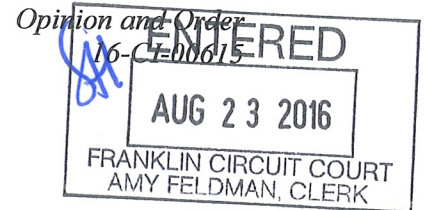


COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 16-CI-00615



JOHN VEITCH

PETITIONER

vs.

KENTUCKY HORSE RACING COMMISSION

RESPONDENT

OPINION AND ORDER

This matter is before the Court upon Petitioner's Petition. Upon review of the parties' briefs and papers, and after being sufficiently advised, this Court hereby **REVERSES** and **REMANDS** the Final Order of Respondent, Kentucky Horse Racing Commission.

STATEMENT OF FACTS

The factual and procedural history of this case is well-known to this Court.¹ For purposes of the instant case, the Court notes that on March 10, 2011, Petitioner, John Veitch (hereinafter "Veitch"), was charged by Respondent, Kentucky Horse Racing Commission (hereinafter "KHRC"), with violations of five regulations, all in connection with the Breeders' Cup Ladies' Classic race on November 5, 2010 at Churchill Downs in Louisville, Kentucky. The initial KHRC penalty, imposed by Final Order dated February 15, 2012, was a one year license suspension. Following extensive judicial and appellate review, Veitch was cleared of having violated two of the initial five administrative

¹ For a more complete recitation of the case's history, please refer to the factual statements in the following Opinions and Orders: Franklin Circuit Court Case No. 12-CI-313 (September 12, 2012); Franklin Circuit Court Case No. 15-CI-380 (March 2, 2016); and Kentucky Court of Appeals Case No. 2012-CA-001610-MR (October 25, 2013).

regulations. Following the Court of Appeals' ruling, the case was referred back to this Court for reconsideration of the penalty question. This Court in turn remanded the penalty matter to the KHRC for reconsideration of the penalty. Upon reconsideration and over Veitch's objection, the KHRC assigned the case to the original hearing officer, who recommended a 9 month penalty. By Revised Final Order dated March 24, 2015, the KHRC adopted the recommendation of a 9 month suspension penalty. Veitch again appealed to this Court, which reversed the KHRC's Revised Final Order and specifically ordered the KHRC to apportion Veitch's penalty to the surviving regulatory violations. The Court, in its March 2, 2016 Opinion and Order, further instructed the KHRC to consider any similar circumstances to justify the penalty imposed. On May 23, 2016, the KHRC issued its Second Revised Final Order, which is presently under review. In the Second Revised Final Order, the KHRC retained the 9 month penalty, apportioning three months to each of the three surviving regulatory violations. Veitch again appealed.

Veitch alleges on appeal that the KHRC did not consider similar circumstances and did not explain justification for the penalty allocation. In support of his appeal, Veitch alleges that the KHRC proceedings violated due process; that the penalty imposed in the Second Revised Final Order does not comport with this Court's Opinion and Order; that the KHRC failed to apportion the penalty appropriately; and that the penalty is not justified. The Court reviews these alleged errors below.

ANALYSIS

I. Standard of Review

KRS 230.330 grants "[a]ny licensee or any applicant aggrieved by any final order of the commission" a right to appeal to this Court in accordance with KRS Chapter 13B.

KRS 13B.150(2) provides, in relevant part, that “[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” KRS 13B.150 also “provides that the court may affirm or reverse, in whole or in part, the final order of an administrative agency and may remand the case for further proceedings if it finds that the agency’s order was in violation of constitutional or statutory provisions, was in excess of the agency’s statutory authority, was not supported by substantial evidence, was arbitrary, capricious, or characterized by abuse of discretion, [...] or was deficient as otherwise provided by law.” See Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 301 (Ky. 1972); Allen v. Kentucky Horse Racing Authority, 136 S.W.3d 54, 58 (Ky. Ct. App. 2004); 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 consequence, having the fitness to induce conviction in the minds of reasonable men.” Fuller, 481 S.W.2d at 308.

If it is determined that the Board's findings are supported by substantial evidence, the next inquiry is 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); quoting Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Comm'n, 437 S.W.2d 775, 778 (Ky. 1969). Questions of law arising out of administrative proceedings are fully reviewable *de novo* by the courts. 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.

