

Matter of Sachs v New York State Racing & Wagering Bd.

2002 NY Slip Op 30185(U)

July 30, 2002

Supreme Court, Sullivan County

Docket Number: 184/02

Judge: Mark M. Meddaugh

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Order of Transfer (Pages 3a-12a)

At a term of the Supreme Court of the State of New York, held in and for the County of Sullivan, at Monticello, New York, on May 8, 2002

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN**

-----X
In the Matter of the Application of

DAVID R. SACHS, D.V.M.

Petitioner, .

For a Judgment Pursuant to CPLR Article 78

-against-

**NEW YORK STATE RACING AND WAGERING
BOARD, DIVISION OF HARNESS RACING,**

Respondent.

-----X
Present: Hon. Mark M. Meddaugh,
Acting Justice, Supreme Court

Appearances: **Michael D. Altman, Esq.**
Attorney for the Petitioner
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South Fallsburg, NY 12779

**The Office of the Attorney General
Of the State of New York
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DECISION/ORDER
Index # 184/02
RJI # 52-20808-02

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MEDDAUGH, J.:

The Petitioner has filed an application by Order to Show Cause, seeking an Order pursuant to Article 78 of the CPLR vacating Respondent's Findings and Order dated January 2, 2002, which Findings and Order suspended and revoked any occupational license issued by

Respondent to Petitioner, and ordered that the Petitioner be expelled from participating at any and all other horse racing tracks. The Order to Show Cause has stayed the enforcement of the Findings and Order of the Respondent, pending the determination of this proceeding.

The Petitioner asserts in his Petition that he is a doctor of veterinary medicine, is admitted to practice in both the state of New York and Florida, and has been practicing veterinary medicine for 12 years. The Petitioner has a specialized equine practice and is currently practicing at the Pompano Raceway in Pompano, Florida. It is asserted that the Findings and Order of the Respondent, dated January 2, 2002, which suspended and revoked the Petitioner's harness racing license will, if upheld, effectively prohibit the Petitioner from practicing his specialized profession at any racetrack in the United States and North America.

It was alleged in the proceeding to revoke and suspend the Petitioner's license that, in November of 1999 at the Monticello Raceway, the Petitioner had administered a proscribed medication ("naloxone") on five separate occasions to harness race horses who were all trained by Joseph Minieri. As the result of the horses testing positive, Joseph Minieri was suspended at the end of 1999, through the year 2000, and into the year 2001.

Mr. Minieri, his girlfriend, Lilian ReRosa, and the owner of the horses, Mark Graber, all gave statements to the Respondent in May of 2000 which inculpated the Petitioner.

The Petitioner's first argument is that the Respondent lacked jurisdiction to bring administrative charges against the Petitioner's license because, at the time the proceeding was brought to suspend and revoke his license, his license with the Respondent Racing Board had expired. The Petitioner's New York license expired on December 31, 2000. The administrative violation charges against the Petitioner were mailed on December 29, 2000, by certified mail, but were not received by the Petitioner until January 9, 2001. The Petitioner argues that the

Respondent did not have jurisdiction to bring this proceeding after his license has expired.

The Petitioner's second argument is that the Hearing Examiner has been employed or involved with the Respondent Board for the past 24 years, and was involved and participated in the investigation of the specific charges against the horse's owner, Joseph Minieri. It was claimed, therefore, that the Hearing Examiner was not unbiased and impartial.

The Petitioner's third argument is that an Amended Order to Show Cause was presented after two days of hearings on the charges against the Petitioner, which amended Order alleged that the horse were injected within seven days of the race for each particular horse, instead of on the actual race day, as was previously alleged. The Petitioner alleges that the "seven day rule"(9(e) NYCRR 4120(e)) regarding the administration of medication or drugs for racehorses is separate and distinct rule from the "one day rule" (9(e) NYCRR 4120(b)). The Petitioner argues that, besides the substantial deprivation of due process, lack of notice and lack of meaningful opportunity to cross examine witnesses as a result of new charges in the amended Order to Show Cause, there was no jurisdiction for the Respondent to bring new charges 16 months after the Respondent's New York State Harness Racing License had expired.

The Petitioner's fourth, and final, argument was that the testimony elicited at the hearing does not justify the findings made by the Hearing Examiner.

In response, the Respondent argues that the Petitioner has raised the issue whether the determination was based upon substantial evidence in the hearing record (CPLR §7803(4)), and the proceeding must be transferred to the Appellate Division (CPLR §7804(g)).

In response to the jurisdictional argument, the Respondent argues that the Petitioner "did not contend and has not proceeded as if the proceeding was made moot by the expiration of the existing license," and in any event disputes the conclusion that jurisdiction may only be

exercised during the term of the license. In addition, the Respondent argues that the proceeding was commenced during the period that the license was in effect, in accordance with the applicable regulations for the mailing of notice of suspension and hearing.

The Respondent also argues that the Petitioner has failed to demonstrate that the Hearing Examiner was biased, and that the fact that the Hearing Examiner had a professional affiliation with the Respondent is not sufficient to establish such bias.

