

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Possible Amendments to Rules Governing Horse Racing, Pari-Mutuel Wagering, Class C Licenses, Advance Deposit Wagering, Horse Races, Harness Races, Horse Medication, and Prohibited Acts; *Minnesota Rules 7873, 7877, 7880, 7883, 7884, 7890, and 7987.*

**ORDER ON REVIEW OF  
RULES UNDER  
MINN. STAT. § 14.26**

This matter came before Administrative Law Judge James E. LaFave upon the application of the Minnesota Racing Commission (the Commission) for a legal review under Minn. Stat. § 14.26 (2020).

On February 18, 2022, the Commission filed the documents with the Office of Administrative Hearings required under Minn. Stat. § 14.26 and Minn. R. 1400.2310 (2021).

Based on a review of the written submissions by the Commission, all the documents in the rulemaking record, Minnesota Statutes, Minnesota Rules, and for the reasons in the Memorandum that follows,

**IT IS HEREBY DETERMINED:**

Except as to proposed Minn. R. 7892.0110, subps. 1, 2, and 3,

1. The Commission has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with the procedural requirements of Minn. Stat. §§ 14.001-.69 (2020); Minn. R. 1400.2000-.2310 (2021).
3. The record demonstrates the rules are needed and reasonable.

**IT IS HEREBY ORDERED THAT:**

1. The following rules or parts thereof are not approved:
  - a. Minn. R. 7892.0110, subp. 1;
  - b. Minn. R. 7892.0110, subp. 2; and,
  - c. Minn. R. 7892.0110, subp. 3.

2. All other rules or parts thereof are **APPROVED**.

3. For clarity and readability, the Commission should consider making the modifications suggested in the attached Memorandum.

4. Pursuant to Minn. Stat. § 14.26, subd. 3(b), and Minn. R. 1400.2300, subp. 6, the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: March 4, 2022

  
JAMES E. LAFAVE  
Administrative Law Judge

## MEMORANDUM

The Board has submitted these rules to the Administrative Law Judge for review under Minn. Stat. § 14.26. Subdivision 3(a) of that statute specifies the Administrative Law Judge must approve or disapprove the rules as to their legality and form. In conducting the review, the Administrative Law Judge must consider the issues of whether the agency has the authority to adopt these rules; whether the record demonstrates a rational basis for the need and reasonableness of the proposed rules; and whether the rules as modified are substantially different from the rules as originally proposed.<sup>1</sup>

When undertaking a review of proposed rules, the Administrative Law Judge must assess whether the proposed rules comport with applicable legal standards. Those standards include prohibitions on grants of undue discretion to government officials, and on proposed rules that are unduly vague and cannot take effect upon their own terms.<sup>2</sup> “A rule, like a statute, is void for vagueness if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement.”<sup>3</sup>

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<sup>1</sup> Minn. Stat. § 14.26, subd. 3.

<sup>2</sup> Minn. R. 1400.2100; *see also* Minn. R. 1400.2300, subp. 3.

<sup>3</sup> *In re N.P.*, 361 N.W. 2d 386, 394 (Minn. 1985), *citing Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972).

## I. Defects in the Proposed Rules

### Minn. R. 7892.0110, subsps. 1-3 Out-of-Competition Testing

Agencies are creatures of statute. They only have the power and authority given to them by the legislature.<sup>4</sup> Moreover, an agency may not enlarge its “powers beyond that which was contemplated” by the legislature.<sup>5</sup>

The Commission has the authority to promulgate rules governing the conduct of horse races held at licensed tracks in Minnesota.<sup>6</sup> They may also develop procedures for sampling and testing of any horse that is eligible to race in Minnesota for substances and practices that are prohibited by law or rule.<sup>7</sup> The Commission may also “make and enforce rules governing medication and medical testing for horses running at licensed tracks.”<sup>8</sup> Finally, the Commission is charged with regulating horse racing in Minnesota to ensure that it is conducted in the public interest and to take all steps necessary to ensure the integrity of racing in Minnesota.<sup>9</sup>

The first three subparts of the Out-of-Competition Testing Rule exceed that statutory authority. Broadly stated, those subparts allow the Commission to take blood, urine or other biological samples from a horse, at any time of the day or night, anywhere in the country, without notice, and without a sufficiently defined nexus to racing in Minnesota. The subparts of the rule are vague, overbroad and unreasonable, and therefore, cannot be approved.

