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PROCEDURAL DUE PROCESS IMPLICATIONS OF KENTUCKY'S THOROUGHBRED MEDICATION REGULATIONS

W. CHAPMAN HOPKINS*

INTRODUCTION

It is no secret that Kentucky's thoroughbred racing industry has recently fallen on hard times. The past two years have been marked by several nationally publicized tragedies including the death of Eight Belles at the Kentucky Derby, allegations of steroid use by the three-year-old of the year, Big Brown, and charges of medication abuse by the sport's most successful trainer, Steve Asmussen. Needless to say, both those outside and within the industry had ample reasons to call for a complete overhaul of racing regulations.

Revision of the industry's medication regulation procedures has undoubtedly been the number one issue on the thoroughbred horse racing industry's agenda. Consequently, many organizations such as the NTRA,¹ RMTC,² KHRC,³ and TOBA,⁴ now find themselves scrambling to assemble task forces aimed at reviewing and amending the thoroughbred racing industry's medication policies. Each of these groups has inevitably found itself looking for ways to demand accountability for illegal and improper conduct on behalf of owners and trainers. These organizations seek to impose heavy penalties for drug and medication violations that will be swiftly and forcefully enforced.

In the industry-wide effort to penalize those found guilty of such violations, it is important to remember that individuals who are charged are entitled to certain constitutionally protected rights. Perhaps the most basic of those rights is the entitlement to constitutional due process. Indeed, the very regulations which prescribe penalties also demand that persons charged with violations be afforded the right to a public hearing and the

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¹ National Thoroughbred Racing Association

² Racing Medication & Testing Consortium

³ Kentucky Horse Racing Commission. Note that in July 2008, Kentucky Governor Steve Beshear signed an Executive Order replacing the Kentucky Horse Racing Authority with the Kentucky Horse Racing Commission. However, because Kentucky's statutory texts and administrative regulations have not yet been amended to reflect this change, for purposes of continuity, all references to the KHRA and KHRC in this paper are one in the same.

⁴ Thoroughbred Owners and Breeders Association

opportunity to defend their actions prior to the imposition of any penalty that would affect their property rights.

Despite the existence of a facially constitutional hearing procedure, a closer examination of the corresponding testing procedures prescribed by the Kentucky Horse Racing Commission reveals that the current medication testing process may contain so many flaws that it produces inaccurate results. Consequently, the outcomes of public hearings, which are based almost entirely on the test results, may not provide the defendant with actual due process sufficient to meet constitutional guarantees.

This article will examine the extent to which improper and potentially inaccurate testing procedures affect the constitutionality of Kentucky's racing medication hearing process. Part I of this article will examine the sources of due process protection and will analyze the current administrative hearing process for violations of medication regulations. Part II will then analyze the potential inadequacies of the current medication testing procedures. Finally, Part III will explain the importance of the Kentucky Horse Racing Commission's present efforts to amend these deficiencies and provide a framework for resolving the due process concerns.

I. THE RIGHT TO PROCEDURAL DUE PROCESS IN ADMINISTRATIVE HEARINGS

The modern view of the right to procedural due process in administrative hearings surfaced in the 1970's and is generally premised upon the concept of fairness. The U.S. Supreme Court held in *Goldberg v. Kelly*, 397 U.S. 254 (1970), that the Due Process Clause guarantees that "[t]he fundamental requisite of due process of law is the opportunity to be heard"⁵ through a hearing held "at a meaningful time and in a meaningful manner."⁶

A. *Origins of the Procedural Due Process Guarantee*

The *Goldberg* Court detailed certain basic procedural steps that an agency must take before it may deprive an individual of his property rights. It explained that the Constitution requires the accused be given notice of the proposed action, a meaningful opportunity to be heard, the ability to present evidence, the right to cross examine adverse witnesses, and the chance to confront the accusers in the presence of an unbiased decision maker. In

⁵ *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

⁶ *Id.* at 267 (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

addition, all of these procedures must be subject to judicial review.⁷ Most importantly, however, the proceeding must be supported by “a finding of fact [that is] based upon an evaluation of the evidence and conclusions supported by substantial evidence.”⁸ Under Kentucky law, “[s]ubstantial evidence is defined as evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable [persons].”⁹

B. Procedural Due Process under Kentucky Law

State legislatures are entrusted with the duty of protecting constitutional due process rights through statutory enactments. The Kentucky legislature has codified these fundamental rights in Chapter 13B of the Kentucky Revised Statutes (hereinafter “KRS”), which closely tracks the rights afforded under the common law. Chapter 13B provides that:

(4) To the extent necessary for the full disclosure of all relevant facts and issues, the hearing officer shall afford all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by limited grant of intervention or a prehearing order.¹⁰

KRS Chapter 13B also provides the parties with other basic procedural rights, such as a hearing officer to preside over the hearing,¹¹ “the opportunity to file pleadings, motions, objections and offers of settlement,”¹² and the opportunity to be represented by counsel¹³.

Kentucky law is also similar to the common law with regard to its relaxation of the evidentiary rules. Kentucky courts tend to take a broader view of the admission of evidence in administrative hearings and generally admit statements that would otherwise constitute hearsay if the statements are “relevant and material.”¹⁴ In other words, hearsay is admissible in an administrative hearing as long as “it is the type of evidence that reasonable

⁷ See *id.* at 267–68.

⁸ *Kaelin v. City of Louisville*, 643 S.W.2d 590, 591 (Ky. 1982) (citing *City of Louisville v. McDonald*, 470 S.W.2d 173, 177 (Ky. 1971)).

⁹ *Allen v. Ky. Horse Racing Auth.*, 136 S.W.3d 54, 59 (Ky. Ct. App. 2004) (quoting *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998)).

¹⁰ KY. REV. STAT. ANN. § 13B.080(4) (West 2006).

¹¹ KY. REV. STAT. ANN. § 13B.080(1) (West 2006).

