NO. 35285

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

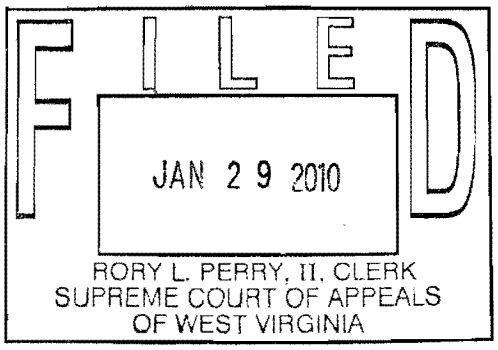
FRED AND SHARON JOHNSON,

Appellants,

v.

BOARD OF STEWARDS
OF CHARLES TOWN RACES,

Appellee.



BRIEF OF APPELLEE BOARD OF STEWARDS OF CHARLES TOWN RACES

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

BENJAMIN F. YANCEY, III
ASSISTANT ATTORNEY GENERAL
West Virginia State Bar No. 7629
Office of the Attorney General
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
(304) 558-2522

Counsel for Appellee

NO. 35285

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FRED AND SHARON JOHNSON,

Appellants,

v.

BOARD OF STEWARDS
OF CHARLES TOWN RACES,

Appellee.

BRIEF OF APPELLEE
BOARD OF STEWARDS OF CHARLES TOWN RACES

I.

KIND OF PROCEEDING
AND RULINGS OF LOWER TRIBUNALS

A. Introduction

This case involves an appeal and challenge to West Virginia's "zero tolerance" rule against a horse running in a race with any drugs, such as caffeine, that are foreign to the horse in its natural state. Far from being arbitrary and capricious, this "zero tolerance" rule is clear, easily understood, and evenly applied to everyone participating in horse racing in West Virginia. The rule, 178 C.S.R. 1, § 66.5, provides as follows:

> No horse participating in a race shall carry in its body *any drug substance*, its metabolites, or analog, which are *foreign to the natural horse* except as provided, by this rule.

(Emphasis added.) This rule is violated whenever a horse runs in a race with any drugs that are not naturally found in the horse's system, including the drug caffeine. The rule is violated regardless

of the amount of caffeine found in the horse's system, whether the amount of caffeine is equivalent to that found in a teaspoon of coffee or some lesser or greater amount of caffeine. The rule is also violated regardless of whether the amount of caffeine found in the horse had any affect on its performance in a race. Thus, arguments, such as the ones posed by Appellants in this case, that their horse only had caffeine in its system amounting to that found in a teaspoon of coffee, which had no affect on his performance, are essentially irrelevant. Such arguments are nothing more than an attempt to divert the Court's attention away from the fact that West Virginia's "zero tolerance" rule, with respect to horses racing with drugs in their systems, has been violated.

B. Procedural History

Fred and Sharon Johnson ("Appellants") violated West Virginia's "zero tolerance" rule on October 20, 2007 when their horse "Eastern Delite," who finished first in the seventh race at the Charles Town Racetrack in Charles Town, West Virginia, tested positive for the drug caffeine. The amount caffeine found in Eastern Delite far exceeded the Racing Commissioners International's ("RCI") recommended threshold level for caffeine. In fact, the levels of caffeine found in Eastern Delite were more than double the RCI's threshold on one study, and three to five times greater than this threshold on a separate test. As such, even if Eastern Delite had been racing in another jurisdiction that specifically identifies caffeine as a prohibited drug, as well as the level of caffeine that is prohibited, the result would have been the same – Eastern Delite would have tested positive for a prohibited drug, namely caffeine.

Because of Eastern Delite's positive test for caffeine, the Board of Stewards of Charles Town Races ("BOS"), by Ruling Number 302, dated November 29, 2007, ordered the redistribution of the

purse and disqualification of Eastern Delite.[1] By Findings of Fact and Conclusions of Law, dated July 7, 2008, the West Virginia Racing Commission ("WVRC") affirmed the BOS' November 29, 2007 Ruling disqualifying Eastern Delite and ordering the redistribution of the purse.[2] Thereafter, on March 11, 2009, the Circuit Court of Jefferson County issued its Order Affirming West Virginia Racing Commission's Order of July 7, 2008.

This matter is now before the Court pursuant to Appellants' appeal from the Circuit Court's Order of March 11, 2009.

II.

BACKGROUND

The WVRC is the state agency charged with the regulation of horse racing in West Virginia. W. Va. Code § 19-23-1 *et seq*. The WVRC is fully authorized to promulgate reasonable rules, under which all horse races are to be held and conducted. W. Va. Code § 19-23-6(3).[3] The WVRC has full authorization to investigate alleged violations of racing law and its rules and to take disciplinary action for the violation thereof. W. Va. Code § 19-23-6(8). *See also* W. Va. Code § 19-23-15(a). In order for a person to participate in horse racing at one of West Virginia's horse tracks, he or she must obtain an occupational permit from the WVRC.[4] W. Va. Code § 19-23-2(a). *See also* 178 C.S.R. 1, § 43.1. This includes owners and trainers of horses. 178 C.S.R. 1, §§ 49.1 and 54.1. All owners and trainers of horses are subject to West Virginia law and the rules promulgated by the

---

[1] The BOS also suspended Eastern Delite's Trainer, Fred Johnson, for 15 days.

[2] The WVRC also vacated the BOS' suspension of Trainer Fred Johnson.

[3] The rules governing horse racing are found at 178 C.S.R. 1, § 1 *et seq*.

[4] The horse tracks must also obtain a license from the WVRC in order to engage in live racing. W. Va. Code § 19-23-1(a). *See also* 178 C.S.R. 1, § 43.1.

WVRC upon entering a race. 178 C.S.R. 1, § 49.2.

A three-member BOS is responsible for officiating horse racing at a particular track. 178 C.S.R. 1, § 9.1. *See also* 178 C.S.R. 1, § 10.1. The BOS have general supervision and authority over occupational permit holders, as well as the tracks and their grounds. 178 C.S.R. 1, § 10.3. The BOS is also empowered to impose reasonable fines and other sanctions upon occupational permit holders and the tracks. W. Va. Code § 19-23-6(9). The BOS is responsible to the WVRC for conduct occurring at a horse race, as it pertains to racing law and the rules of the WVRC. 178 C.S.R. 1, § 10.2.

Violations of statutory and regulatory rules of racing are recorded by way of "rulings" from the BOS. An occupational permit holder may be fined, suspended, or have his occupational permit revoked. The WVRC is also authorized to "hold up, in any disputed horse . . . race, the payment of any purse, pending a final determination of the results thereof." W. Va. Code § 19-23-6(12). *See also* 178 C.S.R. 1, § 60.9 (The owner of any horse that is disqualified from a race shall be denied the purse from the race). If a person is adversely affected by a BOS ruling, he or she is entitled to a hearing before the BOS. From a ruling of the BOS, the permit holder may appeal to the WVRC. Decisions of the WVRC are appealable to the Circuit Court and, in turn, to the Supreme Court. *See* W. Va. Code § 19-23-1 *et seq.*; W. Va. Code § 29A-5-1 *et seq.*; 178 C.S.R. 1, § 1 *et seq.*

Under the WVRC's rules, every horse that wins a race, and others as the BOS may direct, must be sent to the test barn to provide specimens of saliva and/or urine and/or blood and any other examination as may be directed by the WVRC's veterinarian. 178 C.S.R. 1, §§ 24.3 and 24.4. Thereafter, the specimens are delivered to an official chemist selected by the WVRC for analysis. 178 C.S.R. 1, §§ 25.1 and 25.2. The WVRC's rules only permit a specimen to contain, in limited

amounts, three specifically identified drugs/medications/substances. These permissible drugs/medications/substances include Phenylbutazone ("Bute"), oxyphenylbutazone ("Adjunct Bute"), and Furosemide ("Lasix"). 178 C.S.R. 1, §§ 66.5, 66.5.1, 66.5.2, 66.5.3, and 66.5.4. All other drugs/medications/substances are prohibited. *Id.*

III.

STATEMENT OF FACTS

Appellants are occupational permit holders. Eastern Delite's Trainer is Fred Johnson and is owned by Sharon Johnson. On October 20, 2007, Eastern Delite won the Breeders Classic, the seventh race at the Charles Town Racetrack in Charles Town, West Virginia.[5] Following the race, pursuant to post race protocol, samples of Eastern Delite's urine and blood were taken and sent to the WVRC's primary testing laboratory, Dalare Associates, in Pennsylvania, where they were tested for the presence of any prohibited drugs, medications, or substances.[6] On October 29, 2007, Dalare Associates notified the BOS to withhold the purse so that Eastern Delite's samples could be further tested. The following day, October 30, 2007, Joseph J. Strug, Jr., Laboratory Director for Dalare Associates, sent a letter to the BOS confirming that Eastern Delite's blood and urine samples *tested positive for caffeine*. Mr. Strug further indicated that the concentration of caffeine in Eastern Delite's blood sample *exceeded the RCI's threshold* of 100 nanograms per milliliter ("ng/ml").[7]

Pursuant to Appellants' request, a split sample of Eastern Delite's urine and blood samples

---

[5] The horses "Confucius Say," "Double Toolegate," and "Castina" finished second, third and fourth, respectfully.

[6] The second and third place finishers' urine and blood were also taken and sent for testing and were found to be *negative for the presence of any prohibited substances, including caffeine.*

[7] The measurement of "ng/ml" is sometimes referred to as "parts per billion" ("ppb").

were sent to Louisiana State University ("LSU") for testing. By letter, dated November 14, 2007, Steven A. Barker, Professor and Director of the laboratory at LSU, notified the BOS that the split sample of Eastern Delite's urine and blood were confirmed as *positive for the presence of the "drug caffeine."* (Emphasis added.) Mr. Barker further indicated that the concentration of caffeine in the urine sample was 991.7 ng/ml, and that the concentration of caffeine in the blood sample was 106.7 ng/ml.

Thereafter, Appellants requested, and were given, a hearing before the BOS on November 27, 2007. Following this hearing, on November 29, 2007, the BOS issued its Order disqualifying Eastern Delite and redistributing the purse among the second, third and fourth place finishers of the Breeders Classic. [8] Appellants appealed this Ruling and requested a hearing before the WVRC.

