

**COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION No. 23-CI-169**

**STEVEN ASMUSSEN, LEE LEVINSON,  
ED ORR and SUSIE ORR**

**PETITIONERS**

**vs.**

**THE KENTUCKY HORSE RACING  
COMMISSION**

**RESPONDENT**

**OPINION & ORDER**

This matter is before the Court on the *Motion for Summary Judgment*, filed May 22, 2023 by Petitioners Steven Asmussen, Lee Levinson, and Ed and Susie Orr. This matter came before the Court for oral argument on Wednesday, October 4, 2023. Upon review of the record, and being sufficiently advised, the Court hereby **GRANTS** Petitioners' *Motion for Summary Judgment* and **REVERSES** the January 23, 2023 Final Order of Respondent, the Kentucky Horse Racing Commission.<sup>1</sup>

**ISSUE**

The issue in this case is whether the January 23, 2023 Final Order of the Kentucky Horse Racing Commission (KHRC of "the Commission") was an arbitrary agency action? The underlying dispute turns on whether the KHRC can use the presence of hydroxyethylpromazine

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<sup>1</sup> The Defendant, KHRC, affirmed the Recommended Order with modifications on January 23, 2023. A copy of the final order is attached as Exhibit 10 to the Plaintiff's Motion for Summary Judgment. *See Ex. 10, Pl. 's Mot. for Summ. J. and Br. In Supp., Appx. 143-148*. The Final Order is also attached as Exhibit A to the Petitioner's Petition for Judicial Review, filed February 16, 2023. *See Ex. A, Pet'r's Pet. for Judicial Rev.*

sulfoxide (“HEPS”), a metabolite of acepromazine (“ace”), in urine samples. *Id.* at 6-7. (¶¶ 39-60) to support a finding that the Petitioners’ illegally used ace. Ace is an approved therapeutic drug, but it cannot be used within 48 hours of a race. The Petitioners acknowledge that they administered ace orally to the horses 5-7 days prior to the races in question, for an appropriate therapeutic reason. There were no blood or urine tests that showed the presence of Ace in the horses’ blood or urine at the time of the race. The sole basis for the Commission’s penalty is the presence of HEPS, the metabolite of the approved therapeutic drug, in these horses. The Commission has issued “voluntary” guidance about the use of Ace when administered intravenously, but it has not issued any guidance or regulations about the oral administration of HEPS. More importantly, it has not adopted a clearly defined *regulation* that puts trainers on notice of what they can and cannot do regarding the use of Ace in the days prior to a race. The Commission, in its *regulations* (as opposed to its guidance documents) has not set a threshold for the presence of HEPS, nor has it listed HEPS as a banned substance. Rather, the Commission has used the presence of HEPS at levels in excess of its voluntary guidance document, as a proxy for finding the presence of Ace in the horses’ systems. Yet the Commission has failed to cite any generally accepted scientific basis for determining the rate at which Ace metabolizes in horses, or the amount of HEPS in a horses system that would be a reliable indicator of the illegal use of Ace.

Resolution of the ultimate question of arbitrariness requires review of the regulations alleged to have been violated. Specifically, the Petitioners argue “the alleged violation in this case turns on **810 KAR 1:018 §2(3)**, which states, “Therapeutic medications shall not be present in excess of established threshold concentrations set forth in this administrative regulation or in **810 KAR 1:040.**” *See Pet’r’s Pet. for Judicial R.*, at 13. (Court’s own emphasis added)

The question requires analysis of the regulation found in **810 KAR 1:018 §2 (2018)**, which provides that a horse “shall not carry” any substance during a race that can affect the horse and that certain therapeutic medications shall not be present in excess of established threshold concentrations. *See Pet’r’s Mot. for Summ. J. and Br. In Supp.*, at 3. The Plaintiffs contend that **810 KAR 1:018 § 2 (2018)** requires the detection of acepromazine, not merely its metabolite HEPS. Plaintiffs seek declaratory judgment that the Commission’s interpretation of **810 KAR 1:018 §2 (2018)** is arbitrary, because it allows a finding of the illegal presence of acepromazine based solely on the presence of HEPS in the horse’s bloodstream, even though there was no other evidence that acepromazine, a legal therapeutic drug, was improperly administered or remained in the blood of the horse at the time of the races in question. *Id.*

#### STATEMENT OF FACTS

This action is before the Court following the January 23, 2023 Final Order of the Respondent, the Kentucky Horse Racing Commission (“the KHRC”). *See Ex. 10, Pl.’s Mot. for Summ. J. and Br. In Supp., Appx. 143-148.* Petitioner Steven Asmussen is a licensed thoroughbred horse trainer, while Petitioners Lee Levinson and Ed and Susie Orr are licensed owners of the two horses involved in this matter, named THOUSAND PERCENT and BOLDOR, respectively. *See Pet’r’s Pet. for Judicial R., supra* at 2-3. THOUSAND PERCENT finished first in the second race at Churchill Downs on June 28, 2018. *Id.* at 3. BOLDOR finished first in the sixth race at Keeneland on October 25, 2018. *Id.* at 3.

After each of their respective races, the post-race samples showed the presence of hydroxyethylpromazine sulfoxide (“HEPS”), a metabolite of acepromazine (“ace”), in their urine samples. *Id.* at 6-7. (¶ 39-60). HEPS is considered a derivative substance (metabolite) that is generated when the body uses up ace, but it is not a drug that can be administered. *See Pet’r’s Pet.*

for *Judicial R.*, *supra* at 6. (¶ 40-47) Ace metabolizes at a pace that leaves it “usually undetectable in the horse’s blood stream within six to eight hours after administration.” *Id.* (¶ 45-46) When Ace is consumed, the horse’s body transforms the parent drug into a number of metabolites, one of which is HEPS. *Id.* (¶ 46) Of all the metabolites generated by the consumption of Ace, HEPS is the detectable for the longest period. *Id.* (¶ 47)

Due to the long-lasting presence of HEPS in the horse’s body after the rapid consumption of Ace, the Defendant Horse Racing Commission “regulates acepromazine via reference to HEPS; specifically, the Commission prohibits HEPS positives over 10 ng/mL in a horse’s post-race urine.” *See Def.’s Resp.to Pet’r’s Mot. for Summ. J.*, at 2. (internal citation to AR at 60-2, KHRC Hearing Exhibit 2 (KHRC 40-02 at 10)).<sup>2</sup> Here, the question is whether the Commission has any regulation which actually “prohibits HEPS positives over 10 ng/mL in a horse’s post-race urine” as the Commission argues, or whether the Commission has illegally bootstrapped its voluntary guidance on the intervenous use of HEPS into a mandatory policy that equates HEPS with improper administration of Ace.

