

3931

OAH 3-2600-21237-1  
Governor's Tracking No. AR 533

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE RACING COMMISSION

In the Matter of the Proposed Rules of the State Racing Commission Governing Horse Racing, Minnesota Rules, Chapters 7876, 7877, 7879, 7883, 7884, 7890, and 7891

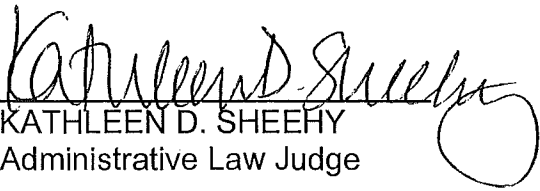
**ORDER ON REVIEW OF  
RULES UNDER MINNESOTA  
STATUTES, SECTION 14.26**

The Minnesota Racing Commission (Commission) is seeking review and approval of the above-entitled rules, which were adopted by the Commission without a hearing. This review and approval is governed by Minn. Stat. § 14.26. On July 20, 2010, the Office of Administrative Hearings (OAH) received the documents that must be filed by the Commission under Minn. Stat. § 14.26 and Minn. R. 1400.2310. On August 2, 2010, the Administrative Law Judge requested additional information from the Commission. The Commission supplemented the record on August 9, 2010. Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum which follows,

**IT IS ORDERED:**

1. The Commission has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with all procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400.
3. The rules are needed and reasonable, with the exception of the following rule part: 7890.0150. Accordingly, this rule subpart is **DISAPPROVED** as not meeting the requirements of Minn. Stat. § 14.06 (a) and Minnesota Rules part 1400.2100, item B.
4. Pursuant to Minnesota Statutes, section 14.26, subdivision 3(b), and Minnesota Rules, part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: August 11, 2010

  
KATHLEEN D. SHEEHY  
Administrative Law Judge

## MEMORANDUM

Pursuant to Minnesota Statutes, section 14.26, the agency has submitted these rules to the Administrative Law Judge (ALJ) for review. The rules of the Office of Administrative Hearings<sup>1</sup> identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. These circumstances include situations in which a rule was not adopted in compliance with procedural requirements, unless the judge finds that the error was harmless in nature and should be disregarded; the rule is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule; the rule is substantially different than the rule as originally proposed and the agency did not comply with required procedures; the rule grants undue discretion to the agency; the rule is unconstitutional<sup>2</sup> or illegal; the rule improperly delegates the agency's powers to another entity; or the proposal does not fall within the statutory definition of a "rule."

### Defect in Part 7890.0150

The Commission proposes to amend Part 7890.0150, Disclosure of Approved Medications to the Public, as follows:

The names of all horses that have been approved for race day use of NSAIDS or furosemide must be identified in the daily racing program. ~~The names of all horses that have been treated with NSAIDS shall be posted on the public information boards in the grandstand by the association by one hour before post time of the first race on the day such horses are to race. Horses that are racing for the first time using furosemide, must be so identified in the daily racing program.~~

The Commission's Statement of Need and Reasonableness (SONAR), dated April 26, 2010, does not offer any rationale for the proposed deletion in Part 7890.0150. The only acknowledgement of the proposed change appears in the Introduction section of the SONAR where the Commission states that it is "deleting obsolete language regarding disclosing the use of approved medications."

Among the statutory procedural requirements that the ALJ is required to review is "whether the record demonstrates a rational basis for the need for and reasonableness of the proposed rule."<sup>3</sup> The SONAR is a critical part of the rulemaking process because it promotes meaningful public participation in the rulemaking process and provides

---

<sup>1</sup> Minn. R. 1400.2100 (2009).

<sup>2</sup> In order to be constitutional, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. See, *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980).

<sup>3</sup> Minn. Stat. § 14.26.

guidance on how a rule should be interpreted.<sup>4</sup> Minn. Stat. § 14.23 emphasizes the importance of the SONAR: "By the date of the section 14.22 notice (Dual Notice), the agency shall prepare a statement of need and reasonableness, which must be available to the public." Minn. Stat. § 14.131 provides that "the agency *must* prepare, review, and make available for public review a statement of the need for and reasonableness of the rule." [Emphasis supplied] Minn. Stat. § 14.131 goes on to list the items of information that must be included to establish the need for and reasonableness of a rule provision.

The Commission's SONAR contains no facts supporting the need for and reasonableness of Part 7890.0150. The Commission asserted in the introductory section of the SONAR that the sentence proposed for deletion was "obsolete." The information provided by the Commission upon the request of the ALJ states that industry practice no longer requires posting of the list of treated horses and that the practice is an unnecessary duplication of requirements in the rule. Had the proposed change been a direct result of a change in the Commission's governing statutes, the ALJ may have looked less critically at the Commission's lack of justification for the change to Part 7890.0150.

Because the affirmative presentation of facts from the SONAR does not address why the names of all horses that have been treated with NSAIDs no longer must be posted in the grandstand, and because the justification provided by the Commission was not part of the record during the public comment period, the Commission has failed to fulfill the need and reasonableness requirements of Minn. R. 1400.2100, item B. The ALJ finds that this defect can be cured in one of two ways:

- The Commission may withdraw the proposed amendment to Part 7890.0150; or
- The Commission may distribute to its rulemaking mailing list and according to its Additional Notice Plan an addendum to the SONAR setting forth an affirmative presentation of facts in support of the deletion of Part 7890.0150. The information distributed by the Commission must notify all recipients of a second 30-day public comment period, including specifying the date the second comment period will close. Following the close of the second 30-day comment period, the Commission shall submit to the ALJ the information described in this paragraph along with any public comments submitted during the second comment period and any Commission responses to those comments.

The change described in the first option is needed and reasonable and would not result in a rule that is substantially different from the rules as proposed and published in the

---

<sup>4</sup> See *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 104 (Minn. App. 1991), review denied (Minn. July 24, 1991) (agreeing with ALJ's determination that agency's SONAR commenting on the proposed rule's impact supported conclusion that decision not arbitrary or capricious). See also *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817, 830 (Minn. 2006); and *Saif Food Mkt. v. State*, 664 N.W.2d 428 (Minn. Ct. App. 2003).

*State Register.* If the Commission chooses the second option, the ALJ will make a determination as to substantial change upon resubmission of the proposed rules.

**K. D. S.**