¹² KY. REV. STAT. ANN. § 13B.080(2) (West 2006).

¹³ KY. REV. STAT. ANN. § 13B.080(5) (West 2006).

¹⁴ *Wade v. Dept. of the Treasury*, 840 S.W.2d 215, 218 (Ky. Ct. App. 1992) (citing *Myers v. Sec’y of Health and Human Servs.*, 893 F.2d 840, 846 (6th Cir. 1990)).

and prudent persons would rely on in their daily affairs.”¹⁵ This flexibility regarding the admission of evidence in administrative hearings is justified by the Commonwealth’s interest in the “reasonable exercise of its police power,”¹⁶ in addition to “the interests at stake and the costs of safeguarding the accuracy of the tribunal’s factual and legal determinations.”¹⁷

C. The Statutory Mandate for Agency-Specific Due Process Guarantees

While KRS Chapter 13B sets forth Kentucky’s general due process procedures, administrative agencies are creatures of statute. Therefore, an administrative agency’s individual powers are more narrowly tailored by the express terms of their respective enabling statutes.¹⁸ Because the enabling statute is controlling, “the authority of the agency is limited to a direct implementation of the functions assigned to the agency by the statute.”¹⁹

KRS section 230.215, which governs horse racing in Kentucky, vests sole administrative power in the Kentucky Horse Racing Commission (hereinafter the “KHRC”).²⁰ The statute gives KHRA “forceful control of horse racing in the Commonwealth with plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted.”²¹ The legislature granted the KHRA the power to “regulate and maintain horse racing at race meetings in the Commonwealth so as to dissipate any cloud of association with the undesirable and maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth.”²²

In addition to the broad authority granted to the KHRA under KRS section 230.215, KRS section 230.240 enumerates several specific areas over which the KHRA is obligated to exercise its rulemaking and adjudicatory authority. The KHRA’s obligations concerning medication and drug use in the racing industry are set forth in KRS section 230.240(2). The statute states in pertinent part:

The [KHRA] shall promulgate administrative regulations for effectively preventing the use of improper devices, and restricting or prohibiting the use and administration of drugs or stimulants or other improper acts to horses prior to

¹⁵ KY. REV. STAT. ANN. § 13B.090(1) (West 2006).

¹⁶ *Smith v. O’Dea*, 939 S.W.2d 353, 357 (Ky. Ct. App. 1997).

¹⁷ *Id.*

¹⁸ *See Pub. Serv. Comm’n v. Att’y Gen.*, 860 S.W.2d 296, 298 (Ky. Ct. App. 1993).

¹⁹ *Flying J Travel Plaza v. Dep’t of Highways*, 928 S.W.2d 344, 347 (Ky. 1996).

²⁰ *See* KY. REV. STAT. ANN. § 230.215 (West 2006).

²¹ KY. REV. STAT. ANN. § 230.215(2) (West 2006).

²² *Id.*

the horse participating in a race. The [KHRA] may acquire, operate, and maintain, or contract for the maintenance and operation of, a testing laboratory and related facilities, for the purpose of saliva, urine, or other tests, and to purchase supplies and equipment for and in connection with the laboratory or testing processes.²³

D. The KHRA's Administrative Regulations

Pursuant to this statutory authorization, the KHRA enacted Title 810, Chapter One of the Kentucky Administrative Regulations, which sets forth the “conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth.”²⁴ Within this chapter, sections 1:018, 1:028, and 1:029 relate specifically to medication testing procedures, disciplinary procedures, and the hearing and review process, respectively. It is necessary to examine each of these provisions in detail to determine whether they conform to the constitutional requirements of due process.

(i) Medication Testing Procedures

Medication testing procedures and prohibited practices, for thoroughbred racing in Kentucky, are set forth in 810 KAR 1:018. Section Two, entitled “Use of Medication,” states that a horse participating in any race:

“ . . . shall not carry in its body any drug, medication, substance, or metabolic derivative, that:

- (1) Is a narcotic;
- (2) Could serve as an anesthetic or tranquilizer;
- (3) Could stimulate, depress, or affect the circulatory, respiratory, cardiovascular, musculoskeletal, or central nervous system of a horse; or
- (4) Might mask or screen the presence of a prohibited drug, or prevent or delay testing procedures.²⁵

²³ KY. REV. STAT. ANN. § 230.240(2) (West 2006).

²⁴ 810 KY. ADMIN. REGS. 1:018 note (2009) (Historical).

²⁵ 810 KY. ADMIN. REGS. 1:018(2)(2) (2009).

Certain medications are deemed “therapeutic” and “necessary to improve or protect the health of a horse” and are exempted from the restrictions.²⁶ However, these medications must be administered by a licensed veterinarian, and the dose cannot exceed an established threshold concentration.²⁷ Sections Four, Five, Six and Eight describe certain other medications that are specifically exempted from regulatory restriction.²⁸

The samples used for testing are to be acquired at a designated “test barn” immediately following each race.²⁹ According to the regulation, the KHRA veterinarian shall take a sample from the winning horse of every race as well as any horse the stewards designate.³⁰ Notably, while the veterinarian is responsible for determining the size of the sample to be taken, the regulation lacks any specific guidance as to what constitutes a sufficient sample size.³¹

Where the sample obtained is “greater than the minimum sample requirement” as determined by the veterinarian, the remainder is stored separately for use as a “split sample.”³² Where the sample taken is less than the minimum sample requirement, no split of the sample is made, but one can be requested by the owner or trainer.³³ If a split sample is produced, it is stored in a secured freezer in the test barn.³⁴ If the initial test results in a positive finding, the trainer or owner may “request that [the] split sample corresponding to the portion of the specimen tested by the commission laboratory be sent” to a pre-approved laboratory for a second round of testing.³⁵ The regulation further demands that the process by which the split sample is taken from the freezer and shipped to the secondary testing laboratory be performed in compliance with strict chain of custody procedures.³⁶ As discussed below, the acquisition, storage, and testing of the split sample is crucial to the due process evaluation because the sample is often the only piece of evidence that the trainer can use to rebut a positive test result.