THOUSAND PERCENT was found to have 76ng/ml of HEPS at the time of his win. *Id.* at 7. (¶ 54) BOLDOR was found to have approximately 17 ng/mL of HEPS. *Id.* (¶ 60) Split samples sent to laboratories subsequently reported “approximately 67 ng/mL of HEPS and 20 ng/mL of HEPS in the split urine samples for *Thousand Percent and Boldor*, respectively.” *Id.* at 9. (¶ 74) Due to the presence of more than 10 nanograms-per-milliliter of HEPS in both post-race samples,

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<sup>2</sup> *See Appx. 973-979. RMTC CTS (Controlled Therapeutic Medications) Monograph Series Study on Acepromazine.* The study is also found labeled with a sticker that identifies it as “Exhibit 31,” but the Court is unclear if this is a Joint Exhibit or an exhibit submitted on behalf of one of the parties, so the Court advises looking for the cite in the Appendix Record in this case.

the KHRC concluded---or in fact *presumed*---that Asmussen had illegally used ace on both THOUSAND PERCENT and BOLDER prior to their races. *Id.* (¶ 80–81)

The stewards disqualified THOUSAND PERCENT and required Asmussen to pay a \$1,000 fine. *See Appx. 109*; *See also Joint Ex. 3, Appx. 110*. Similarly, the Stewards disqualified BOLDOR and required Asmussen to pay a \$2,500 fine. *See Joint Ex. 4-5, Appx. 111-112*. The Stewards imposed two suspensions to run concurrently. *See Appx. 109-112*. *See also Pet'r's Pet. for Judicial R., supra* at 9 (¶ 82). The first was thirty (30) days for THOUSAND PERCENT'S HEPS positive<sup>3</sup>, and the second was sixty (60) days for BOLDOR'S HEPS positive<sup>4</sup>. Thirty (30) days of the second suspension was stayed pending no further violations for 365 days. Asmussen received a total suspension of thirty (30) days. *See Appx. 111* (Stewards Ruling No. 19-0122). Stewards also imposed monetary fines against Asmussen and ordered the two horses disqualified. *See Appx. 109-112* (the Stewards Rulings).

Ace is an authorized therapeutic medication often used to calm a nervous horse, it is not a performance enhancing drug. *See Pet'r's Pet. for Review, supra* at 4. In the KHRC regulations<sup>5</sup> (the "Classification Schedule"), Ace is considered a Class "B" Drug, which are those that have potential to influence performance in the equine athlete, but less of a potential than a Class "A" Drug. *See Appx. 0031-0036*, especially *Appx. 0033*. HEPS is not listed as a drug in the KHRC's "Classification Schedule" in KHRC 40-02 (August 2015)<sup>6</sup>, but is listed in the KHRC's

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<sup>3</sup> *See Appx. 109, Stewards Ruling No. 19-0120*.

<sup>4</sup> *See Appx. 111, Stewards Ruling No. 19-0122*.

<sup>5</sup> *See KHRC Uniform Drug, Medication, and Substance Classification Schedule KHRC 40-01* (August 2015); *See also Appx. 0031-Appx. 0036*. Acepromazine is identified as a Class B substance on the KHRC's Classification Schedule, at *Appx. 0033*.

<sup>6</sup> *See "Classification Schedule," at Appx. 0033*.

“Withdrawal Guidelines.”<sup>7</sup> HEPS appears in the “Withdrawal Guidelines” as a threshold level metric used to detect the presence of Ace. *See Appx. 46*, in “Withdrawal Guidelines.” (chart listing the threshold for detecting Ace as “10 nanograms per ml in urine of hydroxyethylpromazine sulfoxide (HEPS))

Ace can also be found in the KHRC’s “Withdrawal Guidelines.” *See Appx. 0042*. In the withdrawal guidelines, ace has recommended withdrawal guidelines of 48 hours prior to post time when it is administered 0.05 mg/kg IV (intravenously). *See Appx 0042*. Ace also appears again in the “withdrawal guidelines” as detectable when there is a threshold of 10 ng/ml of HEPS in urine. *See Appx 0046*. The Court notes that the “Withdrawal guidelines” do not offer guidance on Ace administered orally or otherwise not through an IV. In this case, the ACE was administered orally.

**No ace was present in the post-race urine samples of the horses, THOUSAND PERCENT and BOLDOR.** *See Pet’r’s Pet. for Judicial R., supra* at 7. (¶ 55 and 61) In the administrative hearing, Asmussen’s Assistant Trainer, Rochelle Vallance, testified Ace was used frequently in Asmussen’s horse barn. *See Pet’r’s Appendix to Pet’r’s Mot. for Summ. J., at Appx. 886-890.* (Hr’g Tr., Asmussen v KHRC Hearing, Sept. 25, 2019) However, the testimony of Assistant Trainer Vallance disputed that THOUSAND PERCENT was administered Ace within the 48-hour recommended withdrawal time of each race. *Id. at Appx. 890-894*. Mr. Asmussen personally testified that BOLDOR also did not receive an Ace administration within the 48-hour recommended withdrawal time of the Keeneland race. *Id. at Appx. 911-914*, especially at *Appx. 914*.

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<sup>7</sup> *See KHRC Withdrawal Guidelines: Thoroughbred; Standardbred; Quarter Horse, Appaloosa, and Arabian KHRC 40-02 (August 2015); See also Appx. 0037—0047.* (“Withdrawal Guidelines”) *See also KHRC 000039-000049.*

In fact, Assistant Trainer Vallance testified to being 100% sure that THOUSAND PERCENT had not received ace within six (6) days of its race at Churchill Downs. *Id.* at *Appx.* 893. In the administrative hearing, Asmussen, his assistant Rochelle Vallance, and Dr. Phil Tripp described the barn's process in assuring that no horses in their barn receive a medication outside the KHRC regulation guidelines. *Id.* at *Appx.* 884-886, 892-893. Dr. Tripp, a vet who prescribes oral ace to Asmussen regularly, stated in the hearing that the bottles themselves list a withdrawal period of seven (7) days. . *See Pet'r's Appendix to Pet'r's Mot. for Summ. J., supra* at *Appx.* 878, 884-886.