The Respondent did not address the issue raised by the Petitioner as to the alleged impropriety of amending the charges in the middle of the administrative hearing.

The Petitioner agrees that the argument that Respondent's determination is not supported by sufficient evidence must be forwarded to the Appellate Division, but asserts that CPLR §7804(g) provides that this Court shall first determine if there is an objection which could terminate the proceeding, for example, lack of jurisdiction, statute of limitations, or *res judicata*, in which case this Court shall first address that issue. If, however, the determination of the other objections does not terminate the proceeding, then it shall be transferred to the Appellate Division for disposition.

On the jurisdictional issue, the Petitioner argues that, contrary to the impression created by the Respondent, he did raise the jurisdictional issue as a defense at the commencement of the administrative hearing. The Petitioner then cites to *Matter of Flynn v. State Ethics Commission*, 87 N.Y.2d 199, 638 N.Y.S.2d 418 [1995] in which the Court of Appeals found that the State Ethics Commission did not have express jurisdiction under Executive Law §94(12) to punish the unethical conduct of an employee after he or she has resigned from State service.

Section 101(1) of the Racing, Pari-Mutuel Wagering and Breeding Law (RP-MWBL) provides that the New York State Racing and Wagering Board (hereinafter the "Board"), as the

successor to state harness racing commission, has “general jurisdiction over all horse racing activities and all pari-mutuel betting activities, both on-track and off-track, in the state and over the corporations, associations, and person engaged therein.” The Board has been granted broad discretion and power to regulate horse-racing activity, including the power to issues rules and regulations to effect control over horse racing and over other participants and employees at harness race meetings (RP-MWBL §§301, 309, and 310, see, Capital Dist. Regional Off-Track Betting Corp. v. New York State Racing and Wagering Bd., 54 N.Y.2d 154, 445 N.Y.S.2d 55 [1981], Equine Practitioners Ass'n, Inc. v. New York State Racing and Wagering Bd., 105 A.D.2d 215, 483 N.Y.S.2d 239[1st Dept., 1984], order affirmed as modified 66 N.Y.2d 786, 497 N.Y.S.2d 901 [1985], Matter of Sullivan County Harness Racing Ass'n v. Glasser, 30 N.Y.2d 269, 332 N.Y.S.2d 622[1972]). It has been recognized that New York State has an important interest in assuring the integrity of the racing carried on under its auspices (Barry v. Barachi, 443 U.S. 55, 99 S.Ct. 2642 [1979]), and that an administrative agency, as a creature of the Legislature, is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication (see, e.g., Finger Lakes Racing Assn. v. New York State Racing & Wagering Bd., 45 N.Y.2d 471, 480, 410 N.Y.S.2d 268 [1978]). In 9 NYCRR §4102.3

(a) it is provided that penalties for violation of the rules of the rules of the State Harness Commission shall include:

- 1) denial, revocation or suspension of license;
- 2) monetary fines not exceeding \$5,000 for each violation;
- 3) suspension from one or more activities at one or more tracks;
- 4) expulsion from pari-mutuel harness racing in New York State;
- 5) forfeiture or return of purses won.

In 9 NYCRR §4102.3(b) it is further provided the “penalties provided above, where applicable, shall be exacted from all persons, whether licensed by the commission or not” (emphasis added).

In 9 NYCRR §4102.1 it provides that “[a]ny person licensed by the New York State Harness

Racing Commission or any person violating any of its rules or regulations shall be liable to the penalties herein provided”(emphasis added).

Accordingly, the Court finds that the Board has jurisdiction to bring an administrative proceeding to discipline the Petitioner, after the expiration of his license with the Respondent Board, for violations of the rules of the State Harness Racing Commission which occurred while he was engaged in providing veterinary services to race horses at a track located in New York State.

Wherefore, the Court finds that the Petitioners claim that the Respondent was without jurisdiction to bring a proceeding against the Petitioner is without merit.

The Court also finds that the Petitioner's has failed to establish his second point of argument that the bias of the Board's Hearing Examiner mandated his disqualification from presiding over this administrative hearing. There is a presumption of integrity and freedom from bias on those serving as hearing examiners, and the Petitioner bears a heavy burden to set aside an administrative determination based upon a claim of bias. The Petitioner would need to make a factual demonstration supporting the allegation of bias and evidence that the outcome flowed from it (Donlon v. Mills, 260 A.D.2d 971, 689 N.Y.S.2d 260 [3rd Dept., 1999], leave to appeal denied, 94 N.Y.2d 752, 700 N.Y.S.2d 426 [1999], see also, Ferraro v. State of New York Racing and Wagering Bd., Div. of Thoroughbred, 284 A.D.2d 949, 726 N.Y.S.2d 191 [4th Dept., 2001], Matter of Hirsch v. Corbisiero, Jr., 155 A.D.2d 325, 548 N.Y.S.2d 1 [1st Dept., 1989], lv. denied, 75 N.Y.2d 708, 555 N.Y.S.2d 691 [1990].). In Hadges v. Corbisiero, 760 F.Supp. 388 [S.D.N.Y, 1991] the Court found that the mere fact that the Hearing Examiner for a New York State Racing and Wagering Board administrative hearing was an employee of the board who had previously served in an investigatory capacity does not establish bias.