II. Discussion

a. Summary of Arguments on Appeal

In support of his Petition for Review, Veitch argues that the KHRC's blatant disregard of this Court's instructions in the March 2, 2016 Opinion and Order reversing and remanding necessitate further reversal and remand. Veitch maintains that in the intervening period of time, the KHRC has become almost entirely recomposed, with new members who are potentially unfamiliar with the history of Veitch's case, making the rubber stamping of the previous 9 month suspension an uninformed decision. Because the KHRC's Second Revised Final Order does not consider similar circumstances or provide reasoning for its allocation of the penalty, Veitch argues that the Second Revised Final Order must be set aside as it is not in compliance with this Court's Order and not supported by substantial evidence in the record.

In support of affirming the Revised Final Order, the KHRC urges the Court not to be persuaded by Veitch's attempt to re-litigate matters already addressed both by this Court and by the Court of Appeals. Rather, the KHRC seeks a narrow review of the penalty imposed. In the May 23, 2016 Second Revised Final Order, the KHRC stated that

Veitch's penalty remained at 9 months "[. . .] based upon the fact that these violations are intertwined and build upon one another. [. . .] Because the cumulative effect of these violations threatened to harm the racing public's trust in the integrity of the industry, the KHRC finds that each penalty shall run consecutive to the other." The KHRC allotted each violation a suspension period of 3 months, to run consecutively, for a total of 9 months. See Second Revised Final Order at 3. The KHRC also noted that while no other steward has ever been penalized, it is an indefensible precedent to penalize only some racing officials. In support of its position that the penalty imposed should remain unchanged, the KHRC cites to Deaton v. Kentucky Horse Racing Authority, 172 S.W.3d 803 (Ky. Ct. App. 2004), for the proposition that "[t]he assessment of a penalty is particularly delegated to the administrative agency. Its choice of sanction is not to be overturned unless 'it is unwarranted in law' or 'without justification in fact.' The assessment is not a factual finding but the exercise of a discretionary grant of power." Deaton, 172 S.W.3d at 808. With the belief that it discharged its duties as directed by the Court, the KHRC urges the Court to affirm the Second Revised Final Order.

b. Review of the Revised Final Order

For the sake of clarity, the Court makes an affirmative finding that the three remaining regulatory violations themselves are supported by substantial evidence. The only issue before the Court at present is the appropriateness of the penalty imposed by the KHRC. While Veitch seems to reassert in his Brief all of the reasons he believes his violations should not stand, the Court is only considering such statements and arguments for the limited purpose of giving context and justification to the penalty imposed by the KHRC.

The KHRC's Second Revised Final Order, issued on May 17, 2016 (filed on May 23, 2016) was issued in response to this Court's March 2, 2016 Opinion and Order reversing and remanding. In this Court's March 2, 2016 Opinion and Order, the Court evaluated the penalty issues as follows:

KRS 13B.090(7) places the burden to show whether a penalty is appropriate on the agency seeking to take action. Therefore, KHRC has the burden of proof on the appropriateness of the penalty imposed. The question for this Court, then, is whether there is substantial evidence to support the KHRC's penalty in the Revised Final Order. Veitch was initially charged with five regulatory violations and punished with a twelve month suspension. He now stands convicted of three regulatory violations, with an imposed penalty of nine months. In addition to challenging his penalty, Veitch also maintains that the original Hearing Officer should not have been enlisted to recommend a new penalty on remand. For these reasons, Veitch seeks reversal on appeal of the Revised Final Order.

Veitch relies on Curd, 433 S.W.3d 291, and Kentucky Bar Ass'n v. Maze, 397 S.W.3d 891 (Ky. 2013), in support of his argument that the KHRC has failed to prove the propriety of the penalty imposed. In Curd, the Supreme Court of Kentucky remanded Curd's case back to the Board for reconsideration of Curd's sanction, as several of the administrative regulations and statutes were found to be unconstitutionally vague as applied to Curd. The Supreme Court stated that remand was required "[b]ecause the Board did not provide insight into how the sanction was apportioned among the various violations found[.]" Curd, 433 S.W.3d at 308. Veitch further relies on Maze, 397 S.W.3d 891, for the proposition that when a penalty is levied by a supervisory or administrative body that the penalties assessed for similar violations should be considered along with other mitigating factors.

