

3363

1. RACING COMMISSION, OHIO STATE — ADMINISTRATIVE RULES — RACING OFFICIALS DESIGNATED AS STEWARDS AT RUNNING RACE MEETINGS AND AS JUDGES AT HARNESS RACE MEETINGS EXERCISE QUASI-JUDICIAL POWERS — PUBLIC OFFICERS — AUTHORITY — COMPENSATION MAY BE FIXED BY COMMISSION AND PAID FROM PUBLIC FUNDS WITHIN LIMITS OF CURRENT APPROPRIATIONS — SECTION 3769.03 RC — 10 AG SEPTEMBER 13, 1951 APPROVED AND FOLLOWED.
2. RACING COMMISSION — GIVEN AUTHORITY TO “PRESCRIBE THE RULES, REGULATIONS AND CONDITIONS UNDER WHICH HORSE RACING SHALL BE CONDUCTED” — AUTHORITY DOES NOT EXTEND TO MAKING OF RULES CONTRARY TO EXISTING LAWS OR WHICH REPEAL OR ABROGATE STATUTES — SECTION 3769.03 RC.
3. SECTION 3769.09 RC AUTHORIZES EMPLOYMENT OF A REPRESENTATIVE TO ATTEND EACH HORSE RACING MEETING — COMPENSATION — TRAVELING EXPENSES — HOLDER OF PERMIT — PAYMENT FOR SERVICES.
4. ADDITIONAL DUTIES ENUMERATED IN SECTION 3769.09 RC — COMPENSATION AND EXPENSES — LIMITATION AS TO AMOUNTS PAID — ADDITIONAL AMOUNTS PAID.
5. AMOUNT OF FEE WHICH MAY BE CHARGED INCIDENTAL TO ISSUANCE OF PERMIT — RACING COMMISSION WITHOUT AUTHORITY TO ALTER STATUTORY PROVISION BY ADOPTION OF ADMINISTRATIVE RULE — SECTION 3769.04 RC.

SYLLABUS:

1. Under the provisions of pertinent administrative rules adopted by the Ohio state racing commission the racing officials designated as stewards at running race meetings, and as judges at harness race meetings, exercise powers which are quasi-judicial in nature and which may properly be conferred on public officers and authority is given under the provisions of Section 3769.03, Revised Code, for the provision by rule for the appointment of such officials by the Ohio state racing commission. The

compensation of such officials may be fixed by the commission, and paid from public funds within the limits of current appropriations. Informal Opinion of the Attorney General of September 13, 1951, approved and followed.

2. The Ohio state racing commission is given authority, under the provisions of Section 3769.03, Revised Code, to "prescribe the rules, regulations and conditions under which horse racing shall be conducted" in this state, but such authority does not extend to the making of rules which are contrary to existing laws, or which repeal or abrogate statutes.

3. Section 3769.09, Revised Code, authorizes the employment by the Ohio state racing commission of a representative "to attend each horse racing meeting," and provides further that "The compensation of such representative, not to exceed twenty dollars for each racing day he attends, and his actual and necessary traveling expenses shall be charged to and collected weekly, by the commission, from the holder of the permit at whose racing track said representative serves. Such representative shall be paid in the same manner as are other employes of the commission. Only one representative may be assigned to any one track, at the expense of the permit holder, on any one racing day."

4. Where the Ohio state racing commission has appointed stewards and judges for assignment to duty at particular racing meetings, it may properly assign to such officers the additional duties enumerated in Section 3769.09, Revised Code, and in such case the compensation and expenses of one of such officers may be charged to the permit holder concerned to the extent provided in such section; but the limitation in such section as to the amounts which may be so charged has the effect of denying to the commission any authority to provide by rule for charging to such permit holder any additional amounts to provide for the compensation either of such officers or of stewards and judges generally.