Under this testing portion of the regulatory scheme, trainers are deemed the absolute insurers of horses in their care in some jurisdictions.³⁷ As a result, a rebuttable presumption of liability for any positive finding is

²⁶ 810 KY. ADMIN. REGS. 1:018(2)(1) (2009).

²⁷ 810 KY. ADMIN. REGS. 1:018(2)(1)–(3) (2009).

²⁸ 810 KY. ADMIN. REGS. 1:018(2)(2) (2009).

²⁹ See 810 KY. ADMIN. REGS. 1:018(10), (11) (2009).

³⁰ 810 KY. ADMIN. REGS. 1:018(11)(1) (2009).

³¹ 810 KY. ADMIN. REGS. 1:018(11)(2) (2009).

³² 810 KY. ADMIN. REGS. 1:018(11)(2)(b)–(c) (2009).

³³ 810 KY. ADMIN. REGS. 1:018(11)(2)(a), (3)(a) (2009).

³⁴ 810 KY. ADMIN. REGS. 1:018(12)(1)(b) (2009).

³⁵ 810 KY. ADMIN. REGS. 1:018(12)(2)(a) (2009).

³⁶ See 810 KY. ADMIN. REGS. 1:018(13) (2009).

³⁷ Bennett Liebman, *The Trainer Responsibility Rule in Horse Racing*, 7 VA. SPORTS & ENT. L.J. 1, 21 (2007).

placed solely on the trainer in Kentucky.³⁸ Moreover, where a properly acquired saliva, urine, or blood sample tests positive for a medication violation, the positive result is “prima facie evidence that [the] horse was administered and carried” a prohibited medication in violation of the regulation.³⁹ Although this absolute insurer rule falls short of imposing strict liability,⁴⁰ the rebuttable presumption of guilt, combined with the existence of sole liability, creates an exceedingly difficult, and sometimes impossible, burden for the trainer to overcome.

(ii) Disciplinary Procedures

810 KAR 1:028 sets forth detailed disciplinary procedures and penalties for medication violations. While it is not necessary to detail these penalties for the purposes of this article, it is important to note that a trainer is often stripped of his property interest, which implicates his due process rights.

Further, 810 KAR 1:028 lists the types of medications for which penalties may be imposed. Medications are broken down by class, with Class A medication violations being the most heavily penalized and Class D violations generating the least serious punishment.⁴¹ The severity of the penalties is tiered according to whether the violation is a trainer’s first, second, or third offense.⁴² Penalties may be enforced against the trainer as well as the horse and can include suspension or revocation of a trainer’s license, suspension of the horse from racing, and monetary fines ranging from \$500 to \$50,000.⁴³

(iii) Hearing and Review Process

Upon a finding of a positive test result, and before the KHRA imposes any penalty, the positive test result is reviewed at a stewards’ hearing.⁴⁴ Prior to the hearing, the party charged with the violation must receive written notice.⁴⁵ Furthermore, the hearing must occur within 14 days after service of the notice.⁴⁶ The hearing is not subject to any technical rules of procedure or evidence⁴⁷; however, all testimony must be given under oath, and the stewards are required to generate a record of the

³⁸ 810 KY. ADMIN. REGS. 1:018(15)(2) (2009).

³⁹ 810 KY. ADMIN. REGS. 1:018(2)(5) (2009).

⁴⁰ Liebman, *supra* note 37, at 21.

⁴¹ See 810 KY. ADMIN. REGS. 1:028(4) (2009).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See 810 KY. ADMIN. REGS. 1:029(2) (2009).

⁴⁵ 810 KY. ADMIN. REGS. 1:029(2)(1) (2009).

⁴⁶ 810 KY. ADMIN. REGS. 1:029(11)(7) (2009).

⁴⁷ 810 KY. ADMIN. REGS. 1:029(2)(4) (2009).

hearing.⁴⁸ If a violation is found, the stewards must issue a written ruling that includes a description of the regulation in question and an appropriate penalty.⁴⁹

Any party found to be in violation of the medication regulations may request a hearing within ten days of the stewards' ruling by filing a written appeal with the KHRA.⁵⁰ Prior to this hearing, parties must receive notice that includes a "clear and concise factual statement sufficient to inform each party with reasonable definiteness of the type of acts or practices alleged to be in violation of the statute or administrative regulations promulgated thereunder."⁵¹ Once the hearing begins, the parties can conduct discovery, issue subpoenas, and utilize all of the pretrial procedures afforded by the Kentucky Rules of Civil Procedure.⁵²

A stewards' hearing is similar to a civil or criminal trial and once it begins, the parties may be "represented by counsel,"⁵³ "respond and present evidence and argument on all issues involved,"⁵⁴ and "examine authority memoranda and data and all other information which is or has been considered by the commission in investigating and hearing the matter or which may be offered as evidence."⁵⁵ All parties are permitted to subpoena and cross-examine witnesses as needed and may introduce any evidence they choose.⁵⁶ However, *ex parte* communications are prohibited for the duration of the hearing.⁵⁷ Furthermore, the KHRA will usually request that the Attorney General appoint a "special prosecutor" to argue against the accused because of the adversarial nature of the hearing.⁵⁸

At the conclusion of the hearing, the KHRA "[t]ake[s] the matter under advisement" and issues a prompt decision.⁵⁹ The final ruling includes a statement of findings of fact and law,⁶⁰ the violated statute or administrative regulation,⁶¹ "[a] separate statement of reasons for the decision[],"⁶² and a corresponding penalty.⁶³ The KHRA's final decision may be appealed to the Franklin Circuit Court within ten days.⁶⁴ If the

⁴⁸ 810 KY. ADMIN. REGS. 1:029(2)(5) (2009).

⁴⁹ 810 KY. ADMIN. REGS. 1:029(2)(6) (2009).