The assistant trainer in charge of giving oral ace, Rochelle Vallance, testified that Asmussen keeps careful records by keeping a chart on each horse in his care. *Id.* at *Appx.* 891. Vallance testified that Asmussen lets the assistants know when a horse is going to be entered and the date is written down in that horse's chart. *Id.* at 891-893. The assistants are then able to backtrack how many days before the race a horse can receive medications. *Id.* The chart system ensures that no horse under Asmussen's care receives a medication inside the window required by the KHRC regulations. *Id.*

Asmussen himself testified that he goes through every chart on every horse daily with assistants where he gives them projected race dates on each horse so they are able to give themselves extra time for recommended withdrawals on any medications. *Id.* at *Appx.* 909.

Based on the logic of the testimony given at the administrative hearing, as THOUSAND PERCENT and BOLDOR had six and five-day entries, neither horse would have been administered ace within six or five days, respectively. *Id.* at *Appx.* 893, 910, 912-913. The KHRC relies on the fact that THOUSAND PERCENT and BOLDOR tested for over 10ng/ml of HEPS to

support its argument that Asmussen administered Ace within 48 hours of the horses' respective races. *See Def.'s Resp. to Pet'r's Mot. for Summ J., supra* at 9-10.

However, after reviewing the record, the Court agrees with Asmussen's contention that the KHRC produced no competent evidence that either horse received ace within 48 hours of their respective races. The KHRC can provide no proof to support its reasoning that urine positive for HEPS is conclusive evidence of an ACE violation under 810 KAR 1:018 §2. There is no evidence concerning whether HEPS in the blood or urine of a horse at the levels later detected proves that ACE was used in violation of the regulation. Even if the metabolite had not been completely eliminated from the horses' system, there is still no substantial evidence that ACE remained present in the horses. The Commission offered no scientific evidence that establishes how long the HEPS metabolite stays in the horses' system.

Further, the KHRC has not shown that ace has a pharmacological effect on a horse when over 10ng/ml of HEPS is found in the urine test, but no ACE is detected. The KHRC has no guidelines for ACE administered orally. The KHRC guidance applies only to IV administration; moreover, the guidance is *voluntary* and *advisory*. Asmussen and his staff persuasively testified that they always follow the vet's seven (7) day withdrawal period when administering ace orally, and because the KHRC has offered no evidence to prove otherwise, Asmussen cannot be punished administering Ace in violation of 810 KAR 1:018 §2. The presence of HEPS above 10ng/ml in a horse's urine test is not, itself, a violation of the ace regulations (found in 810 KAR 1:040 and 810 KAR 1:018 §2) when no trace of ACE is found. The KHRC also cannot prove that using ACE in a manner completely consistent with the KHRC's withdrawal guidance will result in a "passed" post-race concentration of HEPS lower than 10 ng/ml in the urine. *See Def.'s First Am. Answer*, at 8. (¶ 38)



The ACE regulation was originally proposed and adopted as a part of a “national uniform medication proposal” developed by the Racing Medication and Testing Consortium (“RMTC”) – a private organization that recommends uniform policies for horseracing.<sup>8</sup> *See Appx. 801-802* (the Regulatory Impact Analysis and Tiering Statement §1(a) expresses that, “The adoption of these thresholds and withdrawal guidelines represents a major step towards national uniformity in medication regulation and drug testing. Industry stakeholders have long maintained that uniformity is both desirable and necessary for fair competition.”). However, *the RMTC guidelines have never been promulgated or adopted in Kentucky as administrative regulations.*

The RMTC explained that its decision to adopt a 10ng/ml threshold of HEPS was premised on its determination that ACE should not be used within forty-eight hours of a race. *See Appx. 976* (citation to the section on the “Scientific Advisory Committee (SAC) Recommendation” in the RMTC study on “Controlled Therapeutic Medications: Monograph Series: Acepromazine”) The Commission further defended the rationale of RMTC’s HEPS threshold as reasonable because “a horse can still experience sedative effects from acepromazine, even when the acepromazine has metabolized into HEPS and the original acepromazine is undetectable. *See Def.’s Resp. to Pet’r’s Mot. for Summ. J., supra* at 4. Buttressing its defense of the reasonability of the RMTC’s HEPS threshold, the Commission argued that “several scientists connected the HEPS metabolite to a potential pharmacological effect on horses well before the Commission amended its regulation to detect acepromazine through the presence of HEPS.” *See Def.’s Resp. to Pet’r’s Mot. for Summ. J., supra* at 4.

Specifically, the Commission noted that:

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<sup>8</sup> *See Def.’s Resp. to Pet’r’s Mot. for Summ. J., supra* at 3. The footnote on page 3 of the KHRC’s Response details the Mission Statement of the RMTC.

For example, in 1994, researchers theorized that HEPS could be pharmacologically active, due to the length of the horse's sedation following acepromazine administration. [internal citation to Admin Record at 57b, Aug. 30, 2021 Hearing Transcript at 192:11-194:5 (Dr. Scott Stanley)] Furthermore, as Dr. Kynch attested via affidavit, the theory that HEPS alone could sedate a horse is still viable today. In a 2017 study, Dr. Kynch and her team confirmed that horses continued to experience pharmacological effects, including sedation, even after acepromazine's rapid conversion into HEPS. Therefore, it is reasonable to theorize that HEPS itself was causing the sedative effect. [internal citation to KHRC Brief Exhibit 2, Kynch affidavit at ¶ 12. *See also* AR at 60-18, KHRC Hearing Exhibit 18 (H.K. Kynch, et al., Pharmacokinetics, pharmacodynamics, and metabolism of acepromazine following intravenous, oral, and sublingual administration to exercised Thoroughbred horses, 41J. VETERINARY PHARMACOLOGY AND THERAPEUTICS 4 (Aug. 2018)).

*Id.* at 4.

### ARGUMENTS RAISED BY THE PARTIES

For the sake of analytical clarity, the Court here summarizes the relevant arguments raised by the parties necessary to determine the issue of whether the Final Order of the Horse Racing Commission was arbitrary.

### PLAINTIFFS' LEGAL ARGUMENTS

#### i) KRS §13A – “Administrative Regulations”

First, the Court highlights the arguments raised by Plaintiffs related to KRS 13A.222(4)(e)(6)<sup>9</sup>, KRS 13A.224<sup>10</sup>, KRS 13A.2251<sup>11</sup>, and KRS 13A.225<sup>12</sup>, that the “Withdrawal Guidelines” the HRC used to establish the HEPS standard of Ace regulation violated the law on incorporating documents by reference. *See Pet’r’s Pet. for Judicial R., supra* at 16. (¶ 141-143)

Second, the Plaintiffs argue the Commission’s “attempt to convert the KHRC withdrawal

<sup>9</sup> KRS §13A.222 covers “Drafting Rules.”