---

[8] On appeal, Appellants complain that, although they "presented evidence [at the November 27, 2007 hearing before the BOS] that the quantity of caffeine in Eastern Delite, as shown in the post-race testing, had no pharmacological impact on the performance of Eastern Delite in the running of the [Breeders] Classic", the BOS still ordered that Eastern Delite be disqualified and the purse redistributed. Appellants' Brief at 3. First, the BOS based its disqualification of Eastern Delite, as well as the redistribution of the purse, on the test results from two different laboratories, Dalare Associates and LSU, which unequivocally indicate that Eastern Delite tested positive for caffeine. Furthermore, West Virginia has a "zero tolerance" rule, 178 C. S. R. 1, § 66.5, prohibiting a horse from racing with any drug in its system that is foreign to the horse in its natural state, such as the drug caffeine. This rule does not require that the amount of caffeine, or any other prohibited drug, found in the horse exceed a certain level and/or that the amount of caffeine actually found in the horse must have an impact on the horse's performance in a race. As such, the BOS, begging the Court's pardon, had "no business" finding that Appellants did not violate this rule, even assuming that the quantity of caffeine in Eastern Delite had no impact on his performance in the Breeders Classic. Had the BOS so found, then they would have been in violation of a rule that they are required to follow. The same can be said of the WVRC. Appellants also argue that the BOS "made no attempt[, at their hearing on November 27, 2007,] to counter the evidence in Dr. Tobin's report that the amount of caffeine found in Eastern Delite had no impact on equine performance." Appellants' Brief at 5. Appellants make this same argument regarding the hearing before the WVRC on June 17, 2008. *See* Appellant's Brief at 4. Again, because West Virginia is a "zero tolerance" jurisdiction regarding drugs, which are foreign to the natural state of a horse, being present in a horse at the time of a race, it was not necessary for the BOS to present any evidence contradicting the opinion of Dr. Tobin.

By letter, dated January 7, 2008, Steven Barker of LSU again notified the BOS that a mathematical error was made in determining the level of caffeine in Eastern Delite's blood sample, which had been reported on November 14, 2007. After correcting this mathematical error, Mr. Barker indicated the blood sample contained 213.4 ng/ml, rather than the earlier report of 106.7 ng/ml.

On June 17, 2008, a hearing was held in this matter before the WVRC, during which the parties were permitted to introduce testimony and documentary evidence in support of their positions.[9] Danny Wright is the Chief Steward of the BOS at the Charles Town Racetrack and was present during the Breeders Classic on October 20, 2007. Tr. 20, 22. Mr. Wright is an expert in officiating horse racing events with approximately 40 years of experience in the racing industry. Tr. 21, 20. As the Chief Steward, Mr. Wright is responsible for enforcing the rules and regulations of the WVRC. Tr. 20.

West Virginia has a "*zero tolerance*" *rule* regarding the presence of drugs, medications and substances. With the exception of Bute and Lasix, the rules of the WVRC *do not allow any substances that are foreign to the natural body of a horse,* which includes *caffeine,* as *caffeine is not a naturally occurring substance in a horse.* Tr. 26 (emphasis added). The test results from Dalare Associates and LSU *confirmed the presence of caffeine* in the blood and urine samples of Eastern Delite. Tr. 31-32, 37, 39. Caffeine is a *drug or stimulant that is prohibited* by the WVRC's rules. Tr. 50, 65. Furthermore, according to the RCI, caffeine is a Class II substance having no place in racing, especially on race day. Tr. 66, 68. Under the West Virginia rules of racing, it was the

---

[9] Danny R. Wright, Joseph J. Strug, Jr., and Dennis K. Dibbern testified on behalf of the BOS. Fred Johnson, Sharon Johnson, Oscar Flores, and Thomas Tobin testified on behalf of Appellants.

responsibility of Fred Johnson, as the Trainer of Eastern Delite, to make sure that Eastern Delite ran in the race free of any prohibited substances. Tr. 44, 71-72.

Joseph Strug is the Laboratory Director of Dalare Associates, which is the official testing laboratory for the State of West Virginia for equine drug testing. Tr. 73. Mr. Strug has been working in the area of detecting drugs and other banned substances in horses for 37 years, and is considered an expert in the area of equine drug testing as a chemical analyst. Tr. 73, 76, 77. Upon finding that Eastern Delite's initial screening test contained a suspect substance, Mr. Strug performed a follow-up test using a gas chromatography and mass spectrometry, which is the recognized testing method for blood and urine samples. Tr. 78. This follow-up test revealed that Eastern Delite's urine and blood samples *contained caffeine*. Tr. 79. The concentration of caffeine in Eastern Delite's blood sample *exceeded the RCI threshold* of 100 ng/ml.[10] Tr. 74. Furthermore, the amount of caffeine in Eastern Delite's blood sample measured 300-500 ng/ml and, therefore, was *three to five times greater than the RCI's recommended threshold* of 100 ng/ml. Tr. 99.

The split sample of Eastern Delite's blood and urine that was sent to LSU was also *positive for the presence of caffeine*. Tr. 81. In fact, after a mathematical error was corrected, this split sample showed that Eastern Delite's blood contained 213.4 ng/ml of caffeine, rather than 106.7 ng/ml, as earlier reported. Tr. 82-83. Finally, Mr. Strug confirmed that West Virginia has a *zero tolerance policy* concerning prohibited substances in that *any drug*, other than Bute and Lasix up to certain levels, that are detected in a horse are "*recorded as a positive*" for testing purposes. Tr. 80 (emphasis added).

---

[10] The WVRC is a member of the RCI. Tr. 105. However, the WVRC has not adopted the RCI's threshold recommendations, as well as what the RCI considers prohibited and allowed substances. Tr. 105.

Dennis K. Dibbern is a doctor of veterinary medicine and is considered an expert in that field. Tr. 107, 111. Dr. Dibbern is currently the official veterinarian for the Charles Town Racetrack, a position he has held since March 2007.[11] Tr. 108. Caffeine is considered a *prohibited substance under West Virginia's zero tolerance rule*, 178 C.S.R. 1, § 66.5. Tr. 123. During his tenure as the track veterinarian at Charles Town Racetrack between 1986 and 1996, horses that were found to have caffeine in their system were considered *"positives" for prohibited substances, regardless of the source of the caffeine* and how and by whom it was administered. Tr. 125-126 (emphasis added). Finally, Dr. Dibbern confirmed that the sole responsibility of making sure that prohibited substances are not administered to a horse lies with the horse's trainer. Tr. 142.

Fred Johnson has been training thoroughbred racehorses for 25 years and has never administered a prohibited substance to one of his horses. Tr. 144, 145. Prior to Eastern Delite's running in the Breeders Classic on October 20, 2007, Mr. Johnson has never had a horse test positive for a prohibited substance – nor did Mr. Johnson personally administer a prohibited substance, including caffeine, to Eastern Delite. Tr. 145, 149. However, Mr. Johnson admits that, under the WVRC's rules, the trainer bears the ultimate responsibility for making sure that a horse does not consume or be given a prohibited substance. Tr. 151. Mr. Johnson also acknowledges that, under the WVRC's rules, with the exception of Bute and Lasix up to a certain level, *no other substances are allowed to be present in a horse's system at the time of a race.* Tr. 152.

Sharon Johnson did not intentionally and knowingly administer caffeine to Eastern Delite on the day of the race, October 20, 2007. Tr. 161. However, on the day before as well as the day

---

[11] Dr. Dibbern was not the track veterinarian during the Breeders Classic on October 20, 2007. However, Dr. Dibbern is currently the track veterinarian at the Charles Town Racetrack, and he also served in this position from 1986 to 1996. Tr. 108.

of the race, Ms. Johnson *administered Super Creatine which*, unbeknownst to her, *contained caffeine*. Tr. 175. Ms. Johnson described Super Creatine as a "paste" that is put into a horse's mouth, which "*gives them a little oomph.*" Tr. 178 (emphasis added).

Oscar Flores was the jockey of Eastern Delite for the Breeders Classic on October 20, 2007. Tr. 183. According to Mr. Flores, Eastern Delite performed in the same manner as he had in the past when Mr. Flores rode him. Tr. 183.

Thomas Tobin also testified on behalf of Appellants. Dr. Tobin is considered to be an expert in equine pharmacology. Tr. 188. In essence, Dr. Tobin stated that caffeine is an environmental substance that is prevalent in our society. Given this and the variability in drug testing of horses, according to Dr. Tobin, the presence of caffeine in Eastern Delite's samples were not a true positive. *See generally* Tr. 189-243. However, Dr. Tobin clearly acknowledged that "*[c]affeine was detected*" in Eastern Delite's system on the day of the Breeders Classic, October 20, 2007. Tr. 236 (emphasis added). Dr. Tobin also acknowledged that *caffeine is*, "in technical terms, *a drug*," *with* "*extra stimulant properties* ". Tr. 202, 232 (emphasis added).

Following the hearing, the WVRC, by Order of July 7, 2008, affirmed the BOS' Order, dated November 29, 2007, which disqualified Eastern Delite and further ordered that the purse be redistributed. Appellants appealed this Order to the Circuit Court.[12] Following a hearing on December 19, 2008, the Circuit Court, by Order of March 11, 2009, affirmed the July 7, 2008 Order of the WVRC.[13] Thereafter, Appellants brought the current appeal.[14]

---

[12] By Order Granting Stay and Injunction Pending Appeal, dated July 14, 2008, the Circuit Court stayed enforcement of the WVRC's July 7, 2008 Order and issued a preliminary injunction enjoining the redistribution of the first place purse for the Breeders Classic held on October 20, 2007.

[13] In its Order of March 11, 2009, the Circuit Court again stayed enforcement of the WVRC's July 7, 2008 Order and continued the enforcement of the preliminary injunction enjoining the redistribution of the first place purse for the Breeder's Classic. This stay

IV.

ASSIGNMENTS OF ERROR

On appeal, Appellants make the following assignments of error:

1. Whether the Circuit Court erred in the determination that the "zero tolerance policy" embodied in Rule 178-1-66.5 was not arbitrary and capricious for the reasons that the Florida Supreme Court found essentially identical language to be constitutionally infirm in *Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 412 So.2d 357 (1982) *aff'd Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 407 So.2d 269 (1981)?

2. Whether the Circuit Court erred in its determination that caffeine is a drug when the Racing Commission made no such Finding of Fact, and the Racing Commission's Conclusion of Law that caffeine is a drug is unsupported by any regulation, statute or declaration from any court?

3. Whether the Circuit Court erred in its conclusion that the Racing Commission did not improperly delegate its rulemaking authority to the private testing laboratory, which laboratory, and not the Racing Commission, decides which substances will be tested for, as well as the parameters of all such testing?

Appellants' Brief at 20.

V.

STANDARD OF REVIEW

Upon judicial review of a contested case under the West

---

terminated on May 28, 2009, with the filing of the transcript of the December 19, 2008 hearing in the Circuit Court.

[14] Following the filing of their appeal, Appellants moved this Court to again stay enforcement of the WVRC's July 7, 2008 Order and to continue enforcement of the preliminary injunction enjoining the redistribution of the first place purse for the Breeder's Classic. Thereafter, by Order of June 11, 2009, this Court granted Appellants' Motion and ordered that the WVRC's July 7, 2008 Order be stayed, pending the outcome of Appellants' appeal.

