS 198. The minutes of the Commission's January 21, 2015 meeting demonstrate that appellant and his counsel, John Izzo, were present and thus, had the opportunity to address appellant's objections at that time, if he had chosen to do so. Accordingly, appellant's fifth assignment of error is not well-taken and is hereby **OVERRULED**.

In the sixth assignment of error, appellant argues that the Commission's Order is not based upon reliable, probative, and substantial evidence because the hearing officer incorrectly determined the veterinarian's and vet assistants testimonies were most persuasive. Appellant is challenging the weight given to the testimony of some of the witnesses. It is the function of the Commission to weigh the credibility of such testimony

and reach factual findings. *Houser v. Ohio Depat. Of Job and Family Servs.*, 2011-Ohio-1593 citing *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Servs.*, 73 Ohio St.3d 694, 696 (1995). The record in this case includes reliable, probative and substantial evidence from appellant and other witnesses' testimony which supports the undisputed fact that appellant failed to have his horse fully and completely comply with post-race testing procedures. Exhibit H, I and K; Tr. 32, 37, 39-40, 42, 62-63, 74, 82-83, 89, 93, 96, 97, 102, 105, 111, 131-132, 136, 140-141, 150-151, 197-198, 206, 221, 22, 229, 232, 240.

Thus, the record is replete with reliable, probative and substantial evidence supporting the Commission's Adjudication Order and thus, the weight and credibility issues regarding the witnesses are significant because the overwhelming testimony of most of the witnesses demonstrates that appellant did not present his horse, Bell Flower, for TCO2 post-race testing as required. Exhibit H, I and K; Tr. 32, 37, 39-40, 42, 62-63, 74, 82-83, 89, 93, 96, 97, 102, 105, 111, 131-132, 136, 140-141, 150-151, 197-198, 206, 221, 22, 229, 232, 240. Moreover, there is no contrary evidence in the record that appellant *did* present his horse for TCO2 as required. Accordingly, appellant's sixth assignment of error is not well-taken and is hereby **OVERRULED**.

In the seventh assignment of error, appellant asserts that the Commission's Order is not based upon reliable, probative and substantial evidence and is not otherwise in accordance with law because the hearing officer kept vital information from the Commission by failing to recount witness testimony that did not support the hearing examiner's theory of the case. Appellant alleges that five (5) different statements would have made a difference in this case. Appellant's Brief, p. 19; Tr. 32, 56, 84, 96, 142, 194-195, 198.

The Commission had the entire record before it to review. The minutes of the Commission's meeting held on January 21, 2015, reflect as follows regarding Agenda Item 12. B:

> 12. In the matter of hearing officer's report and recommendation:
>
> ***
>
> A. **Frederick Huff Jr.:** Mr. Huff was present at this appeal. He was represented by counsel.
>
> Following a hearing on July 31, 2014, Mr. Huff was declared in violation of racing rules when his horse, Bell Flower, left the test barn before being dismissed following a winning performance in the first race at Scioto Downs on July 18, 2014.
>
> Judges at Scioto Downs disqualified the horse from first to last and ordered the return and redistribution of purse money won ($20,000).
>
> The hearing officer recommended that the purse forfeiture and redistribution should be upheld.
>
> Motion to deny the appeal and approve the purse forfeiture by Commissioner Winters, second by Commissioner Koch. In a roll call vote, Chairman Schmitz voted aye, Commissioner Winters voted aye, Commissioner Book voted aye, Commissioner Koch voted aye and Commissioner Munroe voted aye. Motion approved unanimously.
>
> January 21, 2015 Commission Minutes.

Appellant was present at the Commission's January 21, 2015 meeting, was represented by counsel, and had the opportunity to present and emphasize these statements to the Commission. However, upon review, none of these statements legally challenge the ultimate issue in this case, which is based on an undisputed fact. Exhibit H, I and K; Tr. 32, 37, 39-40, 42, 62-63, 74, 82-83, 89, 93, 96, 97, 102, 105, 111, 131-132, 136, 140-141, 150-151, 197-198, 206, 221, 22, 229, 232, 240.

Accordingly, appellant's seventh assignment of error is not well-taken and is hereby **OVERRULED**.

Upon review, it is undisputed that appellant failed to present his horse for the required TCO2 post-race test. Exhibit H, I and K; Tr. 32, 37, 39-40, 42, 62-63, 74, 82-83, 89, 93, 96, 97, 102, 105, 111, 131-132, 136, 140-141, 150-151, 197-198, 206, 221, 22, 229, 232, 240. It is undisputed that appellant, as trainer and absolute insurer, knew he had to comply with the rules which included reporting to the test barn for post-race testing. *Quesenberry*, 1985 Ohio App. LEXIS 9742, 9749; Tr. 235, 240, 245, and 262. Based on the conflicting testimonies of Dr. McQuinn and Mrs. Huff, the Commission found the testimony of Dr. McQuinn to be more credible when she stated that she did not release appellant's horse from the test barn. Tr. 42.

Appellant's *ad hominem* attacks on the hearing officer, the alleged inaccuracies in the December 11, 2014 Report and Recommendation, and appellant's arguments on issues that are, at best, tangential to the ultimate issue in this case, are not persuasive.

Upon review, the Commission had the entire record available to it and was able to review the documents and witness testimony independently before deciding to adopt, modify or reject the hearing officer's report.

DECISION

Upon consideration, the Court concludes that the Commission's January 26, 2015 Adjudication Order is supported by reliable, probative and substantial evidence and is in accordance with law. See R.C. 119.12. Accordingly, the January 26, 2015 Adjudication Order of the Ohio State Racing Commission is hereby **AFFIRMED**.

THE COURT FINDS THAT THERE IS NO JUST REASON FOR DELAY. THIS IS A FINAL APPEALABLE ORDER**. Pursuant to Civil Rule 58, the Clerk of Court shall serve notice of this judgment and its date of entry upon all parties.**

It is so ordered.

Copies to all parties.

Franklin County Court of Common Pleas

Date:	05-27-2015
Case Title:	J FREDERICK HUFF JR -VS- OHIO STATE RACING COMMISSION
Case Number:	15CV001225
Type:	ENTRY

It Is So Ordered.

/s/ Judge Kimberly Cocroft

Court Disposition

Case Number: 15CV001225

Case Style: J FREDERICK HUFF JR -VS- OHIO STATE RACING COMMISSION

Case Terminated: 10 - Magistrate