Finally, the Petitioner argues that the amendment of charges in the Order to Show Cause after the commencement of the hearing resulted in a deprivation of a fair hearing, the denial of due process. The Respondent failed to offer any argument in opposition to this argument.

The original Order to Show Cause, dated December 29, 2000, and received by the Petitioner on January 9, 2001, alleged that, on five separate occasions, between November 2, 1999 and November 14, 1999, the Petitioner herein, David Sachs, D.V.M., injected horses with "naloxone" within 24 hours of the start of the horse's race.

Section 4120.2(b) 9 NYCRR prohibits the administration of certain medications or drugs to race horses within 24 hours of the start of a race program, subparagraph (c) lists medications which are prohibited within 48 hours of the start of a race program, subparagraph (d) prohibits medications within 72 hours, and subparagraph (e) prohibits them within 7 days. The request to amend the Order to Show Cause to allege that Dr. Sachs injected the horses "within seven (7) days, and within 24 hours, of the start of its race" was made on April 26, 2001, after the Respondent Board had introduced six witnesses in a full day, plus 1 and ½ hours of testimony on another day. The request to amend the charges was based upon the testimony of George Maylin, D.V.M, an Associate Professor of Toxicology at Cornell University and a Director of the New York State Racing and Wagering Board Drug Testing and Research Program, who testified on the afternoon of April 25, 2002. The Hearing Examiner reserved decision on the application, but permitted the Board to complete the presentation of their case. At the conclusion of the proceedings on April 26, 2001, the Hearing Examiner adjourned the case until June 12th and 13th, to permit him to render a ruling on the issue of the amended charges, as well as on the jurisdictional issue raised by the Petitioner. The Hearing Examiner determined to permit the amendment to the Order to Show Cause, and the hearing resumed on June 28, 2001, after a two-

month adjournment in which the Petitioner was permitted to prepare a defense to the amended charges. The Board then presented the testimony of one additional witness, and then Dr. Sachs was the only witness to testify on his behalf.

Section 5402(2)(ii) of Title 9 of NYCRR provides that the Order to Show Cause may be amended or superceded "after commencement of the hearing, as authorized by the hearing officer." In Galvin v. New York Racing Assoc., 70 F.Supp.2d 163 [E.D.N.Y., 1998], it was found that, under New York state law, the holder of an occupational license issued pursuant to Title 9 of the New York Code of Rules and regulations has a property interest in such license which cannot be infringed by a state body without due process of law (*see, also, Barry v. Barachi*, 443 U.S. 55, 99 S.Ct. 2642 [1979]). Procedural due process requires notice and an opportunity to be heard prior to the deprivation of a property interest (Galvin v. New York Racing Assoc., *supra.*). To comply with due process in an administrative forum, the notice must be given sufficiently in advance of the scheduled court proceeding, and the allegations must be reasonably specific in light of all relevant circumstances, to alert the accused as to the misconduct with which he is being charged (Galvin v. New York Racing Assoc., *supra.*, Block v. Ambach, 73 N.Y.2d 323, 540 N.Y.S.2d 6 [1989]). The specificity and timing of adequate notice varies with the importance of the interests at stake (Galvin v. New York Racing Assoc., *supra.*).

In the case before this Court, Dr. Sachs was first notified that he was being charged with a violation of the State Racing and Wagering Board's Rules, based upon the allegation that he "administered and prescribed a drug or restricted substance within the time and in a manner restricted by such rules" and specifically that he administered naloxone within "24 hours" of the start of the horse's race program. Although the amendment to the Order to Show Cause was not requested until the Board has presented approximately one-half of its case, Dr. Sachs was granted

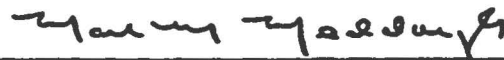
an adjournment of more than two months to prepare his defense. In addition, although Dr. Sachs complains that he was deprived of the opportunity to cross-examine the Board's witnesses on the amended charges, no request was made to recall any of the witnesses for the purpose of further cross-examination. Under the circumstances presented herein, the Court finds that the determination to permit the amendment to the Order to Show Cause did not infringe upon the Petitioner's rights of due process.

Wherefore, based upon the foregoing, the Court denies the arguments raised by the Petitioner in Points I, II, and III of his Order to Show Cause, and it is hereby

ORDERED, pursuant to CPLR 7804(g), that this proceeding be transferred to the Appellate Division of the Third Department.

Dated: July 30, 2002
Monticello, New York

ENTER:



HON. MARK M. MEDDAUGH
Acting J.S.C.

Papers Considered:

1. Order to Show Cause dated January 16, 2002
2. Verified Petition of David R. Sachs, dated January 16, 2002
3. Verified Answer of Respondent, dated April 1, 2002
4. Reply Affirmation of Michael D. Altman, Esq., sworn to May 7, 2002
5. The Record and Exhibits annexed thereto