> Virginia Administrative Procedure[s] Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are (1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Syl. pt. 1, *Webb v. West Virginia Bd. of Medicine*, 212 W. Va. 149, 569 S.E.2d 225 (2002) (quotations and citations omitted).

"On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. pt.1, *Montgomery v. State Police*, 215 W. Va. 511, 600 S.E.2d 223 (2004) (quotations and citations omitted).

"Under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A, appellate review of a circuit court's affirmance of agency action is *de novo*, with any factual findings made by the lower court in connection with alleged procedural defects being reviewed under a clearly erroneous standard." Syl. pt. 2, *Montgomery*, *supra* (quotations and citations omitted).

VI.

ARGUMENT

A. The Circuit Court Did Not Err in Its Determination That the "Zero Tolerance Policy" Embodied in 178 C. S. R. 1, § 66.5 Was Not Arbitrary and Capricious Although the Florida Supreme Court Found Similar, but Distinguishable, Language to Be Constitutionally Infirm in *Simmons v. Div. Of Pari-Mutuel Wagering, Dept. Of Business*

***Regulation*, 412 So.2d 357 (Fla. 1982) *Aff'd Simmons v. Div. Of Pari-Mutuel Wagering, Dept. Of Business Regulation*, 407 So.2d 269 (Fla. App. 3 Dist. 1981).**

1. <u>Introduction</u>

There is absolutely no doubt that Eastern Delite raced in the Breeders Classic with caffeine in his blood stream. Caffeine was unquestionably detected in the urine and blood samples of Eastern Delite by the WVRC's laboratory, Dalare Associates, as well as the laboratory selected by Appellants, LSU. Caffeine is a drug and/or stimulant that does not naturally occur in the system of a horse. Again, the witnesses testifying before the WVRC attested to the same, including Appellants' expert witness, Dr. Tobin, who acknowledged that "*[c]affeine was detected*" and *caffeine is* "in technical terms, *a drug*," *with* "*extra stimulant properties*." (Emphasis added.) Danny Wright, Chief Steward of the BOS at the Charles Town Racetrack, also testified that *caffeine is a drug or stimulant* that is prohibited by the WVRC's rules. Likewise, in his letter of November 14, 2007, Steven Barker, Professor and Director of the laboratory at LSU, notified the BOS that the split sample of Eastern Delite's urine and blood were confirmed as *positive for the presence of the* "*drug caffeine*." (Emphasis added.)

The prohibition against horses racing with drugs in their systems, with certain exceptions, that are foreign to their bodies is found in the WVRC's rules. These rules state that a horse, while running in a race, shall not have in its system any "*drug substance*, its metabolites, or analog" that are *"foreign to the natural horse,"* with the exception of Bute, Adjunct Bute, and Lasix within certain limits. *See* 178 C.S.R. 1, §§ 66.5, 66.5.1, 66.5.2, 66.5.3, and 66.5.4 (emphasis added). Clearly, caffeine is a prohibited substance under this rule, as it does not occur naturally in a horse.[15]

---

[15] Not even Appellants' expert, Dr. Tobin, could argue with a straight face that caffeine is naturally produced in the body of a horse. In fact, Appellee submits that, with the exception of

It is equally clear that Appellants are in violation of this rule, as Eastern Delite raced in the Breeders Classic on October 20, 2007, with caffeine in his system.

There is also no doubt as to the source of the caffeine found in Eastern Delite's system – it came from inside his own "camp." Eastern Delite's owner, Sharon Johnson, clearly testified that she *administered Super Creatine, which contains caffeine, to Eastern Delite* the day before, as well as the day of the Breeders Classic. Despite this, Appellants seem to suggest that the caffeine in Eastern Delite's system was the result of some type of sabotage. Specifically, Appellants state that they submitted evidence, in the form of testimony and correspondence, showing "suspicious activity the night before the race". Appellants' Brief at 4. However, there is absolutely no evidence in the record that Eastern Delite was actually given caffeine by anyone other than its owner, Sharon Johnson. Thus, Appellants' suggestion that Eastern Delite was "doped" by someone else should not be countenanced by this Court, as it is nothing more than a means of diverting the source of the caffeine found in Eastern Delite away from themselves. It is, in fact, mere speculation and conjecture without any factual basis to support it.

On appeal, Appellants continue their attempt to divert the source of the caffeine found in Eastern Delite's system by insinuating that it came from some type of unintentional contamination of Eastern Delite's food:

> Eastern Delite was delivered to the receiving barn before 9 a.m. on the day of the race and remained in the control of Racing Commission officials that entire day. Mr. Johnson testified that caffeinated beverages, such as coffee and soft drinks, were always on the rails to the horse's stalls in the receiving barn and would frequently be spilled onto the hay or straw in each horse's stall. . . .

---

some plant life, caffeine does not naturally occur in any other biological organism on earth, and certainly not in race horses, such as Eastern Delite.

> Simply stated, even on race day for the Classic, the opportunity existed for unintended contamination of hay or straw, after a spill, to be ingested by a horses [SIC], by virtue of the Racing Commission staff permitting caffeinated beverages for humans in the receiving barn.

Appellants' Brief at 13-14. Appellants also note that Dr. Tobin found "[t]here was an 'overwhelming probability' that caffeine got into Eastern Delite by 'inadvertent exposure'". Appellants' Brief at 17 (emphasis omitted). Again, there is absolutely no evidence showing that the hay or straw in Eastern Delite's stall was contaminated with caffeine, "let alone" that Eastern Delite ingested any such contaminated hay or straw. Thus, Appellants and Dr. Tobin's comments are just that – comments, which are not substantiated by any evidence indicating that Eastern Delite was exposed to caffeine through some other food source. Stated in a different manner, the caffeine found in Eastern Delite's system did not come from hay or straw or some act of sabotage – it came from its owner, Sharon Johnson, who has admitted that she gave Eastern Delite Super Creatine, which contains caffeine!

On appeal, Appellants also assert that they "[d]id [n]ot [c]ontaminate Eastern Delite with the [u]se of Super Creatine". Appellants' Brief at 18 (emphasis omitted). Appellants' statement begs the question – then who did? Based on the record in this case, there is no other factually based explanation for the caffeine contamination of Eastern Delite. Appellants state that "[w]hile it is undisputed that Sharon Johnson administered Super Creatine to Eastern Delite, is likewise undisputed that the Super Creatine did not contain the levels of caffeine found in Eastern Delite." Appellants' Brief at 18-19. Among other things,[16] Appellants point to a letter from LSU indicating

---

[16] Appellants note that the manufacturer of Super Creatine, Equine Botanica, state that their product is negative for caffeine because the level of caffeine found in their product, when using their testing process, falls below a certain level, namely 190 to 360 ppb. Appellant's Brief

that "Super Creatine tested positive in a range of 4.8 to 5.7 parts per billion for caffeine, while the test results from LSU and Delare showed a range of 350 to 500 parts per billion." Appellants' Brief at 19. Appellants further argue that "there is no basis for suggesting that a supplement containing approximately 5 parts per billion [of caffeine] could explain a finding of 350 to 500 parts per billion [of caffeine] in Eastern Delite." *Id.* However, Appellants argument fails to consider the amount of Super Creatine that Eastern Delite actually ingested. Obviously, a person who drinks two cups of coffee would have more caffeine in his system than the person who only consumes one cup of coffee. The same holds true for Super Creatine; the more Super Creatine ingested – the more caffeine found in the blood stream.[17]

Finally, there is no doubt that Fred Johnson, as the Trainer of Eastern Delite, was solely responsible for making sure that his horse ran in the Breeders Classic, on October 20, 2007, free of any prohibited substances. Practically everyone that appeared at the WVRC's hearing testified to the same, including Fred Johnson. The WVRC's rules are equally clear: "A *trainer shall prevent the administration of any drug or medication or other prohibited substance* that may cause violation" of the WVRC's rules and regulations. 178 C.S.R. 1, § 66.1 (emphasis added).

> The *trainer is the absolute insurer of and responsible for the condition of the horse entered in . . . a race*, regardless of the acts of third parties. If the chemical or

---

at 19. First, racing authorities in West Virginia are not beholden to equine pharmaceutical companies, such as Equine Botanica, for determining what constitutes a "positive" test result for caffeine, or any other drug for that matter – that is for West Virginia to decide. Secondly, West Virginia has a "zero tolerance" rule regarding the presence of drugs, including caffeine, found in race horses and this rule is violated regardless of whether the level of caffeine in a horse is below Equine Botanica's "cutoff." Thirdly, Equine Botanica's caffeine "cut off" level of 190 to 360 ppb also exceeds the RCI's recommended threshold level of 100 ng/ml or ppb.

[17] The record is silent on the actual amount of Super Creatine ingested by Eastern Delite.

> other analysis of saliva, urine samples, and/or other tests prove positive showing the presence of any narcotic, *stimulant*, depressant, local anesthetic, or *any other drug or unauthorized medication*, the trainer of the horse may be fined, suspended, have his or her occupation[al] permit revoked or be prohibited access to all grounds under the jurisdiction of the Racing Commission. In addition, the owner of the horse . . . may be fined, suspended, have his or her occupation[al] permit revoked or be prohibited access to all grounds under the jurisdiction of the Racing Commission.

178 C.S.R. 1, § 31.2 (emphasis added).[18] *See also* 178 C.S.R. 1, § 54.14.

2. <u>Viability of Appellants' Constitutional Claims</u>

On appeal, Appellants challenge the constitutionality of a rule of the WVRC and the application of the same. The rule, 178 C.S.R. 1, § 66.5, as challenged by Appellants, in its entirety, states as follows:

> No horse participating in a race shall carry in its body *any drug substance*, its metabolites, or analog, which are *foreign to the natural horse* except as provided, by this rule.

(Emphasis added). This rule is known or referred to in racing "circles" as a " zero tolerance" rule or policy. The exceptions, as eluded to in the rule, include Bute (phenylbutazone), Adjunct Bute (oxyphenylbutazone) and Lasix (furosemide) within certain limits. *See* 178 C.S.R. 1, §§ 66.5.1, 66.5.2, 66.5.3, and 66.5.4.

The rule challenged by Appellants, 178 C.S.R. 1, § 66.5, is a legislative rule that has undergone the legislative rule making process.

> Once a disputed regulation is legislatively approved, it has the force of a statute itself. . . . Being an act of the West Virginia Legislative, [a legislatively approved regulation] is entitled to more

---

[18] The WVRC is also authorized to "hold up, in any disputed horse . . . race, the payment of any purse, pending a final determination of the results thereof." W. Va. Code § 19-23-6(12). *See also* 178 C.S.R. 1, § 60.9 (The owner of any horse that is disqualified from a race shall be denied the purse from the race.).

