4-2600-7534-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA RACING COMMISSION

In the Matter of the Proposed Adoption of Rules Relating to Amendments to Existing Rules Governing Pari-Mutuel Horse Racing

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 1:00 p.m. on Wednesday, May 5, 1993 in the Hennepin County Commissioner's Board Room, 24th Floor, Hennepin County Government Center, Minneapolis, Minnesota.

This Report is part of a rulemaking proceeding, held pursuant to Minn. Stat. §§ 14.131 to 14.20, to determine whether the Racing Commission has fulfilled all relevant, substantive and procedural requirements of law, to determine whether the the proposed rules are needed and reasonable, to determine whether the Commission has statutory authority to adopt the proposed rules, and to determine whether or not the proposed rules, if modified, are substantially different from the rules as originally proposed.

E. Joseph Newton, Special Assistant Attorney General, 1100 Bremer Tower, 82 East Seventh Place, St. Paul, Minnesota 55155, appeared on behalf of the Minnesota Racing Commission. Members of the agency panel appearing at the hearing were: Richard G. Krueger, Executive Director of the Commission; Donald Frazier, Chief Steward; and Sharon Beighley, Office Manager for the Commission. The hearing continued until all interested groups and/or persons had had an opportunity to comment concerning the proposed rules.

The Commission must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commission of actions which will correct the defects and the Commission may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commission may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commission does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commission elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commission may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commission makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Commission files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On December 21, 1992, the Commission filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules certified by the Revisor of Statutes.
(b) The Order for Hearing.
(c) The Notice of Hearing proposed to be issued.
(d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
(e) The Statement of Need and Reasonableness (SONAR).

2. On March 15, 1993, a Notice of Hearing and a copy of the proposed rules were published at 17 State Register, pp. 2197 - 2203.

3. On March 12, 1993, the Commission mailed the Notice of Hearing to all persons and associations who had registered their names with the Agency for the purpose of receiving such notice.

4. On April 21, 1993, the Commission filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.
(c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
(d) An Affidavit of Additional Notice.
(e) The names of Commission personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
(f) A copy of the State Register containing the proposed rules.

5. The period for submission of written comment and statements remained open through May 25, 1993, the period having been extended by Order of the Administrative Law Judge to 20 calendar days following the hearing. The record closed on June 3, 1993, the fifth business day following the close of the comment period.

6. Pursuant to Minn. Stat. § 14.115, the Commission considered each of the methods for reducing the impact of the proposed rules on small business as contained in subdivision 2 of that section. That consideration is set forth on pages 9 and 10 of the Statement of Need and Reasonableness. The Commission has determined that the rules as proposed cannot be rewritten or restructured to impose less of a burden on small business and still accomplish the purpose intended by the proposed rules and the Pari-Mutuel Horse Racing Act, Minn. Stat. Chapter 240.

Statutory Authority

7. The Commission contends that its statutory authority to promulgate the proposed rules is contained generally in Minn. Stat. Chapter 240 which empowers it to: "(1) regulate horse racing in Minnesota to ensure that it is conducted in the public interest; (2) enforce all laws and rules governing horse racing; (3) supervise the conduct of pari-mutuel betting on horse races, and (4) take all necessary steps to ensure the integrity of racing in Minnesota." SONAR at page 1. The Notice of Hearing specifically states that statutory authority to adopt the proposed rules is contained in Minn. Stat. § 240.23 (1992). That section recites the broad rulemaking authority granted to the Commission as stated in the SONAR. Except as specifically modified below, the Judge finds that the Commission has demonstrated its statutory authority to promulgate the proposed rules.

Modifications to the Proposed Rules Made by the Commission Subsequent to Hearing

8. After a review of all the oral testimony and written comments submitted, the Commission has modified the proposed rules as follows:

7877.0135 DUAL LICENSING

* * *

E. For all . . . the commission ~~may~~ shall authorize county fair associations . . . . Stewards ~~may~~ shall act as . . . . The commission ~~may~~ shall require that . . . of the class D license if it is determined that additional officials would be required to maintain the integrity of the race meet and to insure the safety of its participants.

7879.0200 AUTHORITY AND DUTIES OF STEWARDS

. . . The powers of stewards shall include:

* * *

K. (all new material; only modification underlined) for all county fair meets, in which the average daily handle for the preceding year was less than $150,000, the rules of horse racing and pari-mutuel rules shall apply, except as otherwise provided or except as otherwise directed by the commission, at the time of application approval and thereafter upon conclusion of a special meeting or telephone poll of the commission unless those changes in conditions would compromise the integrity of the race meet, or create a hazard to humans or animals.

L. for a period of 90 days . . . for the parties concerned ~~may~~ shall be exercised by a ~~single-knowledgeable-person~~ chief steward, presiding simulcast steward, or the executive director, or the designee of the executive director. Any person acting . . . .