5. The amount of the fee which may be charged incidental to the issuance of a permit under the Ohio Horse Racing Act is fixed by the terms of Section 3769.04, Revised Code, and the Ohio state racing commission is without authority to alter such statutory provision by the adoption of an administrative rule.

Columbus, Ohio, December 29, 1953

The Ohio State Racing Commission,
Columbus, Ohio

Gentlemen :

Your request for my opinion reads as follows :

"A question has arisen, as to the advisability, propriety and desirability of Stewards at Running Horse Race Meetings and Judges at Harness Horse Race Meetings conducted in the State of Ohio being selected and employed by this Commission instead of by Permit Holders as has been the practice in the past.

"This Commission desires, and hereby makes formal request of you for an opinion and interpretation of the provisions of the Horse Racing Act, as to whether :

“(1) The Ohio State Racing Commission may hire Stewards and Judges, charging their salaries against Permit Holders, and

“(2) The Ohio State Racing Commission may, by Rule, increase the amount charged Permit Holders for Permit Fees, in order to pay salaries of Commission-Appointed Racing Stewards and Harness Judges.”

The statutory authority of your Commission to adopt administrative rules relative to the conduct of horse racing in this state is set out in Section 3769.03, Revised Code, in the following language:

“The state racing commission may prescribe the rules, regulations, and conditions under which horse racing shall be conducted, and may issue, suspend, diminish, or revoke permits to conduct horse racing as authorized by sections 3769.01 to 3769.14, inclusive, of the Revised Code.”

The position, or office, of steward is not provided for in the Ohio Horse Racing Act, Chapter 3769, Revised Code, but is created under certain of the administrative rules promulgated by the Commission. The functions and duties of these racing officials may be the more readily appreciated by reference to certain of the Commission's rules as follows:

“Rule No. 80

“The Stewards (who shall always be at least three in number) or a majority of them shall determine all questions in reference to racing arising during the meeting and all questions in reference to licensing, entries, etc., arising before the meeting has begun, to the extent to which they are authorized to act under other rules of racing, and in such questions their orders shall supersede the orders of the officials of the permit holder.

“Rule No. 81

“All Owners, Trainer(s), Jockeys, Grooms and other persons attendant upon horses shall be under the general supervision of the Stewards and they also shall have supervision over all other Racing Officials and over those parts of the premises of the Permit Holder used for the conduct of racing. The Stewards shall have free access to any parts of the premises used for racing.”

“Rule No. 84

“The Stewards shall have the power to fine not in excess of two hundred and fifty (\$250.00) dollars, suspend, rule off or expel at their discretion any person for disorderly conduct or

breach of the peace, or for violations of the Rules of Racing or any regulations they may establish not inconsistent with the Rules of Racing. Any such regulations adopted by the Stewards shall be reported promptly in writing to the Commission, and shall remain in effect unless and until the Commission shall otherwise order.

“Rule No. 86

“The Stewards may suspend or exclude from the stands and premises, improper and objectionable characters and persons who have been ruled off by the racing authority of any other state or country so long as such ruling of such authority remains in force.

“Rule No. 149

“Any person fined, suspended, expelled or ruled off, shall have the right to appeal to the Commission for a review of the decision. Any person aggrieved by any other ruling in the application of the Rules of Racing, may also appeal to the Commission for a review of same. Such appeals shall be made in writing and until they can be considered and disposed of by the Commission, the rulings shall be in effect.”

There can scarcely be any doubt that the officials thus provided for by administrative rule, and authorized thereby to perform the duties and to exercise the powers therein provided, are engaged in the exercise of both executive and quasi-judicial functions of the sovereign state which one would normally expect to be lodged in public officers. Thus, as to the fundamental question implicit in your inquiry as to the power of the Commission to appoint these officials, however they be paid, it would appear to be a debatable question whether such power of appointment could validly be lodged elsewhere than in some agency of the state government. This is true by reason of the rule that a quasi-judicial power delegated by the Legislature to an administrative agency cannot be redelegated by such agency. See 42 American Jurisprudence, 387, Section 73. Moreover, an attempted redelegation of quasi-judicial power to the officers, agents or employes of a private organization such as a racing association operated on a purely commercial basis for profit is of even more doubtful validity. See, *In the Matter of Fink v. Pierce*, 302 N.Y., 216.