> than mere deference; it is entitled to controlling weight. As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or it is arbitrary or capricious.

Appalachian Power Co. v. State Tax Dept. of West Virginia,195 W. Va. 573, 585, 466 S.E.2d 424, 436 (1995).

A license to participate in horse racing in West Virginia is a privilege rather than a right and, thus, it is uncertain whether Appellants' claims rise to a constitutional level to which they are entitled to constitutional protections.

> [A] license issued by the State to train and race horses, under a statute assuming to regulate and control horse racing, enacted under its police power, is nothing more than a privilege which the State may, for good cause, revoke or withdraw. Furthermore, it is generally held that the power vested in a board or commission to issue a license for the exercise of a privilege implies the power to revoke such license for good cause.

State ex rel. Morris v. West Virginia Racing Commission, 133 W. Va. 179, 194, 55 S.E.2d 263, 271 (1949). Because participation in horse racing is a privilege rather than a right, the WVRC is fully authorized to impose restrictions and conditions on Appellants' participation in such racing, including a prohibition against the drug/stimulant caffeine, as found in Eastern Delite when he ran in the Breeders Classic on October 20, 2007. "The right to engage in horse racing, upon the results of which wagers may be made, is not a natural right, and is nothing more than a privilege upon which the State, in granting the same, may impose restrictions and conditions." *Morris*, 133 W. Va. 201, 55 S.E.2d 274.

3. <u>This Court Should Not Strike down West Virginia's "Zero Tolerance" Rule Based on the Florida Supreme Court's Invalidation of Florida's "Foreign Substance Rule," As There Is a Critical Difference in the West Virginia and Florida Regulations.</u>

On appeal, Appellants rely heavily on a Florida case, *Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 412 So.2d 357 (Fla. 1982) ("*Simmons II* "), in asserting that West Virginia's "zero tolerance" rule, 178 C.S.R. 1, § 66.5, should be struck down by this Court. In *Simmons II*, the Florida Supreme Court affirmed a Florida District Court of Appeals' decision, in the case of *Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation*, 407 So.2d 269 (Fla. App. 3Dist. 1981) ("*Simmons I* "), invalidating a "foreign substance" rule of racing authorities in Florida. Specifically, Appellants argue that, in *Simmons II*, "the Florida Supreme Court found nearly identical 'foreign to the natural horse' language to be unconstitutional and unenforceable as a matter of law." Appellants' Brief at 30 (emphasis omitted). However, there is a critical difference between the language of the West Virginia regulation at issue in this case, 178 C.S.R. 1, § 66.5, and the Florida regulation at issue in *Simmons I* and *II*, § 550.241(1), Fla. Stat. (Supp. 1980).

Florida's regulation, §550.241(1), provides, in pertinent part, the following:

> The racing of an animal with any drug, medication, stimulant, depressant, hypnotic, narcotic, local anesthetic, or drug-masking agent or *any substance which is foreign to the natural horse* or dog is prohibited. It is a violation of this section for a person to administer or cause to be administered any drug, medication, stimulant, depressant, hypnotic, narcotic, local anesthetic, or drug-masking agent or *any substance which is foreign to the natural horse* or dog to an animal which will result in a positive test for such substance based on samples taken from the animal immediately prior to or immediately after the racing of that animal.

Simmons v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation, 412 So.2d 357, 358 n.1 (in part) (1982) (emphasis added).

The Florida District Court of Appeals in *Simmons I* and the Florida Supreme Court in *Simmons II* both held that the clause "*any substance* which is foreign to the natural horse or dog"

lacked a rational basis and was unconstitutional. However, the *Simmons I* and *II* Courts found that the remainder of the statute was constitutional. Specifically, in *Simmons II*, the Florida Supreme Court stated as follows:

> The district court found the broad prohibition against racing an animal while there is in the animal's body "*any substance* which is foreign to the natural horse or dog," unconstitutional for not being rationally related to the objectives of the statute. s 550.241(1), Fla. Stat. (Supp. 1980). The court upheld the remainder of the statute, prohibiting the administering to racing animals of "*any drug*, medication, stimulant, depressant, hypnotic, narcotic, local anesthetic, or drug-masking agent." Id. We affirm the district court's decision and adopt the reasoning expressed in the district court's opinion.
>
> Accordingly, we hold that the clause, "*any substance* which is foreign to the natural horse or dog," as it appears twice in section 550.241, lacks a rational basis and is unconstitutional and void. The remainder of the provisions of the challenged statute are constitutional and are hereby upheld for the reasons stated by the district court of appeal.

Simmons, 412 So.2d 358-359 (emphasis added). Thus, the *Simmons I* and *II* Courts drew a sharp distinction between the "*any substance*" language of the statute, which was found to be unconstitutional, and the "*any drug*" language of the statute that was found to be constitutional.

West Virginia's rule, 178 C.S.R. 1, § 66.5, provides as follows:

> No horse participating in a race shall carry in its body *any drug substance*, its metabolites, or analog, which are foreign to the natural horse except as provided, by this rule.

(Emphasis added.) West Virginia's rule prohibits "*any drug substance*" that is foreign to the natural horse, which is critically different than the offending language in the Florida rule prohibiting "*any substance*" that is foreign to the natural horse. Obviously, the "*any substance*" language of the Florida statute "prohibit[s] everything, the helpful and the harmful, the beneficial and the detrimental, the benign and the deleterious." *Simmons*, 407 So.2d 271. The same cannot be said

of the "*any drug substance*" language contained in the West Virginia rule, as it "certainly cannot [be said] that to prohibit the racing of an animal *with drugs* is not rationally related to the regulation of racing or is an unreasonable means to accomplish that regulation." *Id.* (emphasis added). As such, Appellants' request that this Court use the Florida Supreme Court's holding in *Simmons II* to invalidate West Virginia's "zero tolerance" rule, 178 C.S.R. 1, § 66.5, should not be honored.

On appeal, Appellants attempt to blur the distinction drawn by the Courts in *Simmons I* and *II* finding that the "*any substance*" language of the statute that they were addressing, 550.241(1), was unconstitutional and the "*any drug*" language of the statute was constitutional. Specifically, Appellants state the following:

> The Stewards have argued that the Florida Court in *Simmons* upheld the prohibition against the use of drugs. While this is true, the Florida statute, specifically 550.24, defined what was a '*drug*,' for the purposes of the statute declaring the same to be '*any drug prohibited by law*.' *See Simmons* at 269. Accordingly, when the Florida Court upheld the prohibition against drugs, it did so with references to drugs otherwise prohibited by law.

Appellant's Brief at 31 (emphasis in original).

To begin with, the language cited by Appellants, "any drug prohibited by law", appears in a separate statute, Section 550.24, than the statute, Section 550.241, that the *Simmons I* and *II* Courts were actually addressing in rendering their Decisions. The relevant provision that the *Simmons I* and *II* Courts were actually addressing, Section 550.241(1), provides, in pertinent part, as follows:

> The racing of an animal with any drug, medication, stimulant, depressant, hypnotic, narcotic, local anesthetic, or drug-masking agent or any substance which is foreign to the natural horse or dog is prohibited. It is a violation of this section for a person to administer or cause to be administered any drug, medication, stimulant, depressant, hypnotic, narcotic, local anesthetic, or drug-masking agent or any substance which is foreign to the natural horse or dog to an animal which will result in a positive test for such substance based

> on samples taken from the animal immediately prior to or immediately after the racing of that animal.

Simmons, 412 So.2d 358 n.1. This regulation is completely devoid of the language "any drug prohibited by law", as cited by Appellants. The language, as cited by Appellants, actually comes from Section 550.24(2), which reads as follows:

> Any person who attempts to affect the outcome of a horserace or dograce through administration of medication or drugs *prohibited by law* to a race animal for the purpose of affecting the outcome of a horserace or dograce; who administers any medication or drugs *prohibited by law* to a race animal for the purpose of affecting the outcome of a horserace or dograce; or who conspires to administer or to attempt to administer such medication or drugs is *guilty of a felony* of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(Emphasis added.)

It appears that Appellants are attempting to "mix apples with oranges" by citing to the language, "drugs prohibited by law", of a separate provision, Section 550.24(2), in Florida's racing regulations, which was not actually addressed by the *Simmons I* and *II* Courts, with the regulation that these Courts did actually address, Section 550.241(1). Obviously, Section 550.24(2) is a criminal statute providing for criminal penalties. Conversely, the statute addressed by the Courts in *Simmons I* and *II*, Section 550.241(1), is purely a civil statute with civil penalties. These penalties, as provided for in Section 550.241(3)(a), permit racing authorities in Florida to "revoke or suspend the license or permit of the violator or deny a license or permit to the violator; impose a fine against the violator in an amount not to exceed $5000; require the full or partial return of the purse, sweepstakes, and trophy of the race at issue; or impose against the violator any combination of such penalties." *Simmons*, 412 So.2d 358 n.1.

Finally, under Appellants' interpretation of Florida's racing regulations, an owner and/or

trainer of a horse is permitted to give his horse as much of a drug as he pleases as long as that drug is not prohibited by law. Thus, using Appellants' interpretation of racing law in Florida, horse owners and/or trainers are free to administer as much of the drug caffeine as they wish to their horse prior to a race, as caffeine is not prohibited by law. Surely, the Courts and racing authorities in Florida, or anywhere else for that matter, do not "share" Appellants' interpretation of their racing regulations.[19]

4. The WVRC's "Zero Tolerance" Rule, 178 C. S. R. 1, § 66.5, Has a Rational Basis and Is Not Required to Have the Specificity That Appellants Contend.