<sup>10</sup> KRS §13A.224 covers “General Requirements for incorporation by reference.”

<sup>11</sup> KRS §13A.2251 covers “Information required in administrative regulation when incorporating material by reference.”

<sup>12</sup> KRS §13A.2255 covers “Amendment of material previously incorporated by reference.”

guidelines into a document carrying the force of law is an unlawful attempt to modify or expand a regulation in violation of **KRS 13A.130**<sup>13</sup> and KRS 230.240(2).<sup>14</sup> *Id.* (¶ 144) The crux of the KRS 13A arguments raised by the Plaintiffs is that “the KHRC’s interpretation in this case is premised upon errors of law, its ruling thereupon is characterized by an abuse of discretion.” *Id.* (¶ 145)

## ii) Arbitrary Interpretation of Regulation

Next, the **Petitioners** argue that the **proper interpretation** of 810 KAR 1:018 § 2 (2018)- which provides “that a horse “shall not carry” any substance that can affect the horse and “therapeutic medications shall not be present in excess of established thresholds concentrations””- **requires the detection of acepromazine** itself. *See Pet’r’s Mot. for Summ. J. and Br. In Supp., supra* at 3. The Plaintiffs frame the positions of the parties by saying, “The Commission contends that acepromazine is “present” if an entirely different substance, HEPS, is detected. Asmussen seeks a declaratory judgment that the Commission’s interpretation is arbitrary.” *See Pet’r’s Mot. for Summ. J. and Br. In Supp., supra* at 3.

The Petitioners buttress their arguments that the Commission arbitrarily interpreted 810 KAR 1:018 §2(3) by noting that KHRC regulated ACE well before it incorporated a HEPS threshold, traditionally through a detection-based scheme of regulation (i.e., detecting the presence of Ace). *See Pet’r’s Mot. for Summ. J. and Br. In Supp., supra* at 9. Petitioners contend that at the time the Commission incorporated the HEPS threshold, “no regulation or table incorporated by reference mentioned HEPS.” *Id.* Under that previous detection regime in the

<sup>13</sup> KRS §13A.130 covers “Matters prohibited as subject of internal policy, memorandum, or other form of action.”

<sup>14</sup> KRS §230.240 covers “Additional Employees for regulation of race meetings and sports wagering – Administrative regulations as to duties, qualifications, and training – Compensation”

regulation, “If *acepromazine* was detected in the horse, it was a violation, no matter how or when *acepromazine* was used.” *Id.*

However, the Petitioners frame the regulatory interpretation issue by saying that, “If the Commission’s interpretation is to be believed, the Commission amended its *acepromazine* regulations in 2013 and 2014 to incorporate a substitute threshold of HEPS at 10 mg/nL in urine.” *Id.* Ultimately, the Plaintiffs argue, “that regulation [810 KAR 1:018 §2(3)], as interpreted by the Commission is arbitrary and capricious.” *Id.* At issue is whether the Commission can infer an illegal use of ACE from the presence of HEPS.

The Petitioners contend that the ultimate issue of interpretation the Court should decide is “whether the Commission ever promulgated a rule that the detection of HEPS alone – i.e., without a lab test confirming the presence of *acepromazine* – is sufficient evidence that the horse carried a Class B drug in violation of 810 KAR 1:018.” *See Pet’r’s Supp. Br.*, at 2. The Petitioners encourage the Court to decide the question on the following principles:

An agency must promulgate by administrative regulation each statement of general applicability or other form of action that implements, interprets, or prescribes law or policy. KRS 13A.100(1) In doing so, the agency must comply with the procedures in KRS Chapter 13A. KRS 13A.120(1)(b) Any attempt to enact or modify a rule without complying with KRS Chapter 13A is null, void, and unenforceable. KRS 13A.120(4), (6); KRS 13A.130. The HEPS “rule” enforced here violates these requirements in multiple ways.

*See Pet’r’s Supp. Br.*, *supra* at 2.

The pertinent part of the regulation (**810 KAR 1:018 §2(3)**) the Commission is alleged to have arbitrarily interpreted says, “Therapeutic medications shall not be present in excess of established threshold concentrations set forth in this administrative regulation or in **810 KAR 1:040.**” *See Pet’r’s Supp. Br.*, *supra* at 3. Therefore, the Court must scrutinize the Commission’s interpretation of **810 KAR 1:018 §2(3)** and **810 KAR 1:040.**

The Plaintiffs strengthen their claim that the Commission’s regulatory interpretations violated **KRS 13A.130** (by unlawfully modifying the regulatory definitions of “Positive Findings” and “Class B Drugs” to Include Metabolites) by pointing the Court to the testimony of Chief Steward Barbara Borden, who “admitted that **810 KAR 1:040**, which **purports to incorporate the guidelines by reference**, does **not reference any threshold** or say that the **guidelines** would be **used to impose** penalties.” *Id.* at 4. (internal citation to Ex. A, pp. 113:9-16) Further, Plaintiffs highlight that Chief Steward Borden “admitted that the **Withdrawal Guidelines** themselves do **not identify** the “**Associated Thresholds**” as the “**established concentration levels**” referenced in **810 KAR 1:018**. *Id.* (internal citation to Ex. A, pp. 106:23-107:2)

Ultimately, the Plaintiffs persuasively argue that, “Repealing and modifying existing acepromazine restrictions under the guise of “interpretation” is prohibited, so the Commission’s interpretation here is null, void, and unenforceable. KRS 13A.130(2)” *Id.* at 7. (internal citation omitted to *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991)) Still, the Plaintiffs address the argument of the Commission that “it accomplished a HEPS-based threshold by incorporating the withdrawal guidelines and the Table by reference.” *See Pet’r’s Supp. Br., supra* at 7.

Specifically, Plaintiffs argue the “Table allegedly relates to the prohibition set forth in 810 KAR 1:018, yet the Table is incorporated only in 810 KAR 1:040, which was not the regulation allegedly violated here. *See* KRS 13A.221(2)” *See Pet’r’s Supp. Br., supra* at 8. Further, the Plaintiffs persuasively argue “the mere presence of HEPS is insufficient to prove the acepromazine violation actually alleged here.” *Id.* at 9. The Court is persuaded that as a matter of law, an Ace violation cannot be proved by a party’s failure to comply with voluntary withdrawal guidance.