I find that the appointment of racing stewards by the state racing commission itself, rather than by the track operators concerned, was the subject of a communication which I addressed to your Commission on September 13, 1951, in connection with hearings then being conducted by the Commission in the matter of one Becknell, a licensed trainer. In that

communication I referred to "the arrangement whereby the stewards of a particular race meeting, although exercising by virtue of the rules of the Commission a considerable amount of authority as agents of that body, are actually hired and paid by the racing association which is conducting a particular meeting." I then said further :

"* * * On this point I deem it proper to advise you that the commission, in my opinion, has the authority to adopt such rules as would change this arrangement to one in which the commission would hire the stewards and assign them to the several Ohio race meetings in their discretion. It is my recommendation that you explore the wisdom of such a policy and give it your serious consideration."

As to the basic question presented by your present inquiry, therefore, I am impelled to adhere to the view that I have thus previously expressed and to conclude that your Commission does have the power to provide by rule for the appointment by the state racing commission of the racing officials known as stewards. The authority to appoint such officials includes, of course, the power to fix their compensation within the limits of appropriations available to the commission.

As to the appointment of the harness horse racing officials known as judges, although I do not find that your Commission has ever directly defined their powers and duties by rule, I note the following provision in the Commission's rule 269 :

"All harness racing in Ohio over which the Commission has jurisdiction and supervision shall be conducted under and in conformity with the rules and regulations of the United States Trotting Association except wherein they may conflict with the laws of Ohio or the Rules and Regulations which the Commission has set forth for harness racing."

Because none of the other rules of the Commission appear to relate to the duties and functions of judges at harness race meetings, we may properly note certain of the rules of the United States Trotting Association relative to these officials. In this connection I am informed that the association's rule 6 provides in part as follows :

"Section 12 :

"The judges shall have authority while presiding to inflict fines and penalties, as prescribed by these rules ; to determine all

questions of fact relating to the race over which they preside; to decide any difference between parties to the race, or any contingent matter which shall arise, such as are not otherwise provided for in these rules; and they may declare pools and bets 'off' in case of fraud, no appeal to be allowed from their decision in that respect, but all their decisions shall be in strict conformity with the rules, or with the principles thereof. * * *

Section 13 provides:

"Before the Judges can impose a penalty of suspension exceeding two days or fine in excess of ten dollars upon any party, such party shall be granted a hearing by the Judges at a designated time. The Presiding Judge and at least one Associate Judge shall be present at all hearings and may inflict the penalties prescribed by these rules. A penalty is imposed from the time that it is entered in the Judges' Sheet and the same is signed by the Judges."

Appeals from the decisions of the judges appear to be provided for in the association's rule 23 which provides in part:

"Section 6:

"All decisions and rulings of the Judges of any race, and of the officers of Member Tracks may be appealed to the District Board of Review within ten (10) days after the notice of such decision or ruling. The appeal may be taken upon any question in the conduct of a race, interpretation of the rules, decision relative to the outcome of a race, application of penalties, or other action affecting owners, drivers, or horses, but it must be based on a specific charge which, if true, would warrant modification or reversal of the decision. In order to take an appeal under Rule 18, a driver must have first made a complaint, claim, or objection as required in Rule 18. The District Board of Review may vacate, modify, or increase any penalty imposed by the Judges and appealed to the Board."

From an examination of these provisions it is abundantly clear that where a judge is acting under the authority of the rules of the United States Trotting Association, under which rules harness racing in recent years has been conducted in this state, such officials exercise quasi-judicial powers and functions substantially similar in the respects pertinent to this inquiry to those of stewards at running race tracks. Such being the case, it would follow that substantially all that has been said hereinbefore with reference to stewards would be equally applicable to judges.