## II. Recommendations to overcome the defects<sup>10</sup>

The Administrative Law Judge make the following suggestions to address the defects.<sup>11</sup>

### A. Minn. R. 7892.0110, subp. 1

This subpart, as drafted, would allow the Commission to take a sample from a horse “at any time on any date.” It grants broad discretion and there was no showing in the Statement of Need and Reasonableness (SONAR) of the need for such an

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<sup>4</sup> *In re Hubbard*, 778 N.W.2d 313, 318 (Minn. 2010).

<sup>5</sup> *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 259 (Minn. 2005).

<sup>6</sup> Minn. Stat. § 240.23 (1) (2020).

<sup>7</sup> Minn. Stat. § 240.23 (10) (2020).

<sup>8</sup> Minn. Stat. § 240.24, subd. 1 (2020).

<sup>9</sup> Minn. Stat. § 240.23 (2020).

<sup>10</sup> See Minn. Stat. § 14.26, subd. 3(a).

<sup>11</sup> The recommendations to overcome the defects and the recommendations for clarity are based on the Association of Racing Commissioners International (ARCI) Model Rules of Racing at 317-322 (Version 11.0, Jan. 2022). The Commission used the ARCI Model Rules as a starting point for proposed rule 7892.110 Out-of-Competition Testing. (See Ex. D (SONAR) at 25).

extraordinary power. Under the circumstances it is unreasonable. A clearly defined period within which the Commission may take a sample would cure this problem.

Subp. 1. **Out-of-competition testing authorized.** The commission may, between the hours of 6:00 a.m. and 2:30 p.m., or 30 minutes after the start of the last race on days where racing is held, whichever is later at any time on any date, take blood, urine, or other biological samples as authorized by chapters 7869 to 7899 from a horse to enhance the ability of the commission to enforce its medication and antidoping rules. The commission shall own the samples. A race day prohibition or restriction of a substance under chapters 7869 to 7899 is not applicable to an out-of-competition test unless there is an attempt to race the horse in a manner that violates chapters 7869 to 7899.

The time frame suggested is merely that - a suggestion. The Commission is free to use its knowledge and expertise to craft a more appropriate one. The important point is that there be a specific period during which testing under this section of the rule may occur.

#### **B. Minn. R. 7892.0110, subp. 2**

Subpart 2 as drafted is too vague. A rule must be sufficiently specific to provide fair warning of the standard of conduct to which the rule applies.<sup>12</sup> That is not the case here. It would be impossible for an owner or trainer to know if their horse was subject to out-of-competition testing. How long ago must a horse have raced to be eligible for testing? Six months? One year? Two years? The subpart fails to adequately define which horses are eligible to be tested. The cure proposed below, is taken from the ARCI Model Rules

Subp. 2. **Horses eligible to be tested.** ~~Any horse that has been training or racing in the state is subject to testing under this part.~~ Any horse that has been engaging in activities related to competing in horsing racing in Minnesota may be tested. This includes, without limitation, any horses that are training outside the jurisdiction to participate in racing in the jurisdiction and all horses that are training in the jurisdiction, but excludes wearlings, yearlings and horses no longer engaged in horse racing (e.g., retired broodmares).

(a) A horse is presumed eligible for out-of-competition testing if:

(i) It is on the grounds at a racetrack or training center under the jurisdiction of the commission;

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<sup>12</sup> *Cullen v. Kentucky*, 407 U.S. 104, 110, 92 S. Ct. 1953, 1957 (1972); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980).