## DEFENDANT'S LEGAL ARGUMENTS

### i) PROPER LEGAL STANDARDS

The Commission voted to approve the codification of proposed regulatory amendments, including the 10ng/mL HEPS threshold limit for acepromazine, on December 11, 2013. *See Def.'s Resp. to Pet'r's Mot. for Summ. J., supra* at 5. The Defendant primarily defends its HEPS threshold regulation on the grounds that it has a rational basis. *Id.* at 12. The ostensible rational purpose of the of the regulation was safety, because the pharmacological effects of the drug and metabolite are “not fully understood.”<sup>15</sup> *Id.* at 3.

The Court pauses here to note that Constitutional analysis on the validity of the regulation is unnecessary when the Court can more narrowly rule on the issue of whether the Commission's Final Order was an arbitrary action under judicial review of agencies in KRS 13B.150. Therefore, the Court does not find it necessary to analyze the constitutional arguments of the parties, and will instead limit its analysis to the **issue** of whether the Commissions' **interpretation** of **810 KAR 1:018** and **810 KAR 1:040** was proper as applied in the Agency's Final Order.<sup>16</sup>

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<sup>15</sup> The Court of Appeals recently applied the Fourteenth Amendment rational basis test to a trainer's arbitrariness challenge of a KHRC medication regulation in *Kentucky Horse Racing Commission v. Motion*, 592 S.W.3d 739, 748 (Ky. App. 2019). *See also, Def.'s Resp. to Pet'r's Mot. for Summ. J., supra* at 13. The Court of Appeals upheld the KHRC's regulation, because “limiting the amount of a drug in a horse's system when the drug is not fully understood is a rational reason for a low threshold.” *See Motion*, at 748. The *Motion* court also rules that the KHRC need not engage in a “science contest” when its regulations were challenged; instead, a medication classification “may be based on rational speculation unsupported by evidence or empirical data. *Id.* at 747-748.

<sup>16</sup> *See Order (November 15, 2023)*, at 2. The Court's Order from November 15, 2023 noted that, “as the Court held in *Stephenson v. Woodward*, 182 S.W.3d 162, 168 (Ky. 2005), Courts should avoid deciding constitutional issues if a case can be decided solely on statutory grounds. As Justice Brandeis summarized this rule, “if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law,

The KHRC argues that it has historically been backed by the Kentucky Courts, which have upheld KHRC medication regulations that prohibit a metabolite or derivative of an administered substance. *See Def.'s Resp. to Pet'r's Mot. for Summ. J., supra* at 14. For instance, in “*Jacobs v. Kentucky State Racing Commission*, the Court of Appeals held that a KHRC regulation prohibiting the presence of a derivative or metabolite of bute in a urine sample was a legitimate exercise of the KHRC’s administrative statutory powers. 562 S.W.2d 641, 643-644 (Ky. App. 1977).” *Id.* However, in *Jacobs*, the record is clear that the regulation prohibited both the substance (phenylbutazone or “bute”) and its derivatives. The chemist’s testimony was that “the terms derivative or metabolized phenylbutazone are synonymous.” *Id.* at 644. Here, the testimony was the opposite: HEPS is not chemically equivalent to Ace.

The KHRC maintains that Asmussen cannot maintain an arbitrariness challenge of their ace/HEPS regulation under KRS 13B.150(2) because that statute “applies to agency final orders, rather than agency regulations.” *Id.* at 17. Here, the Court must consider whether the agency’s final action, based on its own interpretation of its regulations, is arbitrary. Accordingly, under KRS 13B.150 the Court’s authority to address the issue of arbitrariness of the Agency’s Final Order, and its interpretation of its regulations, is clear.<sup>17</sup>

## ii) **KRS 13B.150 ARBITRARINESS**

The Commission framed the Plaintiffs’ Motion for Summary Judgment by saying that it “makes two arguments – only one of which is Constitutional. Specifically, the Motion argues

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the Court will decide only the latter.” *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L.Ed. 688 (1935) (Brandeis, J., concurring)”

<sup>17</sup> *See Order (November 15, 2023)*, at 2. The Court’s Order from November 15, 2023 requested “that the parties address the issue of whether the KRS Chapter 13B appeal should be addressed prior to ruling on the constitutional claims [that] are the subject of the current motion and briefing.” (¶ 2)

that (1) the Commission’s regulations are arbitrary pursuant to KRS 13B.150, and (2) unconstitutionally vague under Ky. Const. § 2.” *See Def.’s Brief*, at 3. (filed November 22, 2023) The Defendant encourages the Court to “dismiss Mr. Asmussen’s KRS 13B.150 arbitrariness claim, because KRS 13B.150 does not apply to regulations, it only applies to final orders.” *See Def.’s Brief, supra* at 4. (filed November 22, 2023)

However, the Commission also points out that “this appeal could potentially be decided on other statutory grounds raised in Mr. Asmussen’s Petition. *See, e.g.*, Petition at 13-15 (Claim 2: Final Order is “Unsupported by Substantial Evidence”)...” *Id.* Further, the Commission highlights that, “Petition’s Count 3 (“Unlawful Interpretation of KHRC Regulations”) and Count 4 (“Arbitrary and Capricious Regulation”) cite to KRS 13B.150 and do not cite to the Kentucky Constitution. Petition at 15-19.” *Id.* Finally, the Commission emphasized that the Plaintiffs’ Motion for Summary Judgment “similarly argues that an agency’s interpretation of its regulation is subject to a three-part inquiry, which is “reproduced” in KRS 13B.150(2). Motion at 15.” *Id.* at 4-5.

The Court rejects the Commission’s argument that the Plaintiffs’ “focus on KRS 13B.150 is fatal to Counts 3 and 4.” *Id.* at 5. Nothing in KRS 13B.150 abrogates this Court’s authority to review the Defendant’s “unlawful interpretation of KHRC Regulations” when those interpretations served as the basis of the Commission’s reasoning in the Final Order penalizing the Plaintiffs. Here, it is the arbitrary *application* of the Commission’s regulations that is at issue. When the Commission adopts an arbitrary interpretation of an administrative regulation, and applies that arbitrary interpretation to impose a penalty, such action is fully subject to judicial review under KRS 13B.150.



