

MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

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May 12, 2008

Mr. Richard Krueger
Executive Director
Minnesota Racing Commission
P.O. Box 630
1100 Canterbury Road
Shakopee, MN 55379

RE: Review of the Proposed Rules of the Minnesota Racing Commission Governing Horse Racing, *Minnesota Rules*, chapters 7869, 7871, 7872, 7873, 7875, 7876, 7877, 7879, 7883, 7884 and 7890.
OAH Docket No. 8-2600-19440-1;
Governor's Tracking No. AR 359.

Dear Mr. Krueger:

After reviewing the above-referenced rules, the Administrative Law Judge has made two negative procedural findings, both determined to be harmless errors under Minn. Stat. § 14.26, subd. 3(d)(2). Accordingly, the rules are approved as to legality.

I. Procedural Defects – Harmless Errors

The Administrative Law Judge notes that the Minnesota Racing Commission (Commission) failed to comply with Minn. Stat. § 14.127. This statute requires that the agency that is proposing to adopt a rule without a hearing make certain cost determinations before it submits the record for the Administrative Law Judge's review.¹ Specifically, the Commission failed to submit documentation with the record showing that it had:

determine[d] if the cost of complying with [the] proposed rule in the first year will exceed \$25,000 for: (1) any one business that

¹ Minn. Stat. §14.127, subd.2.

has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.²

Once the Commission was made aware of this error, it submitted the analysis by a letter to the Administrative Law Judge on May 6, 2008; which was before the time for review of the analysis had passed. The later-arriving analysis fulfilled the requirements of §14.127.

The Commission also neglected to submit with the record an authorization stating that the Order for the proposed rule amendments were authorized by the Commission, or a statement (with the date when the agency met with a quorum present) authorizing an agency official to order the proposed rule.³ This error was also corrected on May 6, 2008. The Commission submitted a copy of a March 20, 2008 Resolution of the Racing Commission authorizing Darcy Hitesman, Chair of the Racing Commission, to sign the Order Adopting Rules and to modify the rules if necessary to obtain approval by the Revisor of Statutes or the Administrative Law Judge.

The Administrative Law Judge finds that these errors are harmless errors under Minn. Stat. § 14.26, subd. 3(d)(2) because the Commission cured each of them in a timely fashion and neither of them deprived any person or entity of an opportunity to participate meaningfully in the rulemaking process.

The agency received written no comments and submissions on the rules. Likewise, no one requested a public hearing. No changes were made to the rules as originally proposed.

Recommended Technical Corrections

The Administrative Law Judge recommends seven technical corrections to the rules. These recommendations do not reflect a defect in the rules, but are merely recommendations for corrections to the rules that the agency may adopt if it chooses to do so.⁴

Minn. R. 7875.0100, subp. 6: Title

The Administrative Law Judge recommends changing the title of Minn. R. 7875.0100, subp. 6 to clarify that the subpart now includes drivers:

Subp. 6 Jockey's and Driver's rooms.

² Minn. Stat. §14.127, subd. 1.

³ One of these two alternatives is required by Minn. R. 1400.2090 B.

⁴ The recommended changes are based on the February 11, 2008 AR3758 Revisor's version of the rules.

Such a change is needed and reasonable and would not constitute a substantial change to the rules as originally published in the State Register.

Minn. R. 7875.0100, subp. 6.A.

The Administrative Law Judge recommends using more specific language to replace the ambiguous phrase "including but not limited to" in this subpart:

The use of public, portable or cellular telephones, or transmitters or other electronic communications devices ~~including but not limited to cellular telephones~~ is prohibited in the jockey's and driver's room for one-half hour prior to the first post and until the last race is official.

This change is consistent with language used in a later provision, is needed and reasonable, and would not constitute a substantial change to the rules as originally published in the State Register.⁵

Minn. R. 7875.0200, subp.9:

The Administrative Law Judge recommends changing the word "wires" to "systems" beginning at line 3.18 of this subpart:

Under no circumstances shall any message be sent over said ~~wires~~ systems transmitting money, or other things of value, or directing the placing of any wager on the result of a race.

This change is consistent with the deletion of a reference to "telegraph" systems in the same subpart. Telegraph was the only technology mentioned in the subpart that would necessarily be wire-based. Use of the word "systems" is broader than the word "wire" and could include both wired and wireless technology. The change provides clarity and consistency within the subpart. This change is needed and reasonable, and would not constitute a substantial change to the rules as originally published in the State Register.

Minn. R. 7877.0180, subpt. 1. C. and D:

Both of these provisions include the phrase "as a driver." The Administrative Law Judge recommends substituting the word "of" for the word "as" in subparts 1.C. and 1.D.:

⁵ The recommended change is modeled on existing language from Minn. R. 7875.0200, subp. 9.