⁵⁰ 810 KY. ADMIN. REGS. 1:029(2)(10) (2009).

⁵¹ 810 KY. ADMIN. REGS. 1:029(3)(1)(d) (2009).

⁵² 810 KY. ADMIN. REGS. 1:029(3)(2) (2009).

⁵³ 810 KY. ADMIN. REGS. 1:029(4)(2)(a) (2009).

⁵⁴ 810 KY. ADMIN. REGS. 1:029(4)(2)(b) (2009).

⁵⁵ 810 KY. ADMIN. REGS. 1:029(4)(2)(c) (2009).

⁵⁶ 810 KY. ADMIN. REGS. 1:029(4)(2)(b), (4) (2009).

⁵⁷ 810 KY. ADMIN. REGS. 1:029(4)(7)(b) (2009).

⁵⁸ 810 KY. ADMIN. REGS. 1:029(4)(1) (2009).

⁵⁹ 810 KY. ADMIN. REGS. 1:029(4)(9)(a)-(b) (2009).

⁶⁰ 810 KY. ADMIN. REGS. 1:029(4)(10)(d)-(e) (2009).

⁶¹ 810 KY. ADMIN. REGS. 1:029(4)(10)(c) (2009).

⁶² 810 KY. ADMIN. REGS. 1:029(4)(10)(f) (2009).

⁶³ 810 KY. ADMIN. REGS. 1:029(4)(10)(g) (2009).

⁶⁴ 810 KY. ADMIN. REGS. 1:029(5) (2009).

appeal is granted, the case proceeds through the court system like any other judicial proceeding.⁶⁵

II. DOES THE KHRA'S ADMINISTRATIVE PROCESS COMPORT WITH PROCEDURAL DUE PROCESS GUARANTEES?

As discussed above, common law due process guarantees an individual the right to a hearing before any type of penalty is assessed that might affect his or her property rights.⁶⁶ More specifically, the right to procedural due process requires notice, the opportunity to be heard, and the chance to examine witnesses and confront the accuser.⁶⁷ Most importantly, the accusations and proceedings must be based on substantial and credible evidence, which must be accompanied by a valid finding of fact.⁶⁸

A. Constitutionally Sufficient Hearing and Review

An examination of the procedural provisions set forth by Kentucky statutes and the KHRA administrative regulations reveal, at least facially, that the provisions comply with due process requirements required by the U.S. Constitution. As specifically provided by KRS section 230.240 and 810 KAR 1:029, persons accused of medication violations in the thoroughbred racing industry are afforded a wealth of procedural protections prior to the imposition of any penalty that would affect his or her property rights. For example, the accused is given ample notice and is afforded the right to a hearing prior to imposition of any penalty.⁶⁹ At the authority hearing, the accused may face his accuser, present and cross examine-witnesses, and offer rebuttal evidence.⁷⁰

At first glance, these procedural protections appear to afford the accused with the full panoply of constitutionally required due process rights. However, a closer review of the medication testing procedures reveals a number of potentially troublesome deficiencies in both the testing process and the acquisition of samples on which those tests are based. As a result, the evidence produced by these testing procedures may be inaccurate or untrustworthy. Considering that these test results are often the sole evidence utilized in reaching a verdict, any doubt as to their substance or credibility may greatly reduce or destroy the constitutionality of the

⁶⁵ See *id.*

⁶⁶ See *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970).

⁶⁷ *Id.* at 267–71; See also *Franklin v. Natural Res. and Envtl. Prot. Cabinet*, 799 S.W.2d 1, 5 (Ky. 1990).

⁶⁸ See *Kaelin v. City of Louisville*, 643 S.W.2d 590, 591 (Ky. 1982).

⁶⁹ See 810 KY. ADMIN. REGS. 1:029(2) (2009).

⁷⁰ 810 KY. ADMIN. REGS. 1:029(4)(4) (2009).

otherwise procedurally valid hearing and can impair the entire administrative process.

B. Evidentiary Deficiencies

Where the methods for the acquisition and testing of evidence underlying the administrative hearing are found to be inaccurate or insubstantial, the validity and trustworthiness of the evidence submitted is necessarily reduced. Consequently, any use of such inaccurate evidentiary findings as the basis for a conviction would open the door for a reversal of the initial decision. Moreover, even where the positive initial finding is deemed accurate, the absence of access to credible *rebuttal* evidence would not enable an accused to properly defend the action in accordance with his constitutional rights.

Despite the facially adequate process provided by the KHRA, the corresponding medication testing and analysis procedures prescribed by 810 KAR 1:018 possess certain deficiencies that may impair the administrative process. The greatest cause for concern revolves around the split sample requirements as well as the testing standards and procedures. As discussed below, deficiencies in these regulations make it possible for trainers to challenge the results of medication hearings, which in turn makes it possible for a court to rule that the entire administrative process is unconstitutional.

(i) Split Sample Requirements

From a trainer's point of view, the most important protection provided by the hearing process is the opportunity to present rebuttal evidence that contradicts the KHRA's positive findings. In medication disputes, the result of a proceeding most often turns entirely on the validity of the positive test result presented by the KHRA.

a. Examining the KHRA's Approach

One of the only means by which a trainer can rebut a positive finding by the KHRA is to introduce contradictory test results from a split sample at the hearing. Appropriately, the acquisition of split samples is possible each time a horse is tested under 810 KAR 1:018.⁷¹ According to the regulatory language, any split sample acquired is to be preserved so as to provide a trainer with an opportunity to submit it as rebuttal evidence.⁷²

⁷¹ See 810 KY. ADMIN. REGS. 1:018(11) (2009).

⁷² See 810 KY. ADMIN. REGS. 1:018(12) (2009).