As to the question of providing by rule for the compensation of

these officials by the several racing associations, it is to be borne in mind that the appointment of such officials by the commission constitutes a recognition of their status as public officers. The compensation of public officers, although it may be fixed in a number of different ways, is normally paid from public funds raised either by taxation or other charges exacted by law.

In the instant case it is proposed to make such payment one of the "conditions under which horse racing shall be conducted," i.e., to make such payment a condition of the granting of a permit to race.

Elsewhere in the statute provision is variously made for the exaction of charges and fees from permit holders. In Sections 3769.08 and 3769.081, Revised Code, we find provision for the levy of two distinct excises on race track operations, and in Section 3769.04, Revised Code, is a provision for a permit fee. These exactions alone are sufficient to suggest that the "conditions" which the commission may establish by rule do not include the exaction of further money payments from permit holders otherwise than under authority of express statutory enactment. Any doubt on this point, however, would appear to be dispelled by the following provision in Section 3769.09, Revised Code.

"The state racing commission shall employ a representative to attend each horse-racing meeting, held under a permit issued under sections 3769.01 to 3769.14, inclusive, of the Revised Code. Such representative shall give bond in the sum of five thousand dollars with sufficient sureties to be approved by and made payable to the treasurer of state, which bond shall be filed with the secretary of state. *The compensation of such representative, not to exceed twenty dollars for each racing day he attends, and his actual and necessary traveling expenses shall be charged to and collected weekly, by the commission, from the holder of the permit at whose racing track said representative serves.* Such representative shall be paid in the same manner as are other employees of the commission. *Only one representative may be assigned to any one track, at the expense of the permit holder, on any one racing day. * * **"

(Emphasis added.)

This provision represents a fourth instance in which the Legislature has expressly provided for an exaction from a permit holder, and in this case the object of the exaction is to provide for the compensation and expense of a public agent. This provision alone, exclusive of the limitation therein stated, would appear to be sufficient to indicate a legislative

intent, under the doctrine of "expressio unius," that no further exactions of this nature were to be made; and when consideration is given to the express limitation in the language above to the compensation and expenses of a single representative, there would appear to be no room for doubt that such was, indeed, the intent of the Legislature.

In this connection I conceive to be quite irrelevant the suggestion that the duties imposed on the commission's representative under the provisions of Section 3769.09, supra, are materially different from those provided for by rule in the case of stewards or judges. It is conceivable, of course, that the commission might choose to amend its rules so as to impose on the officials appointed by it all of the duties mentioned in Section 3769.09, supra, in addition to the duties presently assigned to stewards by rule. In such case such officials would be none the less the representatives whose designation is the subject of this section, simply by reason of the fact that additional duties have been assigned to them. But however this may be, I am impelled to the conclusion that the application of the doctrine of "expressio unius" to the statutory language here under scrutiny has the effect of clearly revealing the legislative intent that no charge should be made of permit holders to defray the expenses and to provide the compensation of officers or employees of the commission except to the extent provided in Section 3769.09, Revised Code.

In this situation it becomes necessary merely to note that administrative agencies are without power to make "rules which subvert the statute reposing such power, or which are contrary to existing laws * * *." 42 American Jurisprudence, 355, Section 49. It thus becomes necessary to conclude that any rule on the subject suggested in your first inquiry would be subject to the statutory limitations set out in Section 3769.03, Revised Code.

By the application of the rules noted above as to the constitutional limitations on the rule-making power of an administrative agency, your second question is readily disposed of. You will observe that on the subject of fees to be paid by a permit holder, Section 3769.04, Revised Code, provides in pertinent part:

"Any person, association, corporation, or trust desiring to hold or conduct a horse-racing meeting, wherein the pari-mutuel or certificate system of wagering is allowed, shall make application to the state racing commission for a permit to do so. Each

such application, accompanied by a *permit fee of ten dollars* and a cash bond, certified check, or bank draft, shall be filed with the commission at least five days prior to the first day of each horse-racing meeting which such person, association, corporation, or trust proposed to hold or conduct. * * *

(Emphasis added.)