C. hold any interest in the contract of a jockey, apprentice jockey, or, in the case of standardbred racing, as of a driver riding or driving at a meeting

D. buy or sell for another person any right to a contract of any a jockey, apprentice jockey, or, in the case of standardbred racing, as of a driver riding or driving at a meeting

The use of the word "as" in the phrase "as a driver" in each of these provisions appears to be an error. These two provisions address situations in which the racing official holds or exchanges contract rights as to a jockey or a driver. These rules do not address the situation where the racing official is acting as a jockey or a driver; a subject that is addressed in subpart 1.E.

These changes correct a wording error and are needed and reasonable. These changes would not constitute a substantial change to the rules as originally published in the State Register.

Minn. R. 7883.0100, subpart 7.C.:

The Administrative Law Judge recommends restoring a sentence which was deleted as part of the rule amendments in this proceeding. The sentence was the first sentence of the original Minn. R. 7883.0100, subp. 7.C. prior to the adoption of these amendments. The new provision, beginning at line 13.8 would read:

B. All horses owned wholly or in part by the same person, or his or her spouse, shall be coupled and run as an entry. The association may uncouple entries on any race with the permission of the stewards.

This change restores language which defined the underlying rule. The remaining language in the provision, giving stewards discretion to permit uncoupling entries, is not meaningful unless there is a rule to which the exception can be applied.

This change clarifies the intent of the Commission, is needed and reasonable, and would not constitute a substantial change to the rules as originally published in the State Register.

Minn. R. parts 7890.0100, subpt.13.B.; 7890.0110, subps. 1 and 5; 7890.0110, subp. 7.C., 7890.0130, subp.1 and 7890.0140, subp.7a:

In each of these subparts, the Commission has proposed amendments based upon recommendations from the Revisor's office as to the proper practice

for hyphenated words. At the urging of the Revisor's office, the Commission has amended the current rule so as to change the hyphenated phrases "post-race" or "pre-race" to the single conflated words, "postrace" and "prerace."

While mindful of the Revisor's general admonition that words which have the prefix "pre" or "post" should be "spelled as solid words" in administrative rules,⁶ conflating these hyphenated phrases creates words that are not in the dictionary.⁷ The concern of the Administrative Law Judge is that conflating the phrase "post-race blood sample" to read "postrace blood sample," the faux term "postrace" appears as if it might be a special term of art used in either veterinary medicine or racing. More problematic still, the term "postrace" would not likely be found by anyone consulting a glossary of either medical or racing terms.

For these reasons, the Administrative Law Judge encourages the Commission staff to again confer with its liaison in the Revisor's office as to whether the referenced rules could either be reworded to avoid the use of non-hyphenated terms that are not in common usage; or, alternatively, replacing the phrases "pre-race" and "post-race" with more readable two-word phrases such as "post race" and "pre race."

These changes would add clarity to the proposed rule, are needed and reasonable, and would not constitute substantial changes to the rules as originally published in the State Register.

Repealer.

In the January 2, 2008 version of the rules, Revisor's number RD3758, Minn. R. 7883.0140, subparts 20 and 29 are repealed. These are the only repeals in the proposed rules.

Due to an apparent typographical error, the repeals are listed in the Repealer section as Minn. R. 7883.0100, subparts 20 and 29. This error is repeated in the February 11, 2008 AR3758 version of the rules.

The Administrative Law Judge recommends that the Repealer provision be changed to reflect a technical correction of this error:

REPEALER. Minnesota Rules, part 7883.0140, subparts 20 and 29, are repealed.

⁶ See generally, Section 8, *Minnesota Rules, Drafting Manual with Styles and Forms* (Office of the Revisor of Statutes, 1997) ("Hyphens").

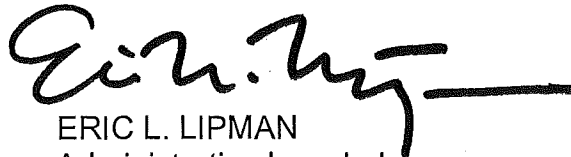
⁷ Compare, *id.* ("To answer questions about hyphenation, first consult *Webster's Third New International Dictionary.*").

This change is needed and reasonable, and would not constitute a substantial change to the rules as originally published in the State Register.

As required by Minn. Stat. § 14.127, the agency has made its determination regarding the effect of the rules on small businesses and small cities. The Administrative Law Judge reviewed the agency's determination and concurs with the agency's finding that complying with the proposed rules in the first year after the rules take effect will not exceed \$25,000 for any one small business or any one small city.

With the approval of the adoption of these rules, our office is sending this letter to the agency for its consideration of the suggested technical corrections. OAH will hold the agency rule record at this time. **Please contact Laura Schlatter at (651) 361-7847 with any questions and to inform OAH whether the agency intends to adopt any of the recommendations discussed above.**

Sincerely,

A handwritten signature in black ink, appearing to read "Eric L. Lipman", with a horizontal line extending to the right from the end of the signature.

ERIC L. LIPMAN
Administrative Law Judge

cc: Office of the Governor
Office of the Attorney General
Legislative Coordinating Commission
Revisor of Statutes