However, the language of the regulation wholly fails to *explicitly demand* that a split sample be taken in *every* instance. Rather, the language of 1:018 merely states that the size of the sample is within the discretion of the veterinarian taking the sample.⁷³

Not only does the regulation not demand that a sample be taken in every instance, but it provides no guidance for the KHRA veterinarian to follow in determining what constitutes an adequate sample size. The regulation only requires a split sample when the sample is *larger* than the “minimum sample requirement” (which, again, is determined by the discretion of the vet).⁷⁴ Thus, if the sample taken by the veterinarian does not meet or exceed the minimum sample size, then no split sample is produced.⁷⁵ A trainer is without any effective rebuttal evidence when there is no split sample for a second round of testing and consequently has very little chance of overcoming any positive finding by the KHRA.

b. Mitigation Through Trainer Request

There is only one protective mechanism for trainers in 810 KAR 1:018. The regulation states that “an owner or trainer *may request* that a split sample be taken from a horse he owns or trains by the [KHRA] veterinarian.”⁷⁶ This provision serves as a “catch all” that can be used to ensure the production of a split sample. Understandably, it appears as though the KHRC inserted this language as a means of protecting itself by shifting ultimate responsibility to the trainers in ensuring that a split sample is taken. Moreover, a trainer who fails to request a split sample is legally estopped from later arguing that the absence of a sample denied him due process since he had the last clear chance to avail himself of the protection. Thus, it appears that 810 KAR 1:018(10)(3) serves to mitigate, if not completely cure, any deficiency in the regulations’ split sample provisions.

Several common scenarios illustrate that a trainer’s option to request this split sample may not always fully protect him. Indeed, these situations demonstrate that even though a trainer has the authority to request a split sample, certain factors beyond his control may make the provision so inadequate that the mitigating effect of the sample is destroyed. For purposes of analyzing these scenarios, it may be helpful to envision a hypothetical trainer, John Doe, and his prized three-year old, RunForTheRoses. In these hypotheticals, assume that trainer Doe is a highly successful, and immensely popular, trainer who has 100 horses in training. Further, as is often the case, assume that the size of Doe’s

⁷³ 810 KY. ADMIN. REGS. 1:018(11)(2) (2009).

⁷⁴ *Id.*

⁷⁵ See 810 KY. ADMIN. REGS. 1:018(11)(2)(a) (2009).

⁷⁶ 810 KY. ADMIN. REGS. 1:018(11)(3) (2009) (emphasis added).

operation requires him to employ multiple groomsmen, caretakers, and assistant trainers, and that he has stables at several racetracks around the country.

First, it is often unclear whether trainers are fully aware of their right to request a split sample. Even though the statute affords trainers this right, there is no guarantee that every trainer has been put on notice or has taken time to adequately research his legal rights. If trainer Doe is like most trainers, he has little or no legal background. Additionally, the fact that trainer Doe has multiple horses running on any given day makes it unlikely that he has the time or ability to be physically present at the test barn after each race. As discussed above, the regulations do not require that a split sample be taken without a request from trainer Doe. Thus, trainer Doe's absence in the test barn, while justifiable, leaves him potentially defenseless if the test yields a positive result.

Second, even if a trainer is aware of his right to a split sample, he may intentionally decline to make such a request. Even if he does request a split sample following the race, he may still decline to have it tested. In our hypothetical, trainer Doe may decline the additional sample if he knows that he has not administered any illegal medications to RunForTheRoses. In other words, he may not consider the split sample necessary. However, if one of his many assistant trainers or employees administered illegal medications to the horse without trainer Doe's knowledge, or if the test was skewed by some other naturally occurring phenomenon, he would be left without any means to rebut a positive finding.

In this scenario, the likelihood that trainer Doe will request a split sample is decreased by the fact that the regulation requires him to pay the testing and sample-shipping costs himself.⁷⁷ Since a prominent trainer such as Doe can have upwards of one hundred horses in training at any given time, the collective testing and shipping costs for his stable may amount to more than the fine that the regulation permits him to pay to mitigate the positive result. Thus, the cost of gathering the evidence necessary to defend the charge and the opportunity cost of attending the hearing may deter trainers such as Doe from ever attempting to combat most positive results, especially when the regulation permits them to simply pay the mitigating fine and move on. As a result, a colorable argument can be made that the current structure of the regulations discourages trainers from utilizing the regulations' procedural protections to such an extent that the otherwise facially appropriate regulations are, in practical effect, inadequate.

A third situation may arise where, even though the trainer requests that a split sample be taken, the horse simply does not, or cannot, produce enough blood, saliva, or urine to create the sample. According to Dr.

⁷⁷ 810 KY. ADMIN. REGS. 1:018(11)(4) (2006).

Thomas Tobin, a renowned large-animal veterinarian and toxicologist, it is not uncommon for horses to act fractious when having their blood drawn or to simply be unable or unwilling to provide sufficient amounts of saliva or urine to produce two samples.⁷⁸ In our hypothetical, the inability of the veterinarian to acquire sufficient blood, saliva, or urine from RunForTheRoses would leave trainer Doe without a split sample despite his request for the sample. If RunForTheRoses' single sample tested positive for a medication violation, trainer Doe would be unable to provide any direct rebuttal evidence to submit at the hearing. When combined with the presumption of guilt, this lack of rebuttal evidence would essentially place strict liability on trainer Doe, and any ensuing hearing would be more of a formality rather than a constitutionally-afforded opportunity to prove his innocence.

c. Examining an Alternative Approach

The deficiencies in the acquisition and testing of split samples are made more apparent by comparing the process to the way in which other equine regulatory bodies, such as the United States Equestrian Federation (hereinafter "USEF"), handle similar testing. The USEF is a governing body that presides over almost all non-racing related equine activities, and it has promulgated a full set of rules that all participants must follow.