Appellants attack the WVRC's "zero tolerance" rule, 178 C.S.R. 1, § 66.5, on a number of fronts. Generally speaking, Appellants assert that this "regulation does not have a 'rational basis' and that any regulation not having a rational basis is 'wholly, clearly and palpably arbitrary' and cannot be enforced." Appellants' Brief at 22 (emphasis omitted). In other words, argue Appellants, the language of the WVRC's rule, 178 C.S.R. 1, § 66.5, that any "'drug substance, metabolite or analog,' is so terribly broad, the regulation is palpably arbitrary and capricious and lacks a rational basis." Appellants' Brief at 34 (emphasis omitted). More specifically, Appellants argue that the WVRC's rule is overly broad in that it does not specify the "drugs or levels thereof" that are prohibited, and further that the rule does not contain a "'safety valve' for permitted substances" that are "'benign or helpful.'" *See* Appellants' Petition at 15, 16, 16 n.5 (emphasis omitted). Appellants

---

[19] Appellants have also argued that "[t]he West Virginia Department of Health does not regulate caffeine as a drug" and that "[t]he West Virginia criminal code does not make the possession of caffeine a 'drug' crime – because caffeine is not a controlled substance or controlled drug substance." *See* Appellants' Petition at 19. Well, of course not; nor does the West Virginia criminal code make the possession of aspirin, as well as numerous other substances, a "drug" crime, but that does not make aspirin, and more importantly caffeine, any less of a drug.

also argue that the WVRC's regulation does not "define what is and what is not a drug". Appellants' Brief at 34.

a. Rational Basis

Contrary to Appellants' assertion, the WVRC's rule, 178 C.S.R. 1, § 66.5, has a rational basis, which is to protect the integrity and fairness of horse racing from fraud and deceit of those who might and will administer a prohibited substance to a horse. Obviously, the WVRC, in promulgating this rule, did not want to get itself into a situation where it had to list all of the prohibited "drug substance[s], [their] metabolites, or analogs" that are "foreign to the natural horse," as any such list would be enormous. At any rate, our Supreme Court, in *State ex rel. Morris v. West Virginia Racing Commission*, 133 W. Va. 179, 55 S.E.2d 263 (1949), discussed *infra*, has found that the WVRC is under no obligation to make any such list of drugs or acceptable levels thereof. Finally, the WVRC has already set forth the permissible drugs and acceptable levels thereof, those being Bute, Adjunct Bute and Lasix, which are helpful to race horses.[20] Conversely, there is nothing helpful in administering caffeine to a race horse.

b. Vagueness

This Court has also addressed the idea, as asserted by Appellants in this case, that a regulation of the WVRC must define, with exacting particularity, the words appearing in the regulation, as well as to specify, again with exacting particularity, the things outside the regulation to which the language of the regulation references (*i.e.*, the language "any drug substance, its

---

[20] "Bute" and its adjunct are anti-inflammatory medications without which race horses could not run in a competitive manner. Some race horses have a tendency to bleed out of their mouth and nostrils when running in a race. "Lasix" prevents this type of bleeding and instead allows the blood to pass out of a horse's body through its urine.

metabolites, or analogs" that are "foreign to the natural horse," as found in 178 C.S.R. 1, § 66.5) and found that the WVRC is under no such obligation:

> It goes without saying that the State, having assumed, under its police powers, full and complete control of all horse racing conducted under the parimutuel system, became morally responsible to insure, so far as possible, that *no fraud or deceit would be practiced* in an enterprise over which it had assumed control. Therefore, the Legislature, in enacting the racing statute, realized the importance and necessity of the power of regulation of racing, and gave to the Racing Commission, set up thereunder, full and complete powers of regulation. The language is broad and general; but it is assumed that it was intended to apply to all problems affecting horse racing, *without going into particular detail, or without attempting to set up any particular standards under which the commission might act.*

Morris, 133 W. Va. 192, 55 S.E.2d 270 (emphasis added).

> The rule requiring an express standard to guide discretion is recognized as properly applied to statutes or ordinances regulating ordinary lawful activity, but to be *subject to the exception that where it is impracticable to lay down a definite comprehensive rule, such as where the regulation turns upon the question of personal fitness or where the act relates to the administration of a police regulation and is necessary to protect the general welfare, morals, and safety of the public, it is not essential that . . . specific prescribed standards be expressed.*

Morris, 133 W. Va. 193, 55 S.E.2d 270 (*quoting* 42 Am.Jur. 345) (emphasis added). "In the very nature of things, *no usable standard can be set up for the promulgation of any of the regulations under which horse racing may be conducted, and especially to guard against fraud and deceit.*" *Id.* (emphasis added).

On appeal, Appellants first state that this Court in *Morris* "*held* that the legislature intended to grant broad discretion to the Racing Commission because it is *impossible to set forth specific laws to adequately protect against fraud and deceit.*" Appellants' Brief at 24 (emphasis added). Thereafter, and inconsistent with this statement, Appellants argue that the above quoted language

from the Court in Morris is "*dicta* . . . [and] not applicable to the facts at hand." Appellants' Brief at 26 n. 9 (emphasis in original). In any event, Appellee disagrees with Appellants' characterization of the *Morris* Court's language as *dicta*. Assuming *arguendo* that the language is *dicta*, it must be pretty persuasive, as it has been used by this Court in later cases. *See State ex rel. Perry v. Miller*, 171 W. Va. 509, 513, 300 S.E.2d 622,626-627 (1983) (*quoting and citing State ex rel. Morris v. West Virginia Racing Commission*, 133 W. Va. 179, 55 S.E.2d 263 (1949); *West Central Producers Co-Operative Association v. Commissioner of Agriculture*, 124 W. Va. 81, 20 S.E.2d 797 (1942); *State v. Bunner*, 126 W. Va. 280, 27 S.E.2d 823(1943); and Syl. Pt. 4, *Quesenberry v. Estep*, 142 W. Va. 426, 95 S.E.2d 832 (1956).

5. <u>Earlier Forerunner Provisions of 178 C.S.R. 1, § 66.5 Held to be Constitutional.</u>

On appeal, Appellants asserts that this is a case of first impression. Appellants' Brief at 23. Appellee agrees insofar as the WVRC's current rule, 178 C.S.R. 1, § 66.5, prohibiting horses from running in a race with any "drug substance, its metabolites, or analog" that are "foreign to the natural horse", has never been challenged in this Court. However, this Court has already addressed earlier forerunner provisions of the WVRC's rule prohibiting drug substances in horse racing and found them acceptable. These earlier rules and the Court's treatment of them is instructive. In *State ex rel. Spiker v. West Virginia Racing Commission*, 135 W. Va. 512, 63 S.E.2d 831 (1951), the Supreme Court found:

> 1. Under the provisions of Section 1, Article 23, Chapter 71, Acts of the Legislature, 1935, Regular Session, conferring power upon the West Virginia Racing Commission to prescribe rules, regulations and conditions under which horse races shall be conducted in this State, such commission has the authority to promulgate and enforce rules which provide that a horse owned by any person may be suspended when its saliva or urine shows the presence of any *narcotic, stimulant or drug*, and that the purse won

by a horse found to have been stimulated shall be returned and redistributed.

2. Rules Nos. 268 and 274, promulgated by the West Virginia Racing Commission, which respectively provide for the suspension of a horse whose saliva or urine discloses the presence of any *narcotic, stimulant, or drug*, and for the return and the redistribution of the purse won by a horse found to be stimulated, are not violative of any provision of the Constitution of the United States or of the Constitution of West Virginia, and are valid.

Syl. pt. 1 and 2, *Spiker*, *supra* (emphasis added).

Rules 268 and 274 of the WVRC respectfully, as provided for in 1951, stated the following:

268. No *narcotic, stimulant or drug* shall be used, no drench of anything shall be administered, and no electrical, mechanical or other appliance other than the ordinary whip shall be used for the purpose of stimulating the horse or affecting his speed in any way in a race. Any person so offending shall be suspended for not less than six months, and, also, any horse showing positive from a saliva and/or urine test shall be suspended, the case referred to the West Virginia Racing Commission for any further action deemed necessary.

. . . .

274. The veterinarian, as soon as possible, shall send or deliver to the chemist designated by the West Virginia Racing Commission, a sample of such saliva and/or urine for analysis, and said chemist shall report to the presiding Steward the result thereof. Should the report of such chemical analysis disclose a positive result indicating a *narcotic, stimulant or drug* had been administered, or should any chemical analysis of other excretions of body fluids taken from any horse, which has run in any race, disclose beyond doubt that a *narcotic, stimulant or drug* has been used, any person so offending shall be suspended for not less than six months, and the case referred to the West Virginia Racing Commission for any further action deemed necessary.

Any purse won by a horse found to have been stimulated shall be returned, and the same, upon its return, shall be redistributed as if said horse had been disqualified. The suspension against a horse and against the person or persons responsible for his stimulated condition shall not be terminated at the end of the period imposed by the

> Stewards or the commission unless the sum won by the horse is returned.

Spiker, 135 W.Va. 519-20, 63 S.E.2d 835-36 (emphasis added).

On appeal, Appellants argue that 178 C.S.R. 1, § 66.5 does "not define what is and what is not a drug." Appellants' Brief at 34. Likewise, the earlier rules of the WVRC, Rules 268 and 274, that the Supreme Court examined in *Spiker, supra,* did not define the words "narcotic, stimulant or drug." Nor did these earlier rules specify which narcotics, stimulants and drugs were prohibited.

The WVRC rule that the Supreme Court addressed in *Morris*, Rule 248, provided:

> The saliva of the winner of each and every race shall be taken, and from such other horses as the Stewards may direct. In all such cases the trainer shall be held responsible for the condition of his horse or horses, except in case of unavoidable absence of the trainer, when the stable foreman or groom in charge of the horse or horses shall be held responsible, and in the event of the horse or horses from which said saliva has been taken shall have been found by the Chemist to show evidence of the administration of *narcotics*, said responsible person so offending shall be suspended for not less than six (6) months and the case referred to the West Virginia Racing Commission for any further action deemed necessary.
>
> 'Any urine test may be taken of any horse or horses that the Stewards may ask the Veterinarians in charge to take and have analyzed, and if found positive, the responsible person so offending shall be suspended for not less than six (6) months and the case referred to the West Virginia Racing Commission for any further action deemed necessary' . . . .

Syl., *Morris*, 133 W. Va. 179-180, 55 S.E.2d 264 (emphasis added). Again, there was nothing in the earlier rule, Rule 248, of the WVRC defining the term "narcotics," let alone specifying which narcotics were disallowed and the Supreme Court upheld the regulation.

On appeal, Appellants assert that "[t]he 1949 [r]egulation in *Morris* and [t]he 1951 [r]egulation in *Spiker* [c]larify the [a]rbitrary and [c]apricious [n]ature of the '[f]oreign to the

[n]atural [h]orse' [r]ule[.]" Appellants' Brief at 25 (emphasis omitted). Appellants further argue that: "[T] he principal reason that *Morris* and *Spiker* are not applicable to the facts at hand is because the language of Rule 245 in *Morris* and Rule 268 in *Spiker*, were each radically different from the language in Section 178-1-66.5. The regulations in effect in 1949 and 1951 required that the substance provided to a horse have a 'stimulation affecting speed in a race.'" Appellants' Brief at 26 (emphasis omitted). Appellants also suggest that "Rule 245 in *Morris* and Rule 268 in *Spiker* each had a far more appropriate and rational basis than Section 178.1-66.5 because Rules 245 and 268 required stimulation affecting speed in a race." Appellants' Brief at 25-26 (emphasis omitted).