(ii) It is under the care or control of a trainer licensed by the commission;

(iii) It is owned by an owner licensed by the commission;

(iv) It is entered or nominated to race at a premises licensed by the commission;

(v) It has raced within the previous 12 months at a premises licensed by the commission; or

(vi) It is nominated to a program based on racing in the jurisdiction, including without limitation a state thoroughbred development, breeder's award fund, or standardbred state sires stakes.

(b) Such presumptions are conclusive in the absence of evidence that a horse is not engaged in activities related to competing in horse racing in the jurisdiction.

### **C. Minn. R. 7892.0110, subp. 3**

Subpart 3(B) of the rule gives the chief commission veterinarian, chief steward, and the presiding judge unfettered discretion to select the horses to be tested. As noted by the Minnesota Court of Appeals:

The government cannot operate without agencies that exercise discretionary power . . . [n]onetheless, conferring too much discretion on an individual or an institution creates the potential for harm attributable to the abuse of discretion. The challenge is to balance the need for discretion with the need for checks on discretion at each level of decision making. Rules are an effective limit both on agency discretion and on the discretion of agency personnel.<sup>13</sup>

A rule may provide agency decision-makers with discretion so long as it also provides some standard guiding agency officials in the exercise of that authority. Discretionary power may be delegated to administrative officers:

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<sup>13</sup> *Coalition of Greater Minnesota Cities v. Minnesota Pollution Control Agency*, 765 N.W.2d 159, 165-66 (Minn. Ct. App. 2009) (internal citations and quotations omitted).

[i]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.<sup>14</sup>

Item B does not sufficiently describe the situations where it is appropriate for the chief commission veterinarian, chief steward, or the presiding judge to test a horse.

**Subp. 3. Selection of horses to be tested.**

- A. Horses shall be selected for sampling by the chief commission veterinarian, chief steward or presiding judge.
- ~~B. Horses are selected to be tested at random, for cause, or as otherwise determined necessary.~~

The SONAR does not provide enough information to allow the Administrative Law Judge to suggest language that would cure this defect. The language must, however, be rewritten to have specific, nondiscretionary criteria for selecting a horse for testing.

**III. Recommendations to add clarity to the rules**

The Administrative Law Judge recommends that the Commission make a few changes to the language of the proposed rules to clarify or improve the readability of the proposed rules. These suggested changes are merely recommendations and do not denote defects in the proposed rules.

**A. Minn. R. 7877.0170, subp. 9(L)**

- L. The commission shall initiate a complaint with the Board of Veterinary Medicine ~~for~~ against a veterinarian determined to have acquired or administered a Class 1 substance contained in the Association of Racing Commissioners International (ARCI) Uniform Classification Guidelines for Foreign Substances and Recommended Penalty Rule.

**B. Minn. R. 7892.0110, subp. 4**

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<sup>14</sup> *Lee v. Delmont*, 228 Minn. 101, 112, 36 N.W.2d 530, 538 (Minn. 1949); *see also Anderson v. Comm'r of Highways*, 267 Minn. 308, 312, 126 N.W.2d 778, 780-81 (Minn. 1964) (noting exceptions to the requirement that a rule contain an express standard to guide the exercise of discretion by agency officials "where it is impracticable to lay down a definite comprehensive rule-such as, where the administration turns upon questions of qualifications of personal fitness, or where the act relates to the administration of a police regulation which is necessary to protect the general health, welfare, and safety of the public."). The proposed rule does not fall within these exceptions, but instead requires the applicant to demonstrate measurable, substantive knowledge.

Subpart 4. **Cooperation with the commission.**

A. Licensees of the commission are required to cooperate and comply fully with this ~~subpart~~ rule.

B. No person shall knowingly interfere with or obstruct a sampling.

IV. Conclusion

None of the changes recommended above to the parts of the proposed rules that have been found to be defective would render the rule substantially different from the rule as initially proposed. Because the Administrative Law Judge has disapproved subparts 1, 2 and 3 of proposed Minn. R. 7892.0110, this report will be submitted to the Chief Administrative Law Judge for review pursuant to Minn. Stat. § 14.26, subd. 3(b), and Minn. R. 1400.2300, subp. 6.

**J. E. L.**