Subchapter 4 of USEF General Rules (hereinafter "GR") addresses drugs and medications and sets forth the procedure for the acquisition and testing of blood samples. Similar to the KHRA, the USEF requires that the tubes be divided into two samples "upon the collection of a sufficient number of tubes of" blood or urine.⁷⁹ Like the KHRA, one tube is to be used for testing, and the second tube is to be maintained as a split sample available for use by the trainer as rebuttal evidence.⁸⁰ However, the USEF takes added measures to ensure that a second sample is acquired in every situation by requiring that a second tube be produced *even when the trainer is not present or fails to request that one be made*.⁸¹ The USEF also demands that blood, urine, *and* saliva samples each be tested. In addition, the USEF directs that the horse be administered furosemide in a timely fashion to ensure that enough urine is produced for a second sample if necessary.⁸² Although the KHRA also permits the use of furosemide, it does so only in relation to pre-race necessity rather than as a means of

⁷⁸ Interview with Dr. Thomas Tobin, Veterinarian and Pharmacologist, in Lexington, Ky. (Mar. 17, 2009).

⁷⁹ U. S. EQUESTRIAN FED'N, USEF RULE BOOK Gen. Rule 402(4), at GR46 (2009), <http://www.usef.org/documents/ruleBook/2009/03-general%20rules.pdf>.

⁸⁰ *See id.* Gen. Rule 402, 405-06, at GR45-50.

⁸¹ *Id.* Gen. Rule 402(4), at GR 46.

⁸² *Id.* Gen. Rule 405(3), at GR 47.

ensuring the acquisition of adequate urine samples.⁸³ Further, in the event that a split sample cannot be obtained, any portion of the original sample not used in the initial test must be used as the split sample and tested again.⁸⁴

As evidenced by these provisions, the USEF makes a more concerted effort to ensure the procurement and analysis of split samples each time a collection is made. As opposed to the KHRA, the USEF places full responsibility on itself, rather than the trainer, to guarantee that a second sample is acquired whenever possible. The USEF proactively addresses the situation where a horse is unwilling or unable to produce a large enough sample. Additionally, the USEF provides a fall-back remedy that allows any remaining portion of the original sample to be used as a split sample.

These acts go a step beyond those prescribed by the KHRA and help to ensure that a split sample is acquired. More importantly, these provisions demonstrate the USEF's awareness of the importance of providing an accused trainer with the opportunity to acquire the rebuttal evidence necessary to provide a constitutionally valid hearing.

(ii) *Testing Procedures*

Due process requires that an administrative hearing be based on valid findings of fact and presentation of evidence that is both substantial and accurate.⁸⁵ Without these guarantees, the result of the hearing, even though procedurally sufficient, would lack a proper factual and evidentiary basis that would run the risk of being overturned upon review.

Under the KHRA regulations, a "positive finding" occurs when the "[KHRA] laboratory has conducted testing and determined that a drug, medication, or substance, the use of which is restricted or prohibited by [the] administrative regulation, was present in the sample."⁸⁶ Even though evidentiary standards are not strictly enforced in administrative proceedings,⁸⁷ the evidence upon which a positive finding is based must be sufficiently substantial to "induce conviction in the minds of reasonable [persons]."⁸⁸ Although hearsay evidence is permitted, such evidence "shall not be sufficient in itself to support an agency's findings of fact unless it

⁸³ See 810 KY. ADMIN. REGS. 1:018(6) (2009).

⁸⁴ U. S. EQUESTRIAN FED'N, *supra* note 82, Gen. Rule 406(7), at GR 47.

⁸⁵ See *Allen v. Ky. Horse Racing Auth.*, 136 S.W.3d 54, 59 (Ky. Ct. App. 2004) (citing *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998)).

⁸⁶ 810 KY. ADMIN. REGS. 1:018(1)(6) (2009).

⁸⁷ See *Wade v. Dept. of the Treasury*, 840 S.W.2d 215, 218 (Ky. Ct. App. 1992).

⁸⁸ *Allen v. Ky. Horse Racing Auth.*, 136 S.W.3d 54, 59 (Ky. Ct. App. 2004) (quoting *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998)).

would be admissible over objections in civil actions”⁸⁹ and is accompanied by additional “competent evidence which by itself would have been legally sufficient to support the findings.”⁹⁰

As previously mentioned, the KHRA’s regulations provide for the testing of blood and urine samples for all winning horses, as well as all others required by the stewards.⁹¹ The regulations set forth the method of sample procurement and prescribe the classification of medicines whose presence would result in a violation.⁹² However, the absence of certain standardization threshold provisions may diminish the accuracy and validity of these medication testing procedures. Specifically, the regulations fail to establish: (1) standardized testing procedures and quality assurance standards and (2) medication threshold levels that are sufficiently detailed.

a. Standardized Testing Procedures

The text of the KHRA regulations is wholly devoid of any language setting forth standardized testing procedures or quality control mechanisms that the KHRA laboratory is required to follow. Thus, the testing procedures and quality control mechanisms utilized in the testing of the samples are determined solely by the discretion of this laboratory.

Currently, Kentucky has no facility that is capable of analyzing blood, saliva, or urine samples. Therefore, the KHRA has been forced to contract with out-of-state laboratories to perform medication tests.⁹³ According to a recent report produced by the KHRA, that was presented to Kentucky Governor Steve Beshear, there are currently eighteen laboratories in the U.S. that are capable of performing these tests.⁹⁴ Of those eighteen laboratories, only two are for-profit and the remaining sixteen labs are affiliated with colleges and universities.⁹⁵ Strikingly, only four of the eighteen labs are quality control certified.⁹⁶

Through December 2008, the KHRA contracted with the Iowa Racing Chemistry Veterinary Diagnostics Lab located at Iowa State University to perform these tests. Iowa State was the sole laboratory used by the KHRA, which means that it tested every sample taken from a racehorse in Kentucky. Iowa State’s lab is not quality control certified

⁸⁹ KY. REV. STAT. ANN § 13B.090(1) (West 2006).

⁹⁰ Big Sandy Cmty. Action Program v. Chaffins, 502 S.W.2d 526, 530 (Ky.1973).

⁹¹ 810 KY. ADMIN. REGS. 1:018(11)(1) (2009).