On the contrary, the regulations in *Morris* and *Spiker* clarify why the "*shall be used for the purpose of stimulating the horse or affecting his speed in a race*" language of Rule 245 and the "*for the purpose of regulating the horse or affecting his speed in any way in a race*" language of Rule 268 have been removed from the current rules. The Legislature and the WVRC came to understand that the above language of Rules 245 and 268 would produce endless litigation and rules that were impossible to enforce. In *Kline v. Illinois Racing Bd.*, 469 N.E.2d 667, 671-672 (Ill. App. 1Dist. 1984), another case heavily relied on by Appellants, so too was the finding of the Illinois Supreme Court:

> Plaintiff's suggestion that the rule be construed to prohibit only those substances "found to *affect a horse's speed* " must be rejected. First, as noted, this court is not empowered to disturb a police regulation merely because there may be a difference of opinion as to the rule's wisdom or expediency. Second, the Board found, and plaintiff has not questioned nor contradicted the finding, that there presently exists no reliable scientific manner by which to determine whether a specific substance had an "effect" on a certain horse during a certain race. Since plaintiff's suggested rule would appear *impossible to enforce*, it has little to recommend it. Even ignoring this substantial hurdle for a moment, we agree with the Board that plaintiff's suggested rule, if adopted, would necessarily result in

> *almost endless conflicts* before the winner of a race could be declared; first between chemical and medical experts at the hearings conducted by the stewards and the Board, and then between legal experts appearing before the courts. *Endless debates* as to whether the speed of a particular horse was "affected" by a given concentration of a certain drug during a given race under prescribed conditions would not, in our opinion, enhance the interest of the Illinois horse racing industry, nor its patrons. The essence of horse racing is the immediate finality of declaring the winner.

(Emphasis added.)

Furthermore, as the Court found in *Morris*, 133 W. Va. 191, 55 S.E.2d 269, "the nature of the effect of the drug administered is unimportant in this case." Additionally, from the fact that Eastern Delite won the Breeders Classic on October 20, 2007 "it is natural to assume that the drug administered [caffeine] had a stimulating effect." *Id.* Finally, and perhaps most importantly, the evidence of record indicates that Sharon Johnson, Owner of Eastern Delite, was attempting to stimulate or affect the speed of her horse when she ran him in the Breeders Classic on October 20, 2007. Ms. Johnson testified at the hearing before the WVRC that on the day before as well as the day of the race, she *administered Super Creatine, which contains caffeine, to Eastern Delite.* Ms. Johnson further stated that Super Creatine is a "paste" that is put into a horse's mouth, which "*gives them a little oomph.*" (Emphasis added). These statements, under any reasonable interpretation, indicate that Ms. Johnson gave Eastern Delite Super Creatine to give him more alertness or "pep" thereby increasing his speed. One thing is for certain, she sure was not trying to decrease his speed. Appellants even admit that the substance containing caffeine, Super Creatine, that was administered to Eastern Delite is a performance enhancer. Specifically, Appellants clearly state that Super Creatine is a creatine monohydrate and that "[c]reatine monohydrate is a dietary supplement that athletes and many body builders *use to increase* high intensity exercise *performance*, increased

strength, have fuller looking muscles, increase body mass and faster post workout recovery." Appellants' Brief at 18 (emphasis added).

6. **The WVRC's "Zero Tolerance" Rule, 178 C.S.R. 1, § 66.5, is not Void for Vagueness.**

On appeal, Appellants assert that the WVRC's "zero tolerance" rule, 178 C.S.R. 1, § 66.5, is void on vagueness grounds. *See generally* Appellants' Brief at 28-30. Specifically, Appellants argue that "the lack of reasonable guidance as to what constitutes a drug substance, its metabolites or analog, or clear authority establishing a zero tolerance policy, renders the rule unconstitutionally vague." *See* Appellants' Petition at 21.

To begin with, because Appellants did not sufficiently plead or raise this vagueness issue to the Circuit Court, it is questionable whether they can raise it now. Nowhere in their Opening Brief or Reply Brief to the Circuit Court do Appellants articulate this vagueness argument with such distinctiveness to alert the Circuit Court of their claim that West Virginia's zero tolerance" rule, 178 C.S.R. 1, § 66.5, is void on vagueness grounds. It is only in their appeal to this Court that Appellants have fully raised this vagueness issue. *See generally* Appellants' Brief at 28-30. "'To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect.'" Syl. pt. 1, *State v. Jason H.*, 215 W. Va. 439, 599 S.E.2d 862 (2004) (*per curiam*) (*quoting* Syl. pt. 2, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996)). "'This Court will not consider questions, nonjurisdictional in their nature, not acted upon by the circuit court as an intermediate appellate court.'" *Haines v. Kimble*, 221 W. Va. 266, 277, 654 S.E.2d 588, 599 (2007) (*per curiam*) (*quoting* Syl. pt. 1, *Pettry v. Chesapeake and Ohio Railway Company*, 148 W. Va. 443, 135 S.E.2d 729 (1964)). *See also Maplewood Community, Inc. v. Craig*, 216 W. Va. 273, 287, 607 S.E.2d 379, 393 (2004) (*per*

curiam) ("[B]ecause we are without any ruling from the circuit court that addresses this assignment of error that was properly raised below, we are similarly prohibited from conducting meaningful appellate review."). [21]

At any rate, Appellants' assertion that West Virginia's zero tolerance" rule, 178 C.S.R. 1, § 66.5, is unconstitutionally vague is without merit under the facts of this case. "[T]he general premise is that [a]s a matter of basic procedural due process, a law is void on its face if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *State ex rel. White v. Todt*, 197 W. Va. 334, 344, 475 S.E.2d 426, 436 (1996) (quotations and citations omitted). The Court has also "made clear that '[t]he vagueness standard may vary depending on the type of statute involved.'" *Todt*, 197 W. Va. 344, 475 S.E.2d 436 (*quoting Hartstock-Flesher Candy Co. v. Wheeling Wholesale Grocery, Co.*, 174 W. Va. 538, 546,

---

[21] Appellants, without having first raised the issue with the Circuit Court, also insinuate that their due process of law rights have been violated in this case. In this regard, Appellants state the following:

> Impassioned arguments were conducted before the Racing Commission as to whether or not Dr. Tobin's evidence would even be received. By the time he testified, it was clear that the Racing Commission was anxious to conclude the hearing.

Appellant's Brief at 15. Appellants further state that "Dr. Tobin's testimony was interrupted by the Racing Commission before he concluded his testimony, as if the Commission did not care to hear the balance of his testimony." Appellants' Brief at 15 n. 6. Nothing could be further from the truth. First, the only reason that the WVRC was reluctant to allow Dr. Tobin to testify in the first place was due to the fact that West Virginia is a "zero tolerance" jurisdiction regarding prohibited drug substances, and Dr. Tobin was not going to offer testimony that Eastern Delite did not have any caffeine in his system at the time of the Breeders Classic and, therefore, his testimony would not be relevant. *See* Tr. at 193. At any rate, Dr. Tobin was allowed to testify and did so at length. In fact, Dr. Tobin's testimony, including both direct and cross examination, took up "the better part of" 43 pages of hearing transcript. *See generally* Tr. at 201-243. The WVRC's interruption of Doctor Tobin's testimony, as pointed out by Appellants, was " short-lived," as he was permitted to continue testifying for a considerable amount of time. *See generally* Tr. at 233-243.

328 S.E.2d 144, 152 (1984), *holding modified on another point by, Gibson v. W. Va. Dept. of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991)). Specifcally, "it is appropriate under the Due Process Clause vagueness doctrine to apply a less restrictive test to statutes or ordinances involving economic matters in which criminal penalties are not at issue." *Hartstock-Flesher Candy Co.*, 174 W. Va. 546, 328 S.E.2d 153. Finally, "'[t]he Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.'" *Hartstock-Flesher Candy Co.*, 174 W. Va. 546, 328 S.E.2d 153 (*quoting Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498-99, 102 S. Ct. 1186, 1193, 71 L. Ed. 2d 362, 371-72 (1982), *reh'g denied*, 456 U.S. 950, 102 S. Ct. 2023, 72 L. Ed. 2d 476 (1982)).

The WVRC's "zero tolerance" rule provides that a horse cannot participate in a race with any *drug substance*, its metabolites, or analog, which are *foreign to the natural horse*, with the exception of Bute, Adjunct Bute and Lasix. *See* 178 C.S.R. 1, §§ 66.5, 66.5.1, 66.5.2, 66.5.3, and 66.5.4. Persons of ordinary intelligence, and certainly persons as familiar with the rules of racing in West Virginia as Appellants, would not have to guess as to the meaning of this rule, nor would they differ as to its application. This is further evidenced by the testimony given at the hearing before the WVRC. Practically everyone that testified at this hearing had a clear understanding of the rule. Danny Wright, Chief Steward of the BOS at the Charles Town Racetrack, testified that West Virginia has a "*zero tolerance*" *rule* regarding the presence of drugs, medications and substances. (Emphasis added.) He further stated that, with the exception of Bute and Lasix, the rules of the WVRC *do not allow any substances that are foreign to the natural body of a horse, which includes caffeine, as caffeine is not a naturally occurring substance in a horse*. Likewise,

Joseph Strug, Laboratory Director of Dalare Associates, the official testing laboratory for the State of West Virginia, confirmed that West Virginia has a "*zero tolerance*" *policy* concerning prohibited substances in that *any drug*, other than Bute and Lasix up to certain levels, that are detected in a horse are "*recorded as a positive*" for testing purposes. (Emphasis added.) Finally, even Fred Johnson, Trainer of Eastern Delite, acknowledged that, under the WVRC's rules, with the exception of Bute and Lasix up to a certain level, no other substances are allowed to be present in a horse's system at the time of a race:

> Q. Good afternoon, Mr. Johnson. I'm Tom Smith. We met earlier. Would you agree with me that it's a rule of the West Virginia Racing Commission that the trainer is . . . has the ultimate responsibility to make sure that horses don't consume or are given prohibited substances?
>
> A. Yes, sir.
>
> Q. And you've heard the term zero tolerance bandied about here today. Isn't it true that other than bute and Lasix and related medications up to a certain level, West Virginia is a zero tolerance jurisdiction?
>
> . . . .
>
> Q. *That no other substances other than bute and Lasix up to a certain level, compounds related to them, are allowed in a horse when they're racing. Isn't that right?*
>
> A. *Yes, that's right.*

Tr. 151-152 (emphasis added).