**iii) WHETHER HEPS IS A VALID PROXY FOR A FINDING OF  
SUBSTANTIAL EVIDENCE OF AN ACEPROMAZINE VIOLATION**

This Court’s Order from November 15, 2023 directed to parties to “address the issue of whether HEPS, at the levels found in the post-race urine testing, is a valid proxy for a finding that there is substantial evidence of an acepromazine violation under the controlling administrative regulation.” *See Order (November 15, 2023), supra* at 1. Additionally, that same Order directed the parties to “identify any scientific evidence that it is more likely than not that the HEPS levels found in these horses in the post-race urine testing is proof that acepromazine was administered in violation of 810 KAR 1:018 or any other duly promulgated administrative regulation at the time of the alleged violations.” *Id.*

Endeavoring to respond to the Court’s Order, the Commission answered, “yes,” to the question of whether HEPS is a valid proxy for a finding that there is substantial evidence of an acepromazine violation. *See Def.’s Br., supra* at 6. (filed November 22, 2023) According to the Defendant, the instant HEPS overage:

violated 810 KAR 1:018 Section 2 in two ways: (1) by evidencing that the horses participated in races while carrying a metabolic derivative that could “depress” or otherwise “affect” their “central nervous system[s]”; and (2) by constituting positive findings that the horses raced while carrying a “prohibited” amount of a metabolic derivative. However, HEPS overages did not establish that acepromazine was “administered in violation of 810 KAR 1:018.” (Order at 1) because the Commission does not have mandatory acepromazine administration regulations.

*Id.*

**STANDARD OF REVIEW**

**KRS 13B JUDICIAL REVIEW OF A FINAL AGENCY ORDER**

Kentucky courts are bound to follow the criteria for judicial review of an agency decision in KRS Chapter 13B. Pursuant to KRS 13B.150(2),

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) **Without support of substantial evidence** on the whole record;
- (d) **Arbitrary**, capricious, or characterized by abuse of discretion;
- (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
- (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
- (g) Deficient as otherwise provided by law.

(emphasis added).

In reviewing an agency decision, this **Court may only overturn** that decision if the agency acted arbitrarily or outside the scope of its statutory authority; if the agency applied an incorrect rule of law; or **if the decision itself is not supported by substantial evidence on the record**. *See Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 301 (Ky. 1972); *see also Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641, 642-43 (Ky. Ct. App. 1994).

“Judicial review of an administrative agency’s action is concerned with the question of arbitrariness.” *Commonwealth, Transportation Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky. Ct. App. 1990), *quoting Am. Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm’n*, 379 S.W.2d 450, 456 (Ky. 1964). Arbitrariness means “clearly erroneous, and by ‘clearly erroneous’ we mean unsupported by substantial evidence.” *Crouch v. Police Merit Board*, 773 S.W.2d 461, 464 (Ky. 1988). Substantial evidence is “evidence of substance and relevant consequences, having the fitness to induce conviction in the minds of reasonable men.” *Fuller*, 481 S.W.2d at 308.

“The trier of facts in an administrative agency may consider all the evidence and choose the evidence he believes.” *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 410 (Ky. Ct. App. 1994). Upon review of a denied application for benefits, the reviewing court must accept the Board’s findings of fact as true if they are supported by substantial evidence. *Id.* at 409. A reviewing court must be guided by the principle that the “trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before [it].” *Fuller*, 481 S.W.2d at 308. So long as the agency’s findings are supported by substantial evidence, the Court must defer to the agency, even if there is conflicting evidence. *Kentucky Comm’n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981).

If it is determined that the agency’s findings are supported by substantial evidence, the next task is to assess whether the agency has correctly applied the law to the facts as found. *Kentucky Unemployment Ins. Comm’n v. Landmark Cmty. Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 578 (Ky. 2002). An agency’s conclusions of law are reviewed *de novo*. See *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. Ct. App. 1998). When an administrative agency’s findings are supported by substantial evidence, and when the agency has applied the correct rule of law, these findings must be accepted by a reviewing court. *Ward*, 890 S.W.2d at 642.

Finally, case law is helpful in guiding the Court on its analysis of an arbitrary agency action. The Court’s analysis is bound by §2 of the Kentucky Constitution, which prohibits an administrative agency from exercising arbitrary power. *Cabinet for Health and Family Services v. Appalachian Regional Healthcare, Inc.* 606 S.W.3d 623, 632 (Ky. 2019). Specifically, Kentucky courts look to three important factors in evaluating whether an agency acted arbitrarily. *Commonwealth Transportation Cabinet Department of Vehicle Regulation v. Cornell*,

796 S.W.2d 591, 594 (Ky. App. 1990) First, judicial review centers on, “whether the agency acted within the constraints of its statutory powers or exceeded them.” *Id.* at 594. (internal citation omitted) Second, the Court should **scrutinize Agency procedures** to see if the party affected by an administrative order was **afforded procedural due process**, meaning the party was given a meaningful opportunity to be heard. *Id.* at 594. Last, judicial review, “...must **determine whether the agency’s action is supported by substantial evidence.**” *Id.* at 594. Importantly, if any of the three factors fails, then a reviewing court has the authority to find the agency’s action was arbitrary. *Id.* at 594.

### **KRS 13A AGENCY RULEMAKING REQUIREMENTS AT ISSUE**

#### **KRS 13A.130 Matters prohibited as subject of internal policy, memorandum, or other form of action.**

(1) An **administrative body shall not** by **internal policy**, memorandum, or other form of action:

(a) **Modify** a statute or **administrative regulation**;

(b) Expand upon or limit a statute or administrative regulation; or

(c) Except as authorized by the Constitution of the United States, the Constitution of Kentucky, or a statute, expand or limit a right guaranteed by the Constitution of the United States, the Constitution of Kentucky, a statute, or an administrative regulation.

(2) Any administrative body memorandum, **internal policy**, or other form of action violative of this section or the spirit thereof is **null, void, and unenforceable**.

(3) This section shall not be construed to prohibit an administrative body issuing an opinion or administrative decision that is authorized by statute.

### **REGULATIONS AT ISSUE**

Here, the regulations at issue **are 810 KAR 1:018 §2 and 810 KAR 1:040**. *See Pet’r’s Pet. for Judicial R., supra* at 13. The Plaintiffs highlight that **810 KAR 1:018 § 2(5)** establishes a prima facie case of a violation if a commission laboratory presents to the commission a report of a positive finding of a drug, medication, substance, or metabolic derivative prohibited by the

regulation. *See Pet'r's Pet. for Judicial R., supra* at 14. (¶ 123) Further, the Plaintiffs emphasize the definition of “positive finding,” as it is found in **810 KAR 1:018 §1(6)**, requires a commission lab to determine that the sample contained the presence of a drug, medication, or substance prohibited by “this administrative regulation, **810 KAR 1:040**, or **810 KAR 1:110**.” *Id.* (¶ 124) The Plaintiffs contend that “Acepromazine is a “drug, medication, or substance, the use of which is restricted or prohibited by” **810 KAR 1:018**, **810 KAR 1:040**, or **810 KAR 1:110**. *Id.* (¶ 128) However, the Plaintiffs note that “HEPS is not a metabolic derivative prohibited by **810 KAR 1:018**.” *Id.* at 15. (¶ 130)