The nature of the payment of the "cash bond, certified check or bank draft" mentioned in this section is apparent from the following provisions in Section 3769.05, Revised Code:

"At the time of making application for a permit to conduct a horse-racing meeting, the applicant shall deposit with the state racing commission a cash bond, certified check, or bank draft, payable to the order of the commission, in an amount equal to one hundred dollars for each day, excluding Sundays, petitioned for in said application. At the close of the last day of the horse-racing meeting, for which a permit is issued, as provided for in Section 3769.06 of the Revised Code, the commission shall refund to such permit holder the sum of one hundred dollars for each racing day the permit holder paid to the state tax commissioner the tax due for said day, as provided for and at the rate stipulated in section 3769.08 of the Revised Code. If such permit holder has not paid to the commission the compensation and expenses of the representatives assigned to his track, as provided for in Section 3769.09 of the Revised Code, the commission shall withhold such refund until the same has been paid. In harness horse-racing meetings, if any full day's racing is declared off by the judges because of inclement weather or a muddy track, the commission shall refund to the permit holders the sum of one hundred dollars of their deposit for each such day."

From this language it is clear that the permit fee itself is fixed by statute in the amount of ten dollars, and this notion is in full harmony with the following provision in Section 3769.06, Revised Code:

"Upon the proper filing of an application to conduct a horse-racing meeting accompanied by a permit fee and a cash bond, certified check, or bank draft by any person, association, trust, or corporation, not in default of payment of any obligation or debt due to the state under sections 3769.01 to 3769.14, inclusive, of the Revised Code, the state racing commission may issue a permit to such applicant to hold or conduct a horse-racing meeting. * * *

While it may be a matter of some surprise that a purely nominal fee has thus been established, for what is indubitably a valuable and potentially highly profitable franchise, I am unable to find any authority in

the statute which would authorize the commission to charge any greater amount; and since an administrative agency is wholly without power to adopt a rule "contrary to existing laws," I must conclude that your second inquiry must be answered in the negative.

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. Under the provisions of pertinent administrative rules adopted by the Ohio state racing commission the racing officials designated as stewards at running race meetings, and as judges at harness race meetings, exercise powers which are quasi-judicial in nature and which may properly be conferred on public officers; and authority is given under the provisions of Section 3769.03, Revised Code, for the provision by rule for the appointment of such officials by the Ohio state racing commission. The compensation of such officials may be fixed by the commission, and paid from public funds within the limits of current appropriations. Informal Opinion of the Attorney General of September 13, 1951, approved and followed.

2. The Ohio state racing commission is given authority, under the provisions of Section 3769.03, Revised Code, to "prescribe the rules, regulations and conditions under which horse racing shall be conducted" in this state, but such authority does not extend to the making of rules which are contrary to existing laws, or which repeal or abrogate statutes.

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4. Where the Ohio state racing commission has appointed stewards and judges for assignment to duty at particular racing meetings, it may properly assign to such officers the additional duties enumerated in Section 3769.09, Revised Code, and in such case the compensation and expenses of one of such officers may be charged to the permit holder

concerned to the extent provided in such section; but the limitation in such section as to the amounts which may be so charged has the effect of denying to the commission any authority to provide by rule for charging to such permit holders any additional amounts to provide for the compensation either of such officers or of stewards and judges generally.

5. The amount of the fee which may be charged incidental to the issuance of a permit under the Ohio Horse Racing Act is fixed by the terms of Section 3769.04, Revised Code, and the Ohio state racing commission is without authority to alter such statutory provision by the adoption of an administrative rule.

Respectfully,

C. WILLIAM O'NEILL
Attorney General