As part of their argument that West Virginia's "zero tolerance" rule is unconstitutionally vague, Appellants also state that "Danny Wright, the Chief Steward at Charles Town, testified about his knowledge of the 'zero tolerance' policy, but could not identify any written regulation or interpretation documenting such a policy." Appellants' Brief at 30 (emphasis omitted). This

argument is of minor, if any, importance. What is of major importance is the content of the WVRC's "zero tolerance" rule. Although this rule, 178 C. S. R. 1, §66.5, is not labeled or titled "zero tolerance rule" or "zero tolerance policy," it is clear from the language of the rule that racing authorities in West Virginia have absolutely no tolerance when it comes to a horse having in its system any drug substance, its metabolites, or analogs, which are foreign to the horse in its natural state. "In an effort to not elevate form over substance, we must recognize that it is the content of what is contained under a title that is critical in most instances, not the title itself." *Snider v. Fox*, 218 W. Va. 663, 666, 627 S.E.2d 353, 356 (2006). "'The title to [a rule] is simply an index of what is contained therein[.]'" *Snider*, 218 W. Va. 666, 627 S.E.2d 356 (2006) (*quoting Casto v. Upshur County High School Bd.*, 94 W. Va. 513, 520, 119 S.E. 470, 473 (1923)).

7. **Regulations of Other States**

Throughout this claim, Appellants have argued that West Virginia needs to "craft" its regulations in the same manner as other racing jurisdictions have done by specifically identifing which substances are prohibited, as well as to establish and use threshold testing levels for determining whether a horse is "positive" for a prohibited substance. Appellants have even asked this Court to "take judicial notice of foreign substance regulations" that "have been adopted in" "California, Kentucky, Maryland and New York." Appellants' Brief at 21. According to Appellants, "[i]n these states, the substances prohibited are defined and specifically identified while the West Virginia rule does not even define what a 'drug substance, its metabolites or analog' is or is not." *Id.* (emphasis omitted).

However, Appellants fail to inform the Court that these other racing jurisdictions, as well as the RCI, prohibit caffeine in the levels found in Eastern Delite. In fact, both Dalare and LSU, the

laboratory selected by Appellants to have Eastern Delite's split sample tested, found Eastern Delite's urine and blood samples contain caffeine *above the RCI's recommended threshold* of 100 ng/ml.[22] Joseph Strug, the official chemist for the WVRC at Dalare, testified that the amount of caffeine in Eastern Delite's blood sample measured 300-500 ng/ml, which was *three to five times greater than the RCI's recommended threshold* of 100 ng/ml. Likewise, Steven Barker, the chemist at LSU where Appellants requested that Eastern Delite's split sample be examined, stated that the concentration of caffeine in Eastern Delite's urine sample was 991.7ng/ml, and the concentration of caffeine in the blood sample equaled 213.4 ng/ml, again which is *more than double the* 100 ng/ml *recommended threshold of the RCI.* Given these concentrations, even if Eastern Delite had been racing in another jurisdiction (i.e., California, Kentucky, Maryland and/or New York) that, as Appellants argue, specifically identifies caffeine as a prohibited drug, as well as the level of caffeine that is prohibited, the result would have been the same – Eastern Delite would have tested positive for a prohibited drug, namely caffeine.[23]

B. The Circuit Court did not err in its Determination That Caffeine is a Drug When the Racing Commission Made no Such Finding of Fact.

On appeal, Appellants assert that "[n]either the [s]tewards [n]or the Racing Commission [p]resented [e]vidence that [c]affeine is a '[d]rug [s]ubstance, [m]etabolite or [a]nalog' [p]rohibited

---

[22] This information was provided to the BOS and WVRC for informational purposes only and not to set any particular threshold testing levels.

[23] Interestingly, Appellants note that "a teaspoon of coffee would yield 350 to 500 parts per billion [ng/ml] of caffeine". Appellants' Brief at 4 n.2. Assuming this is true, then approximately 1/5 to 1/3 of a teaspoon of coffee would yield 100 ppb or ng/ml of caffeine. Thus, again assuming that Appellants' calculations are correct, it would take "little more" than 1/5 to 1/3 of a teaspoon of coffee to surpass the RCI's recommended threshold of 100 ppb or ng/ml of caffeine.

[p]ursuant 178-1-66.5." Appellants' Brief at 41(emphasis omitted). First, to suggest that caffeine is not a drug is utterly ridiculous and "flies in the face" of common sense and understanding – the whole world knows that caffeine is a drug! Secondly, and more to the point, evidence was adduced at the hearing before the WVRC clearly indicating that caffeine is a drug. Numerous witnesses testified as such, including Appellants' own expert witness, Dr. Tobin, who acknowledged that "[c]affeine was detected" and that *caffeine is*, "in technical terms, *a drug*," *with* "*extra stimulant properties*." (Emphasis added). Danny Wright, Chief Steward of the BOS at the Charles Town Racetrack, also testified that *caffeine is a drug or stimulant* that is prohibited by the WVRC's rules. Likewise, in his letter of November 14, 2007, Steven Barker, Professor and Director of the laboratory at LSU, notified the BOS that the split sample of Eastern Delite's urine and blood were confirmed as positive for the presence of the "*drug caffeine*." (Emphasis added).

Appellants also "go on and on" about caffeine being "everywhere", "ubiquitous", and a "natural substance."[24] Appellants' Brief at 42. First, the issue in this case is not the prevalence of caffeine in our society – no one would dispute its widespread availability. The issue is whether caffeine is a prohibited substance under 178 C.S.R. 1, § 66.5 – and it most certainly is, as discussed above. Secondly, there is no doubt as to the source of the caffeine found in Eastern Delite. The caffeine in Eastern Delite's system came not from some outside source, but rather from his owner, Sharon Johnson, who *administered Super Creatine to Eastern Delite which*, as it turns out, *contains*

---

[24] Appellants also note that "[g]iven the common perception of what is and what is not a 'drug', the use of caffeine certainly would not be characterized as drug abuse[;] [o]therwise coffee drinkers at the local coffee shops in every town in this State would be perceived in a negative light." Appellants' Brief at 42 (emphasis omitted). The undersigned counsel is not sure about this one either, as he clearly has a problem with caffeine and is barely able to speak English in the morning without having first had a cup of coffee. More importantly, the fact that caffeine is socially acceptable does not, in turn, make it acceptable with racing authorities in West Virginia.

caffeine. Thirdly, the second and third place finishers' in the Breeders Classic, "Confucius Say" and "Double Toolegate", urine and blood were also taken and sent for testing and were found to be *negative for the presence of any prohibited substances, including caffeine.* If, as Appellants argue, caffeine is everywhere, ubiquitous, and a natural substance, then why is it that these other horses did not test positive for caffeine. The answer is simple – the presence of caffeine in horses at the Charles Town Racetrack is not as big a problem as Appellants suggest. In fact, there has only been one other reported case of a horse testing positive for caffeine at this racetrack, which occurred in 1999.[25]

On appeal, Appellants continually attempt to minimize the fact that Eastern Delite ran in the Breeders Classic on October 20, 2007 with caffeine in his system. "Over and over," in an almost endless fashion, Appellants assert that the amount of caffeine found in Eastern Delite amounted to no more than that found in a "teaspoon of coffee", which had "no affect on the performance of their horse in the [Breeders] Classic." Appellants' Brief at 1, 48. At the risk of being too blunt, Appellants' assertions do not matter "one bit!" [26] As stated at the outset of this Brief, West Virginia's has a "zero tolerance" rule against a horse running in a race with any drugs, such as caffeine, that are foreign to the horse in its natural state. This "zero tolerance" rule, 178 C.S.R. 1, §66.5, unequivocally provides as follows:

> No horse participating in a race shall carry in its body *any drug substance*, its metabolites, or analog, which are *foreign to the natural horse* except as provided, by this rule.

---

[25] *See* Tr. at 40, 181, referencing BOS Ruling 337, introduced as an exhibit at the hearing before the WVRC on June 17, 2008.

[26] On October 28, 2009, during Appellants' argument of their Petition to the Court, the same information "came up" that Eastern Delite only had an amount of caffeine equaling that found in a teaspoon of coffee, and Justice Davis stated "it doesn't matter."

(Emphasis added.) This rule is violated whenever a horse runs in a race with any drugs that are not naturally found in the horse's system, including the drug caffeine. The rule is violated regardless of the amount of caffeine found in the horse's system, whether the amount of caffeine is equivalent to that found in a teaspoon of coffee or 1,000,000 teaspoons of coffee. The rule is also violated regardless of whether the amount of caffeine found in the horse had any affect on its performance in a race. Thus, Appellants' perpetual assertion in this case that Eastern Delite only had caffeine in his system amounting to that found in a teaspoon of coffee, which had no affect on his performance, is irrelevant. This argument is nothing more than an attempt to divert the Court's attention away from the fact that West Virginia's "zero tolerance" rule, with respect to horses racing with drugs in their systems, has been violated by Appellants.

Furthermore, Appellants' argument that Eastern Delite only had in his system an amount of caffeine equivalent to that found in a teaspoon of coffee, which had no affect on his performance, comes from the testimony of Dr. Tobin, who opined the same. However, the testimony of Dr. Tobin is difficult to understand at best. Perhaps impossible to understand would probably be a better characterization of his testimony. Not only is Dr. Tobin confusing and unclear, he is inconsistent and, at times, evasive! The following cross-examination testimony of Dr. Tobin illustrates the point:

CROSS EXAMINATION
BY MR SMITH:

Q. Dr. Tobin, you are aware that the horses that finish second and third did not test positive for caffeine, aren't you?

A. What was the... I can only answer that question relevant, sir, to limit of detection of the testing method and time.

Q. And they tested under the same levels and at the same practices as Eastern

Delite was tested under... tested under.

A. Then they... then they did not test positive. Then they... there was no chemical identification of caffeine made in those horses.

Tr. 230-231.

Q. And we'll agree... you would agree caffeine's a stimulant, would you not?

A. At concentrations of... 100 and 1000... at concentrations 20-fold greater than the concen...

Q. No, it...it... as a complement to the brain, as a substance, it's a stimulant?

A. It has extra stimulant properties, yes.

Tr. 231-232.

Q. And what is your understanding, if any, of who, under the West Virginia Rules of Racing, is responsible for making sure that horses don't race with prohibited substances in their systems?

A. Can you define... can you help me with my definition? What is a prohibited substance?

Q. Any substance other than bute or Lasix or their analogs.

A. Any substance other than bute or furosemide...

Q. I'm sorry. May... I may not have phrased the question clearly. Who's responsibility is it that the horses are racing legally, that is, without prohibited... without substances that they're not supposed to have in their system?

A. Well, you have to help me. You still... you're leaving me any substance other than that would mean bute and furosemide is not supposed to be in their system, not supposed to be in their system?

Q. Yes.

A. Well, one of the things that came to mind as we're sitting here was a treatment for equine protozoan by the...

MR. SMITH: How about he answers the question?

THE WITNESS: Well, I... I'm trying to demonstrate it with an example, because you...

MR. SMITH: You need to answer the question first. Really, you've got to.

THE WITNESS: Okay.

Q. Who do you believe has the responsibility for the horse not racing with prohibited ban... with prohibited substances in its system? Whose responsibility is it?