7883.0100 ENTRIES AND SUBSCRIPTIONS

* * *

Subp. 16. Workout requirements . . . .

* * *

E. For all county fairs . . . prior to entry ~~for an examination and workout, which shall be based upon the horse's past and present medical and physical condition as determined by the commission veterinarian~~ for a consultation to determine whether an examination and/or workout is required based upon the horse's past and current medical and physical condition.

These modifications were made to eliminate standardless discretion and clarify the proposed rules. During the hearing, the Judge pointed out that the language initially proposed in Rule 7879.0200 K. was too discretionary and unclear and should be rewritten. However, instead of striking the unclear language and clarifying the intent of the rule, the Commission added new language (see modification above) which only makes the rule more unclear. There was no explanation of the new meaning or intent of the modification contained with the Commission's submission. Consequently, this rule and the proposed modification are defective because the rule is so unclear as to constitute unconstitutional vagueness.

The most obvious intent of the defective rule is to allow the Commission to waive the application of existing rules to county fair meets with low betting revenues if the waiver does not affect safety or the integrity of the meet. This intent could be much more clearly expressed as follows:

> K. for all county fair meets . . . shall apply unless waived by the commission after a determination by the commission that the integrity of the race meet and safety to humans or animals would not be affected. In the event circumstances . . . .

As modified, the Judge finds that the defect will be corrected. The Judge finds additionally that the need for and reasonableness of all the modifications above has been shown.

Discussion of the Proposed Rules

9. These rules have been proposed by the Commission for the purpose of promoting standardbred racing at county fairs and to allow simulcast pari-mutuel betting. Although county fairs (class D licensees) have been permitted to apply for on-track pari-mutuel betting licenses for the past several years, none have done so. Rather, the county fairs have sponsored standardbred horse racing without pari-mutuel betting so licensure was not required. See, Minn. Rules 7870.0600-.0870. Many of the proposed rule provisions received no public comment and are adequately supported in the SONAR. The Judge specifically finds that any rule provisions not discussed below are needed and reasonable and are within the Commission's statutory authority.[1] The Findings below will only address substantive issues of need, reasonableness or statutory authority which have been raised concerning proposed rule language.

10. The primary issue addressed in this hearing was the legality of permitting Class D licensees (county fairs) to conduct wagering on races televised to Minnesota from another licensed racing jurisdiction during a televised racing day (non-live racing days). Currently, only Class B licensees are authorized to conduct wagering on "televised racing days" pursuant to existing rules. See, Minn. Rule 7871.0090, subp. 1. However, Minn. Rule 7873.0300, subp. 1 does permit a Class D licensee to conduct wagering on televised races done on a live racing day at the county fair. This rule was adopted in 1985 (9 S.R. 2527-2543) but has never been implemented because no Class D licenses have ever been applied for by county fair associations to conduct wagering.

The Pari-Mutuel Horse Racing Act was enacted in 1983 and contained specific language authorizing Class B and D licensees to conduct betting on televised horse races from other jurisdictions. Subdivisions 1 and 6 of Minn. Stat. § 240.13 (1984) read as follows:

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[1]In order for an agency to meet the burden of reasonableness, it must demonstrate by a presentation of facts that the rule is rationally related to the end sought to be achieved. Blocher Outdoor Advertising Co. v. Minnesota Dep't of Transp., 347 N.W.2d 88, 91 (Minn. Ct. App. 1984). Those facts may either be adjudicative facts or legislative facts. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). The agency must show that a reasoned determination has been made. Manufactured Housing Institute at 246.

240.13 PARI-MUTUEL BETTING.

Subdivision 1. **Authorized.** Class B and class D licenses give the licensees authority to conduct pari-mutuel betting on the results of races run at the licensed racetrack, and on other races as authorized by the commission under subdivision 6. (Emphasis added.)

* * *

Subd. 6. **Televised races.** The commission may by rule permit a class B or class D licensee to conduct on the premises of the licensed racetrack pari-mutuel betting on horse races run in other states and broadcast by television on the premises. All provisions of law governing pari-mutuel betting apply to pari-mutuel betting on televised races except as otherwise provided in this subdivision or in the commission's rules. . . . (Emphasis added.)

In 1985, the Commission adopted Minn. Rule 7873.0300 which permits both class B and D licensees to conduct pari-mutuel betting on televised horse races on live racing days. In 1989, the Commission adopted Minn. Rule 7871.0090 which permits class B licensees to conduct wagering on non-live racing days (televised racing days). Class D licensees were not included in that rule, however.

During the 1991 legislative session, subds. 1 and 6 of Minn. Stat. § 240.13 were amended to read, in relevant part, as follows:

PARI-MUTUEL BETTING.

Subdivision 1. **Authorized.** Class B and class D licenses give the licensees authority to conduct pari-mutuel betting on the results of races run at the licensed racetrack, and on other races as authorized by the commission under this section. (Emphasis added.)