### ANALYSIS

The **KHRC arbitrarily interpreted 810 KAR 1:018 and 810 KAR 1:040 in its Final Order** by imposing a penalty on Petitioners for failing to comply with voluntary guidance found in the Commission’s “Withdrawal Guidelines.” The Commission does not have the authority to penalize Petitioners by invoking internal policy (the “Withdrawal Guidelines”) that are at odds with adopted statutes and regulations (810 KAR 1:018 and 810 KAR 1:040) that cover penalization for the presence of ACE. A guidance document (the “Withdrawal Guidelines”) can not be construed as mandatory, meaning the Commission may not use the Withdrawal Guidelines to penalize Petitioners without substantial evidence of illegal Ace usage. Here, no scientific evidence supports the conclusion that ACE was illegally or improperly administered by the Plaintiffs.

The Commission relies heavily on *Kentucky Horse Racing Commission v. Motion*, 592 S.W.3d 739 (Ky. App. 2020) for the proposition that the KHRC can set drug thresholds at a low level when “there has been no scientific testing to determine such and it cannot be readily observable.” *Id.* at 748. In other words, the KHRC regulations may err on the side of caution, when the scientific evidence is unclear. However, in this case, Ace is the only banned substance,

and it was not found in the horses' systems. HEPS is a metabolite of Ace, but the Commission has not set a regulatory threshold for HEPS or listed it as a banned substance, even though it has the authority to do so. Rather than amending its regulations and setting a threshold for HEPS, or banning HEPS, the Commission has adopted a policy from its voluntary guidance documents that addresses HEPS, and attempted to substitute HEPS as a proxy for Ace.

The Commission in its supplemental brief conceded that the "Commission does not have mandatory acepromazine administration regulations." *Def's Supp. Br. Supra* at 6 (filed November 22, 2023). If the Commission seeks to impose penalties based on administration of acepromazine, it must adopt regulations that set forth the rules. It cannot merely assume an ace violation from the presence of HEPS, as it did in this case. This is regulatory overreach that attempts to circumvent the regulatory oversight process by regulating through the back door of internal policy, rather than duly promulgated regulations.

Therefore, the Horse Racing Commission's Final Order should be void and Petitioners' *Motion for Summary Judgment* shall be **GRANTED**. The Final Administrative Order cannot stand based on the above findings; therefore, it is **REVERSED**.

**i) WITHDRAWAL GUIDELINES ARE VOLUNTARY**

The Petitioners argue the Commission never "promulgated a rule that the detection of HEPS alone – i.e., without a lab test confirming the presence of *acepromazine* – is sufficient evidence that the horse carried a Class B drug in violation of 810 KAR 1:018." *See Pet'r's Supp. Br., supra* at 2. The Plaintiffs strengthen their claim that the Commission's regulatory interpretations violated **KRS 13A.130** (by unlawfully modifying the regulatory definitions of "Positive Findings" and "Class B Drugs" to Include Metabolites) by pointing the Court to the testimony of Chief Steward Barbara Borden, who "admitted that **810 KAR 1:040**, which **purports**

to **incorporate the guidelines by reference**, does **not reference** any **threshold** or say that the **guidelines** would be **used to impose** penalties.” *Id.* at 4. (internal citation to Ex. A, pp. 113:9-16) Further, Plaintiffs highlight that Chief Steward Borden “admitted that the **Withdrawal Guidelines** themselves do **not identify** the “**Associated Thresholds**” as the “**established concentration levels**” referenced in **810 KAR 1:018.**” *Id.* (internal citation to Ex. A, pp. 106:23-107:2)

Ultimately, the Plaintiffs persuasively argue that, “Repealing and modifying existing acepromazine restrictions under the guise of “interpretation” is prohibited, so the Commission’s interpretation here is null, void, and unenforceable. KRS 13A.130(2)” *Id.* at 7. (internal citation omitted to *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991)). As the Court of Appeals has held in similar circumstances, “an administrative agency is prohibited from modifying or expanding any statute or administrative regulation by internal policy, memorandum or other action and any attempt to do so is unenforceable, null and void. KRS 13A.230(1) and (2).” *Commonwealth, Education & Humanities Cabinet, Dept. of Educ. v. Gobert*, 979 S.W.2d 922, 926 (Ky. App. 1998).

Here, the HRC improperly modified the administrative regulations in 810 KAR 1:018 and 810 KAR 1:040 by adopting voluntary “withdrawal guidelines” and enforcing its suggestions as mandatory. In the instant action, the HRC adopted guidelines that establish a HEPS threshold to detect the use of Ace during a race. Those guidelines suggest a 48-hour withdrawal window when Ace is administered through IV, but are silent on other routes of administration. The Agency’s mistake here occurred when it relied on voluntary withdrawal guidelines as mandatory reporting criteria that establishes a “positive finding” violative of 810 KAR 1:018 §6. Further, the Plaintiffs note that the withdrawal guidelines allegedly relate to the ban on certain substances in 810 KAR 1:018, but is incorporated only in 810 KAR 1:040. *See Pet’r’s Supp. Br., supra* at 8.

The Court here is persuaded by the arguments of the Plaintiff that the Final Order of the HRC turns the voluntary guidance of the withdrawal guidelines from a shield into a sword. *Id.* at 9. The Final Order, in its Third Conclusion of Law, found it irrelevant “at what time Mr. Asmussen administered acepromazine to THOUSAND PERCENT and BOLDOR, because Mr. Asmussen did not otherwise follow the Commission’s guidelines of IV administration.” *See Appx. 145.* It is undisputed that the withdrawal guidelines on IV administration do not apply here because Mr. Asmussen’s use of Ace was administered orally. Yet, the HRC impermissibly uses its 2013 adoption of the RMTTC thresholds (“withdrawal guidelines”) for detecting Ace through HEPS because the withdrawal guidelines are an “internal policy” or memo of the HRC being policed for mandatory compliance. It is clear from the plain language of the Third Conclusion of Law in the Final Order that the instant violation was premised on Mr. Asmussen’s failure to follow voluntary guidance that was only loosely (and improperly, under KRS 13A.130) incorporated by reference in 810 KAR 1:018 and 810 KAR 1:040.