A. You're asking me... you're trying to ask me a different question than you're asking me, sir.

Q. I...

A. Oh, yes, you are. I... there are...

Q. Isn't it true, doctor...

A. Thank you.

Q. ... that the trainer has the ultimate responsibility in those circumstances?

A. Under the rule... and I'm no lawyer... the trainer is the first stop on responsibility.

Tr. 241-243.

Anyone reading this testimony, whether he be a lawyer, a judge, an expert in the field of horse racing, or simply a layman, would probably say to himself – "This guy can't give a straight answer to a straight question!"

Appellants also argue that "[b]ecause the Racing Commission did not find as a matter of fact that caffeine is a 'drug substance, its metabolite or analog'", "then disqualification [of Eastern Delite] pursuant to Section 178-1-66.5 should not have been sustained." Appellants' Brief at 41 (emphasis omitted). Although they did not specify in their "Findings of Fact" that caffeine is a

"drug substance, its metabolite or analog," the WVRC clearly found as a matter of fact that Eastern Delite "tested positive for caffeine at Dalare Associates and at Louisiana State University . . . ." 07/07/2008 Order of WVRC at 2. Furthermore, the WVRC went on to find, in its "Conclusions of Law", that "caffeine is a stimulant and is a banned substance in that it is not a naturally occurring substance in horses" and that "[p]ursuant to [r]ules of [r]acing § 178-1-66.5 West Virginia is a zero tolerance jurisdiction with respect to caffeine." *Id.* Taken as a whole, it is clear from their Order that the WVRC found that caffeine is a drug. They found that caffeine is a stimulant and a stimulant is, of course, a drug. To argue otherwise, with no sarcasm intended, is silly.

Despite this, Appellants argue that "[t]he language in Section 178-1-66.5 does not ban stimulants." Appellants' Brief at 34. Rather, argue Appellants, "the language in Section 178-1-66.5 bans any 'drug substance, its metabolites, or analog'". *Id.* (emphasis omitted). Stimulants are drugs! They are, in fact, a particular class or category of drug in the same manner that depressants, hypnotics, narcotics, anesthetics, etc. are particular classes or categories of drugs. As such, contrary to Appellants' contention, the language of the WVRC's "zero tolerance" rule, 178 C. S. R. 1, §66.5, does ban stimulants. By way of example, cocaine is a stimulant. Would anyone argue that cocaine is not a banned substance under the WVRC's rule – surely not.

Appellants further argue that "[t]he Racing Commission did not find caffeine to be a 'drug, its metabolite or analog' because no compelling evidence about caffeine was presented." Appellants' Brief at 42 (emphasis omitted). On the contrary, as noted above, evidence was presented at the hearing before the WVRC clearly indicating that caffeine is a drug. Danny Wright testified that caffeine is a drug or stimulant that is prohibited by the WVRC's rules. Furthermore, in his letter of November 14, 2007, Steven Barker notified the BOS that the split sample of Eastern

Delite's urine and blood were confirmed as positive for the presence of the "drug caffeine." In support of their allegation that no compelling evidence about caffeine being a drug was presented, Appellants first note that the BOS's witnesses, Danny Wright, Joseph Strug and Dr. Dennis Dibbern, are not experts in the field of equine pharmacology. *Id.* Appellants further argue that they presented evidence in the form of reports and testimony of an "equine pharmacologist, Dr. Thomas Tobin[,] who identified caffeine as a naturally occurring substance used by humans principally in food and beverages." *Id.* However, Appellants fail to inform the Court that Dr. Tobin, consistent with the evidence presented by BOS, acknowledged that *caffeine is* "in technical terms, *a drug*" *with* "*extra stimulant properties* ". (Emphasis added.)[27]

---

[27] In their quest to convince the Court that caffeine is not a drug, Appellants even equate caffeine with sugar: "While laypersons may know of caffeine, they certainly would not know whether caffeine is a 'drug, its metabolite or analog.' Because government does not regulate caffeine, it is very much analogous to sugar, which also has stimulating properties and is ingested." Appellants' Brief at 42 n.15 (emphasis omitted). First, Appellants are "selling" the public short. While most people may not know what a metabolite or analog is, they certainly know what a drug is and that caffeine qualifies as one. Furthermore, under Appellants' logic, caffeine is analogous to carbohydrates, which, once ingested, breakdown or metabolize as sugar or glucose with stimulating effects. Surely the Court recognizes the absurdity of such arguments. After noting that caffeine is not regulated by the Food and Drug Administration, the West Virginia Legislature, or West Virginia state agencies, Appellants argue that "[c]affeine seems not to meet the definition of a drug by any working definition." Appellants' Brief at 31, 32. On the contrary, ordinary dictionary definitions indicate that caffeine is a drug. The American Heritage College Dictionary 260 (Third Edition 2000), defines "drug" as follows: "1.a. A substance used in the diagnosis, *treatment*, or prevention of a disease or as a component of a medication. b. Such a substance as recognized or defined by the U.S. Food, Drug, and Cosmetic Act. 2. A chemical substance, such as a narcotic, that *affects the central nervous system*, causing changes in behavior and often addiction. (Emphasis added.) "Stimulant" is defined as "1. An agent, esp. a chemical agent such as *caffeine*, that temporarily *arouses or accelerates physiological or organic activity*. 2. A stimulus or an incentive. 3. A food or drink believed to have a stimulating effect." *Id.* (emphasis added). Caffeine has the following definition: "a bitter white alkaloid . . . often derived from tea or coffee and *used in medicine* chiefly as a mild *stimulant*." *Id.* (emphasis added). Clearly, caffeine is a stimulant, as it arouses or accelerates physiological or organic activity. Likewise, being a stimulant, caffeine qualifies as a drug, as it affects the central nervous system and is sometimes used for medicinal purposes.

Appellants also argue that because the WVRC did not specify in its Findings of Fact that caffeine is a drug, then "[t]he Racing Commission's Conclusion of Law . . . on this issue is clearly erroneous -- although no deference is given the Racing Commission with regards to Conclusions of Law." Appellants' Brief at 43. Not so. Legal issues are generally for courts to resolve upon review of administrative decisions; however, even in considering such issues, reviewing courts are to give some deference to the administrative body's informed decision. *See generally Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 312, 465 S.E.2d 399, 414 (1995). Similarly, "when faced with a problem of statutory construction, the circuit court and this Court should give some deference to the interpretation of the officer who is charged with statutory implementation." *Martin*, 195 W. Va. 313, 465 S.E.2d 415. "Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." *Id.* (quotations and citations omitted).

C. The Circuit Court did not err in its Conclusion That the Racing Commission did not Improperly Delegate its Rule Making Authority to a Private Testing Laboratory, as This Private Testing Laboratory Does not Decide Which Substances Will be Tested for or the Parameters of Such Testing.

On appeal, Appellants argue that "Dalare Associates, the Racing Commission's testing laboratory, decides what substances the chemist will seek to detect, and at what levels" and that this is "an improper abdication of the Racing Commission's authority to regulate racing as Dalare Associates is not empowered to determine what test should be run and the testing levels related thereto." Appellants' Brief at 44. Absolutely not! First, by statute, the WVRC is fully authorized to contract with Dalare Associates to have horses tested for the presence of prohibited substances:

> The racing commission has full jurisdiction over and shall supervise all horse race meetings . . . and all persons involved in the holding or conducting of horse . . . race meetings and, in this regard, it has plenary power and authority . . . [t]o acquire, establish, maintain and operate, or *to provide by contract* for the maintenance and operation

> of, *a testing laboratory* and related facilities, for the purpose of conducting saliva, urine and other tests on the horse . . . or horses . . . run or to be run in any horse . . . race meeting . . . .

W. Va. Code § 19-23-6(11) (emphasis added).

Furthermore, Dalare Associates is the official testing laboratory for the State of West Virginia for equine drug testing. Joseph Strug, Laboratory Director of Dalare Associates, clearly testified at the hearing before WVRC that West Virginia has a *zero tolerance policy* concerning prohibited substances in that *any drug, and not just certain drugs*, other than Bute and Lasix up to certain levels, that are detected in a horse are "*recorded as a positive*" for testing purposes. (Emphasis added). Thus, Appellants' allegation that Dalare determines what drugs are to be tested is simply not true.[28] Appellants' second allegation that Dalare determines the testing or threshold levels for a positive finding of a drug or drugs is equally untrue. Dalare detects the presence of prohibited substances *at any level* no matter how minimal or great the concentration of the prohibited substance. Specifically, when a sample comes into the laboratory at Dalare, it is given an initial screening test to determine whether it contains a suspect substance. If the initial screening test proves positive for a prohibited substance, then a follow-up test using a gas chromatography and mass spectrometry, which is the recognized testing method for blood and urine samples, is performed to determine the concentration, *in any amount*, of the prohibited substance in a horse's system.

---

[28] Appellants point out that the WVRC has "not adopted any rules or regulations regarding" "[t]he identity of substances for which no testing will be conducted", such as "antibiotics" and "worming agents". Appellants' Brief at 43, 44. In other words, argue Appellants, the WVRC allows horses to race with antibiotics and worming agents in their systems, without testing for such medications. However, Appellants fail to point out that antibiotics and worming agents are not considered prohibited substances in other racing jurisdictions, whereas caffeine undoubtedly is prohibited.

VII.

CONCLUSION

However dissatisfying the Circuit Court's Decision is to Appellants, their dissatisfaction should not be used as a means of striking down the WVRC's "zero tolerance" rule, 178 C.S.R. 1, § 66.5, as the rule itself is legally sound as is the application of the rule by the WVRC. Courts "are loathe to engage in the arduous task of rewriting legislation, regulations, and agency structure simply on the whims of a few who have expressed dissatisfaction with an agency's action." *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 588, 466 S.E.2d 424, 439 (1995).[29] "'When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.'" Syl. pt. 1, *Sale ex rel. Sale v. Goldman*, 208 W. Va. 186, 539 S.E.2d 446 (2000) (*per curiam*) (*quoting* Syl. pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967)).

[29] When Appellants argued their Petition to the Court on October 28, 2009, Justice Benjamin likewise commented that "we are not a rulemaking body."

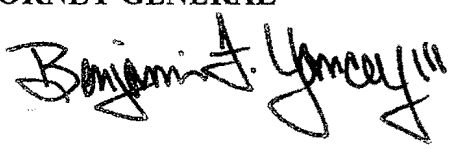
Based on all matters discussed above, Appellee, the Board of Stewards of Charles Town Races, respectfully requests that the Circuit Court's Order of March 11, 2009 be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



BENJAMIN F. YANCEY, III (WVSB # 7629)
ASSISTANT ATTORNEY GENERAL
Office of the Attorney General
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
(304) 558-2522