A class B or class E license gives the licensee the authority to transmit and receive telecasts and conduct pari-mutuel betting on the results of horse races run at its class A facility, and of other horse races run at locations outside of the state, as authorized by the commission. A class E licensee must present, for pari-mutuel wagering purposes, all live horse races conducted at its class A facility. The class B or class E licensee may present racing programs separately or concurrently. (Emphasis added.)

> Subject to the approval of the commission, for simulcasts and telerace simulcasts the types of betting, takeout, and distribution of winnings on pari-mutuel pools of a class B or class E facility are those in effect at the sending racetrack. Pari-mutuel pools accumulated at a class E facility must be commingled with the pools at the class A facility for comparable pools on those races that are being simultaneously presented at both facilities. Pari-mutuel pools may be commingled with pools at the sending racetrack, for the purposes of determining odds and payout prices, via the totalizator computer at the class A facility.
>
> The commission may not authorize a class B or class E licensee to conduct simulcasting or telerace simulcasting unless 125 days of live racing, consisting of not less than eight live races on each racing day, have been conducted at the class A facility within the preceding 12 months. . . .
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> * * *
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> Subd. 6. **Simulcasting.** The commission may permit an authorized licensee to conduct simulcasting or telerace simulcasting at the licensee's facility on any day authorized by the commission. All simulcasts and telerace simulcasts must comply with the Interstate Horse Racing Act of 1978. United States Code, title 15, sections 3001 to 3007. In addition to teleracing programs featuring live racing conducted at the licensee's class A facility, the class E licensee may conduct not more than seven teleracing programs per week during the racing season, unless additional telerace simulcasting is authorized by the director and approved by the horsepersons' organization representing the majority of horsepersons racing the breed racing the majority of races at the licensee's class A facility during hte preceding 12 months. . . . (Emphasis added.)

Subsequent to the above statutory amendments, there was no longer any specific authority in statute for class D licensees to conduct betting on televised racing or for the Commission to promulgate rules permitting such activity.

During the 1993 session, the Minnesota House of Representatives voted to amend S.F. No. 700, a bill which would have permitted two class A licenses within the metropolitan area, by adding the following sentence to Minn. Stat. § 240.13, subd. 6:

> Notwithstanding any other provision, a class D licensee may conduct pari-mutuel betting on simulcast races under this section only on a racing day assigned by the commission on which the class D licensee conducts at least six races.

This amendment passed but S.F. No. 700 was voted down by the full House.

The Commission argues that despite the amendments to Minn. Stat. § 240.13, subds. 1 and 6 set forth above, there is a residuum of statutory authority to authorize a rule permitting class D licensees to conduct betting on televised horse races. The Judge disagrees. Minn. Stat. § 240.23 enumerates the rulemaking authority of the Commission which includes rules governing "the operation of teleracing facilities". However, there is no specific authority concerning class D licensees in that section. It is a general rule that specific statutory authority is necessary for the promulgation of substantive legislative-type rules. See, State v. Lloyd A. Fry Roof Co., 246 N.W.2d 696, 699-700 (Minn. 1976); Beck, Bakken, Muck, Minnesota Administrative Procedure, § 19.21 (1987).

The only specific authority concerning televised racing is found in Minn. Stat. § 240.13, subds. 1 and 6 (set forth above). Subdivision 1 authorizes class B and D licensees authority to "conduct pari-mutuel betting on the results of races run at the licensed racetrack, and on other races as authorized by the commission under this section." (Emphasis added.) The following paragraph in subdivision 1 states clearly that class B or E licensees may conduct betting on televised races "as authorized by the commission". If the legislature had wanted class D licensees to have similar authority, it could have easily included that class when this language was added in 1991. Instead, the legislature deleted class D licensees from subdivision 6 which was amended to provide that an "authorized licensee" could conduct simulcasting. Subdivision 1 only authorizes class B or E licensees to "transmit and receive telecasts and conduct pari-mutuel betting . . . [on] horse races run . . . outside of the state . . . ."

The Judge finds that statutory authority is lacking for the proposed rules which permit class D licensees to conduct betting on televised horse racing. Consequently, those rules cannot be adopted.[2]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Commission gave proper notice of the hearing in this matter.

2. That the Commission has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.

3. That the Commission has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Findings 8 and 10.

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[2]The issue of the validity of Minn. Rule 7873.0300 which was adopted in 1985 has not been specifically addressed.

4. That the Commission has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. That the amendments and additions to the proposed rules which were suggested by the Commission after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, Subp. 1 and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusion 3 as noted at Findings 8 and 10.

7. That due to Conclusion 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Commission from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above.

Dated this 21 day of June, 1993.

Peter C. Erickson

PETER C. ERICKSON
Administrative Law Judge