⁹² See 810 KY. ADMIN. REGS. 1:018 (2009).

⁹³ See KENTUCKY HORSE RACING COMMISSION, REPORT OF THE GOVERNOR’S TASK FORCE ON THE FUTURE OF HORSE RACING 32-38 (2008), <http://www.khrc.ky.gov/NR/rdonlyres/FF6DAD59-A64D-4347-8E34-057B618F2ED0/0/FinalGovernorsTaskForceReportonHorseRacing61109145pm.pdf>.

⁹⁴ *Id.* at 33.

⁹⁵ *Id.*

⁹⁶ *Id.*

which greatly increased the likelihood of inaccurate test results.⁹⁷ Recognizing this potential problem, the KHRC terminated its relationship with Iowa State in January 2009 and entered into a contract with the University of Florida, which has received the highest level of standardized testing and quality assurance accreditation.

Unfortunately, this contract with Florida does not provide a full guarantee that the test results will remain subject to sufficient quality control standards in the future. As noted by the KHRC in its report to Governor Beshear, acquiring and maintaining accreditation is a costly endeavor and “financial problems for state governments and universities directly and adversely impact funding for the university-affiliated laboratories’ operating budgets.”⁹⁸ Thus, Florida’s testing facility, a state-owned and operated entity, is particularly vulnerable to economic downturns that may decrease its funding. Any decrease in funding may cause a reduction in quality assurance that would potentially render the test results inaccurate, or at the very least, unreliable in the minds of a reasonable person.

b. Regulatory Threshold Requirements

The presence of certain drugs, medications, and other substances in a horse’s sample will result in a positive finding in violation of the KHRA’s administrative regulations.⁹⁹ These substances can be broken down into two categories: (1) therapeutic (those medications necessary to improve or protect the health of a horse) and (2) non-therapeutic (those medications that do not provide health related benefits). The presence of *any* level of non-therapeutic medication in a horse’s sample, other than minimal levels of certain naturally occurring substances, will result in a positive finding.¹⁰⁰ This policy is both fair and necessary, as these substances can unfairly enhance a horse’s performance and, potentially, endanger the horse’s long-term health.

Therapeutic medications, however, are permitted as long as they do not exceed specific threshold concentrations.¹⁰¹ These thresholds are most commonly defined by the variable concentration levels of the therapeutic substance within a given sample.¹⁰² The reason for this distinction is that below these threshold levels, therapeutic medications are not believed to

⁹⁷ See *id.* at 38.

⁹⁸ *Id.* at 33.

⁹⁹ See 810 KY. ADMIN. REGS. 1:018(1)(6) (2009).

¹⁰⁰ See 810 KY. ADMIN. REGS. 1:018(1)(6), (2) (2009).

¹⁰¹ 810 KY. ADMIN. REGS. 1:018(2)(3) (2009).

¹⁰² See Wendy Spencer et. al., *Review of the Current Status of Thresholds/Withdrawal Time Guidelines for Therapeutic Medications in Performance Horses*, 54 AAEP PROCEEDINGS 29, 33 (2008), <http://www.cabi.org/vetmedresource/FullTextPDF/2009/20093131466.pdf>.

affect equine physiological systems and, as a result, have no direct influence on a horse's performance or health.¹⁰³

This variable concentration level forms the basis for medication regulation by providing the legally permissible presence of the therapeutic substances.¹⁰⁴ The KHRA establishes a specific list of permitted therapeutic medications along with their corresponding threshold concentration levels.¹⁰⁵ Despite the implementation of this seemingly well-defined system of therapeutic medication regulations, the KHRA's system is not without fault.

To date, there has been no across-the-board adoption of a uniform set of threshold requirements by the racing industry, despite a recognition as far back as 1995 that the appropriate concentration levels should be identified "so as not to lead to disciplinary action based on pharmacologically insignificant traces of these substances."¹⁰⁶ While the KHRA regulations, which follow the guidelines proposed by the Racing Medication and Testing Consortium ("RMTC"), allow minimal levels of eleven therapeutic medications, the American Association of Equine Practitioners currently recognizes at least fifty acceptable therapeutic medications.¹⁰⁷ Consequently, the KHRA regulations impose penalties for the presence of more than forty medications that have been proven to have no pharmacological effect on a horse. This penalty for the presence of this type of medication appears to constitute an unconstitutional deprivation of rights.

However, for those medications the KHRA currently allows, proper concentrations are not always easily administered. First, the medications' highly technical scientific form creates implementation problems for trainers. "[A] regulatory threshold, expressed as a concentration in plasma or urine, is not a particularly useful piece of information to horsemen and veterinarians, who need explicit guidelines as to when to withdraw a medication to avoid exceeding the regulatory threshold."¹⁰⁸ Hence, trainers may not have the practical ability to take advantage of what little leeway the KHRA provides.

In addition, there is substantial evidence that the threshold levels used by the RMTC and the KHRA may be set inappropriately low, thereby making them unnecessarily vulnerable to inaccuracies caused solely by statistical error. Because of numerous variables, such as an individual horse's metabolic rate, interaction with other medications, and other

¹⁰³ See *id.* at 33–35.

¹⁰⁴ *Id.* at 36.

¹⁰⁵ 810 KY. ADMIN. REGS. 1:018 (4)–(6), (8) (2009).

¹⁰⁶ Wendy Spencer, *supra* note 105, at 30.

¹⁰⁷ See *id.* at 30–33.

¹⁰⁸ *Id.* at 35.