The HRC may not punish Mr. Asmussen for failing to follow the *voluntary* guidance in the withdrawal guidelines, but that is exactly what the Final Order does. The Commission violated KRS §13A.130 by modifying 810 KAR 1:018 and 810 KAR 1:040 with voluntary withdrawal guidelines, so that a “positive finding” of a banned substance (Ace) could be found upon the “conclusive” proof of non-compliance with the voluntary guidelines on HEPS IV administration. The Final Order also violated KRS 13B.150 because it arbitrarily found that a showing of HEPS above the voluntary threshold for IV administration was substantial evidence of a horse carrying “Ace” during a race. The Court notes again that no levels of Ace were ever detected in the instant proceedings, only HEPS thresholds. Thus, the Court has two independent bases on which to invalidate the Final Order: the HRC’s violation of KRS 13A.130 by using voluntary internal



guidance (as embodied in the “withdrawal guidelines” adopted in 2013) to impermissibly expand the scope of a “positive Ace finding” in 810 KAR 1:018; and the HRC’s violation of KRS 13B.150 because the Final Order was arbitrary in that it found a violation of the Ace regulation (810 KAR 1:018) without substantial evidence the horses actually ran with Ace present in their systems.

Neither of Asmussen’s horses tested positive for a drug; therefore, the KHRC’s Final Order was arbitrary in finding Petitioners violated the Ace regulation. The KHRC has shown no scientific evidence that the presence of HEPS over the 10 ng/ml threshold means that Ace was administered in violation of the regulation (prohibiting the presence of Ace during a race). In the administrative hearing record, the KHRC did not prove that HEPS itself has a pharmacological effect on a horse; there is no definitive study that it can point to in which an investigator has been able to administer HEPS and prove that it has pharmacological effects. *See Appx. 955.*

The record also shows an Ace study that tested HEPS levels on horses who received Ace. *See Appx. 973-979.* In the study, urine tests showed that HEPS concentrate peaked at 4 hours and was detectable in 13/20 horses at 120 hours. *See Appx. 975.* In over half the horses, HEPS was still detectable five (5) days after giving ace; therefore, the detection of HEPS alone is not “conclusive evidence” of an ace violation (48 hours prior to race), based on the study. In fact, the record shows that the presence of HEPS is not even a reliable indicator of Ace usage in the prior 48 hours. In the same study, the administration of ace orally presents unknown risks for concentration in excess of the HEPS threshold, so an extended withdrawal period is recommended for oral administration. *See Appx. 976.* Ultimately, this study bolsters the argument that the voluntary withdrawal guidelines are themselves **not** substantial evidence of Ace being present during a race, since oral administration can leave traces of HEPS even beyond the 48 hour suggested guidance for IV administration. Based on the record in this case, the presence of HEPS is an unreliable and wholly

speculative indicator of the illegal use of Ace, and thus it cannot, by itself, be considered substantial evidence of an Ace violation. Thus, the record is devoid of substantial evidence of an Ace violation to support the Commission's final order.<sup>18</sup>

### CONCLUSION

After reviewing the testimony and the record in this case, this Court holds that the KHRC Final Order cannot prove that a horse testing positive for over 10 ng/ml of HEPS is "conclusive evidence" of an ace violation. The KHRC has no rational basis to prove that a HEPS positive above the 10 mg/ml threshold means that a trainer administered Ace on race-day or that a horse ran a race with Ace present in its system. There is also no admissible evidence in the record that the presence of HEPS has a pharmacological effect on the horse, or that it is a valid proxy for a finding of the illegal use of Ace. On the record before the Court, the Commission's finding of an Ace violation based solely on the presence of HEPS is sheer speculation.

The Horse Racing Commission's Final Order warrants Reversal on two independent grounds. First, the Final Order violated KRS 13A.130 by elevating an internal 2013 policy decision- to adopt the voluntary RMTC HEPS thresholds- to the level of mandatory compliance. The Final Order, in Conclusion of Law 3, found it irrelevant when Asmussen administered Ace since the voluntary guidance on IV administration had not been followed. The Agency was free to adopt the RMTC guidelines on detecting IV usage of Ace within 48 hours of a race using HEPS testing as guidance, but it was not permitted to elevate the RMTC suggestions to the force of law

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<sup>18</sup> Here, the Commission's position that HEPS is a valid proxy for a finding of Ace in the horse's system is at best based on an ambiguous interpretation of the governing statute and regulation. It is primarily a legal, not a technical, issue as to whether the governing administrative regulation can be fairly interpreted to support the Commission's position. The U.S. Supreme Court has recently held that when an agency's legal interpretation of its own authority is in dispute, the courts should not defer the agency's interpretation, but make an independent determination of the agency's authority. *See Loper Bright Enterprises v. Raimondo*, \_\_\_ U.S. \_\_\_ (Slip. Op., June 28, 2024). In this case, an independent review of the Commission's actions yields the inescapable conclusion that the Commission's finding that HEPS can be used as a proxy for Ace is arbitrary and capricious under KRS 13B.150.

by simply attempting to incorporate the guidelines by reference in 810 KAR 1:040 and 810 KAR 1:018. Guidelines are not mandatory, and the Commission cannot bootstrap a regulatory penalty onto a failure to follow voluntary guidelines, without some independent proof of a violation of a underlying regulatory duty regarding Ace. No such proof exists in this record. And there is no scientific proof that the presence of HEPS is a valid proxy for finding the presence of Ace at the time of the races.

Second, the Final Order violated KRS 13B.150 by arbitrarily finding the horses here ran with Ace in their systems without the support of substantial evidence. The record reflects that HEPS remains traceable in the system for longer periods of time when administered orally rather than through an IV. There is no substantial evidence establishing that the horses here carried Ace in their systems, given that any Ace administered orally would likely have resulted in HEPS remaining detectable beyond the 48 hour window sufficient to test below the HEPS threshold for IV ace. But HEPS is not Ace. If the Commission wants to ban HEPS it may promulgate a regulation to do so. However, it cannot use the presence of HEPS to support a finding of an ACE violation unless its regulations put trainers on notice of what those rules are.

Accordingly, the Petitioners' *Motion for Summary Judgment* is **GRANTED**. Additionally, the Final Order is **REVERSED** based on the above findings. The Court grants the Plaintiff's request to vacate the KHRC's Final Order affirming the penalties imposed in agency rulings 19-TB-0120 through -0123, and the penalties imposed by the Commission's Final Order.

This is a final and appealable order and there is no just cause for delay.

**SO ORDERED**, this 3rd day of July, 2024.



PHILLIP J. SHEPHERD, JUDGE  
Franklin Circuit Court, Division I

PHILLIP J. SHEPHERD, JUDGE  
Franklin Circuit Court, Division I

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