Upon review of the record, the Court agrees with Veitch that the KHRC failed to apportion his penalty to the remaining violations. Accordingly, the Court **REMANDS** the matter to the KHRC again, to apportion Veitch's penalty to the surviving regulatory violations. On remand, the KHRC is instructed to consider similar circumstances, if they exist, and justify the penalty imposed.

John Veitch v. Kentucky Horse Racing Commission, Franklin Circuit Court Civil Action No. 15-CI-380 (March 2, 2016) at pages 10-11.

On remand, it does not appear that the KHRC fully followed these instructions. It is true that the KHRC set forth a penalty, the basis for the penalty and an explanation of the

apportionment of the penalty, but it is also true that the Second Revised Final Order completely ignored several of Veitch's arguments. Veitch is not only the only steward ever to be punished, but also the only one of three stewards being punished based on the Life at Ten race, and his punishment is inconsistent with the agreed penalty imposed on the only other individual charged with any violations stemming from the entire running of the Breeders' Cup (i.e., the agreed penalty of fine for jockey John Velazquez). Further, the Second Revised Final Order does not explain other similar or analogous disciplinary actions. While no other steward has ever been disciplined, the KHRC could and should look to disciplinary actions of jockeys, trainers or other licensed racing officials for guidance. To this end, the KHRC glossed over the Court's reliance on Curd to address at least two important issues – the discretionary nature of Veitch's actions within the scope of the regulations and apportionment of the penalty for the surviving regulatory violations. Again, these issues require a thoughtful discussion of the events covering the days of the Breeders' Cup, including standard protocol as applied to other instances and any relevant disciplinary actions in the KHRC's history. Despite the KHRC's position that Veitch failed to set forth viable claims for disparate treatment and deprivation of due process, the KHRC must still be required to explain why the conduct of or action taken against third parties or the performance of other horses is irrelevant to the action taken against Veitch for his handling of the Life at Ten race. This simply was not accomplished in the three page discussion contained within the Second Revised Final Order. The Court fully acknowledges that it cannot revise the KHRC's penalty determination to a fine or a lesser temporal penalty. However, the Court can and must ensure that the KHRC's

penalty is not arbitrary, is not an abuse of discretion and is properly justified by the record.

After five years of litigation, the KHRC owes Veitch a proper explanation of the penalty imposed against him for violating the KHRC administrative regulations. This explanation should be a comprehensive writing, detailed with supporting evidence from the administrative record taking into consideration any similar circumstances against which Veitch's conduct can be judged. If no similar circumstances exist, it is the duty of the KHRC to show the propriety of the penalty imposed pursuant to KRS 13B.090(7). The Court implores the KHRC, for the benefit and integrity of horse racing in the Commonwealth of Kentucky, to reconsider the Second Revised Final Order and issue a Final Order that appropriately addresses the Court's concerns.

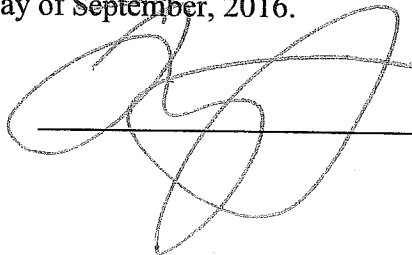
III. Conclusion

The only question presented to the Court is whether the KHRC's continued imposition of a 9 month suspension penalty is justified and supported by the administrative record. On review, the Court concludes that the penalty has not been justified, and it is unclear whether the record supports the KHRC's imposed penalty. Accordingly, the Court reverses the KHRC's May 23, 2016 Revised Final Order and remands the matter to the KHRC for further proceedings consistent with this Opinion.

WHEREFORE, the Final Order of Respondent, Kentucky Horse Racing Commission, is **REVERSED** and **REMANDED**.

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

SO ORDERED, this 21st day of August September, 2016.



THOMAS D. WINGATE
Judge, Franklin Circuit Court

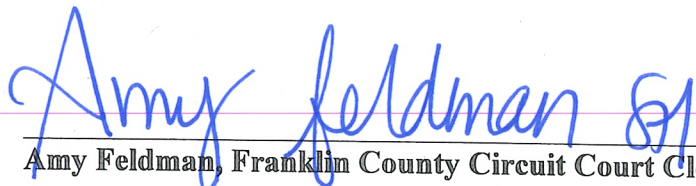
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was mailed,
this 23rd day of ~~September~~ ^{August}, 2016, to the following:

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