“unique aspects of the animal’s physiology,” there is a significant statistical probability that any given test will produce a positive finding, even if the medication was properly administered.¹⁰⁹

Take, for example, furosemide, for which the KHRA formerly set thirty nanograms per milliliter (30-ng/ml) as the appropriate threshold.¹¹⁰ Based on that threshold, a study found that there was a 1:1000 probability that scientific error would cause the presence of an overage.¹¹¹ This number may seem small, but considering that Kentucky produces over 10,000 samples per year, that percentage equates to at least ten innocent trainers being found in violation of the regulations each year.¹¹² As a result of this statistical deficiency, the RMTC and KHRA increased the regulatory threshold of furosemide to 100-ng/ml.¹¹³ No similar analysis has been performed on other permitted therapeutic substances, leaving open the possibility that numerous positive test results for these substances may actually be the result of statistical overages, not trainer misconduct

c. Fine and Suspension

The construction of 810 KAR 1:028 permits the imposition of fines and/or suspensions for a violation and, in some cases, permits the payment of a fine to mitigate the level of suspension imposed on a trainer. This construction raises the potentially serious constitutional issue of whether the Act permits the KHRA to engage in an abuse of agency discretion in choosing what combination of penalties to impose.

The language of 810 KAR 1:028 gives a great deal of discretion to the KHRA in determining whether, and to what extent, to impose a combination of monetary fines and suspensions on a trainer whose horse tests positive for an illegal substance.¹¹⁴ As a result, an inherent risk exists that any determination by the Agency could be found arbitrary and capricious and, thus violative of constitutional due process. Under general constitutional law, state legislatures are permitted to establish standards of legal conduct under which an agency may operate.¹¹⁵ As long as that delegation of discretionary power is guided by an “intelligible principle” of operation, the agency’s discretionary authority will be considered constitutional.¹¹⁶

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See id.*

¹¹³ *Id.*

¹¹⁴ *See* 810 KY. ADMIN. REGS. 1:028(4) (2009).

¹¹⁵ *See* *Citizens to Protect Overton Park v. Volpe*, 401 U.S. 402 (1971); *see also* *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

¹¹⁶ *Whitman v. American Trucking Ass’ns., Inc.*, 531 U.S. 457, 474 (2001).

The Kentucky state legislature has delegated discretionary authority to the KHRA under KRS section 230.215. The statute gives the KHRA “plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted.”¹¹⁷ This language serves as an intelligible principle in which the KHRA is permitted to exercise its own discretion in enacting more specific regulations, such as 810 KAR 1:028.

Despite this grant of authority, general constitutional law prohibits agencies like the KHRA from enacting any regulation that would permit an arbitrary and capricious determination, even if the agency is guided by a valid intelligible principle.¹¹⁸ Even though 810 KAR 1:028 establishes general ranges of monetary penalties and suspension periods based on the violation, the regulation fails to set forth specific, narrowly-drawn penalties that correspond to specific violations. Moreover, the decision of whether to permit the payment of fines to mitigate certain suspension periods is left up to the “agreement” reached by the trainer and the KHRA. Even then the parties’ agreement may consist of a combination of monetary fines, forfeiture of purse money, or both.¹¹⁹ Ultimately one would have to assume that, due to the discrepancy in bargaining position between the KHRA and the trainer, and the trainer’s need to make a quick return to active duty, the “agreement” reached by the parties would be less of a negotiation and more of a unilateral decision by the KHRA.

As mentioned above, an arbitrary and capricious standard of review is used to determine whether the KHRA’s ultimate decision is unconstitutional.¹²⁰ Under this standard, the KHRA “must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”¹²¹ Additional factors to consider include whether: (1) the agency relied on factors the legislature would not have intended it to consider, (2) the agency entirely failed to consider one or more important aspects of the case, (3) the agency’s decision ran counter to the facts before it, and (4) the result was so implausible that it could be ascribed only to the product of agency bias.¹²²

¹¹⁷ KY. REV. STAT. ANN. § 230.215(2) (West 2006).

¹¹⁸ See *Citizens to Protect Overton Park*, 401 U.S. at 414.

¹¹⁹ 810 KY. ADMIN. REGS. 1:028(4) (2006).

¹²⁰ See *Citizens to Protect Overton Park*, 401 U.S. at 414.

¹²¹ *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

¹²² *Id.* at 43.

III. CONCLUSION AND RECOMMENDATION

Without question, the current state of thoroughbred racing necessitates an industry-wide effort to strengthen medication restrictions and penalties. Regardless of the need to impose penalties, any effort to tighten medication reform must be done in compliance with basic constitutional rights. While the recently revised Kentucky Horse Racing Authority's administrative regulations provide facially appropriate hearing procedures, certain deficiencies within the regulations' testing procedures may potentially impair the evidence on which those procedures are based, thereby reducing or destroying their constitutionality.

The most striking deficiencies relate to the acquisition and analysis of blood, urine, and saliva samples. Specifically, deficiencies in the language regarding the production of split samples, the standardization of testing procedures and quality control mechanisms, and the creation of scientifically sufficient threshold requirements present problems that may diminish the credibility of the evidence on which the administrative process is based.

Fortunately, each of these problems can be cured through simple changes in the language of the regulations. Many of these issues have already been noted by the KHRC and efforts are underway to institute the necessary revisions. For example, the KHRC has initiated action to join with the RMTC in developing standardized testing procedures, and it has informed Kentucky Governor Beshear of the need to implement these standardized testing procedures. Additionally, the KHRC has begun campaigning for the creation of a centralized testing facility within the state of Kentucky that would adhere to the strictest quality control standards. Moreover, the KHRC remains receptive to advice from the Association of Equine Practitioners and other industry experts concerning the measures it can take to increase the number of permissible therapeutic medications and other recommended changes in the corresponding medication threshold levels.

However, a mere discussion of these changes is not enough. In order to fully comply with the demands of constitutional due process, the KHRC must take affirmative steps to revise the language of its administrative regulations to reflect these changes. Further, the KHRC must ensure that its officers comply with each and every element of the regulations; otherwise, the KHRC runs the risk that its otherwise facially constitutional hearing procedure may be destroyed by an insufficient evidentiary basis. If, however, these changes are effectuated by the KHRC and adhered to by its officers, the effectiveness and overall constitutionality of these regulations will be greatly increased, and they will withstand the highest level of judicial scrutiny.