

13-1325

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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PNGI CHARLES TOWN GAMING, LLC,
d/b/a Hollywood Casino at Charles Town Races,

CATHY A. HANCOCK, CLERK
KANAWHA COUNTY CIRCUIT COURT

JHM

Plaintiff/Petitioner,

v.

Civil Action No. 12-C-753
Honorable Tod J. Kaufman

WEST VIRGINIA RACING COMMISSION,

Defendant/Respondent.

**ORDER GRANTING SUMMARY JUDGMENT TO
WEST VIRGINIA RACING COMMISSION**

On April 27, 2012, the Plaintiff (PNGI) filed a Petition for Writ of Prohibition and Complaint for Declaratory Judgment seeking to prohibit the Respondent, West Virginia Racing Commission (Commission), from holding a pending administrative ejection hearing, and requesting that the Court declare invalid certain procedural rule amendments promulgated by the Commission in its Due Process and Hearings rule, 178 W. Va. C.S.R. 6. On May 2, 2012, this Court entered a Final Order on Stay and Declaratory Judgment Action in which it ruled against PNGI and dismissed this case from the docket. On May 16, 2012, PNGI filed a Rule 59(e) Motion to Alter or Amend requesting that the Court vacate its May 2, 2012 order.

On January 2, 2013, the Commission filed a response to PNGI's Rule 59(e) motion, and subsequently, such motion came on before the Court for hearing on February 26, 2013. On March 5, 2013, the Court entered an order amending its May 2, 2012 order and reinstating PNGI's Declaratory Judgment claim pertaining to the Commission's procedural rule amendments. The

Court subsequently entered an order requiring the parties to brief their respective positions. Briefing was completed on May 31, 2012. Thereafter, pursuant to the Court's request, the parties submitted proposed orders on October 11, 2013.

PNGI's declaratory judgment claim now being ripe for the Court to adjudicate, the Court does hereby **GRANT** summary judgment to the Respondent, West Virginia Racing Commission.

In support of its Order, the Court finds and concludes as follows:

I.

BACKGROUND

This case arises out of an ongoing legal dispute between PNGI and the Commission over the Commission's authority to review, and ultimately reverse, ejections of occupational permit holders by licensed racetracks in this State. On November 18, 2011, the West Virginia Supreme Court issued an opinion in *PNGI Charles Town Gaming, LLC v Reynolds*, 229 W. Va. 123, 727 S.E.2d 799 (2011) in which it held that an ejection of a permit holder by a racing association (a racetrack licensed by the Commission) is subject to review by the West Virginia Racing Commission. Syllabus Point 3. The Court stated:

The express language of West Virginia Code of State Rules and Regulations § 178-1-4.7 [now 178-1-6.1] makes clear that a racing association's right to eject a person from its grounds is not an unfettered right as argued by CTR & S [PNGI]. To the contrary, the regulation which permits a racing association to eject a person contains the following restrictive language: "**However, all occupational permit holders who are ejected have the right of appeal to the Racing Commission.**" This provision emanates from the United States Supreme decision in *Barry v. Barchi*, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979), wherein the Supreme Court determined that there is a property interest in a license or permit issued by a state racing commission, like the permit issued to the jockeys in the instant matter, sufficient to invoke the Due Process Clause.

229 W. Va. at 131-132, 727 S.E.2d at 807-808.

After the issuance of the holding in *Reynolds*, the Commission amended its Due Process and Hearings procedural rule (178 W. Va. C.S.R. 6) to establish certain hearing procedures for the ejection hearings at issue. The proposed amendments were put out for public comment on January 19, 2012. (Exhibit 1 to Racing Commission's Cross-Motion for Summ. J. and Resp. to PNGI Charles Town Gaming's Mot. for Summ. J.) After reviewing the comments received, the Commission made several changes to the rule. (Exhibit 2 to Racing Commission's Cross-Motion for Summ. J. and Resp. to PNGI Charles Town Gaming's Mot. for Summ. J.; Response to the Comments and Amendments Made to Rule as a Result of Public Comments.) Upon making the changes as a result of public comments, the Commission filed the rule with the Secretary of State on March 22, 2012 and it went into effect on April 21, 2012. (Exhibit 2 to Racing Commission's Cross-Motion for Summ. J. and Resp. to PNGI Charles Town Gaming's Mot. for Summ. J.)

The amendments to the procedural rule contested by PNGI in this action are: 1) 178 W. Va. C.S.R. 6, § 4.7.d. which places the burden of proof on the racetrack to demonstrate that "the permit holder acted improperly or engaged in behavior that is otherwise objectionable pursuant to 178 CSR 1, § 6.2. or 178 CSR 2, § 6.2"; and, 2) 178 W. Va. C.S.R. 6, § 4.3.g. which sets forth the procedures by which the Racing Commission will handle stay requests made by permit holders who are seeking a stay of their ejections pending disposition of their ejection appeals before the Commission.¹ PNGI complains that the burden of proof rule should be a legislative rule, not a procedural rule, inasmuch as it alleges that the burden of proof is substantive in nature. PNGI also alleges that the stay rule is invalid

¹ In its summary judgment filings in this case, PNGI abandoned its earlier claim set forth in its Complaint that the Racing Commission's rule, 178 W. Va. C.S.R. 6, § 4.2.c., requiring the racetrack to provide an ejected permit holder with a written statement of the reasons for the ejection, is invalid. Therefore, the Court deems this claim abandoned and does not rule upon the same in this order.

inasmuch as PNGI claims that the Commission does not have the authority to stay a racetrack ejection pending appeal.

Notably, during the public comment period on the procedural rule amendments, PNGI filed a public comment on February 20, 2012 in which it complained that an earlier draft of the proposed rule did not have a standard for the burden of proof that was grounded in law. PNGI said that the Commission's standard required "legislative approval." (Exhibit 2 to Racing Commission's Cross-Motion for Summ. J. and Resp. to PNGI Charles Town Gaming's Mot. for Summ. J.; 2/20/12 Letter from Brian Peterson to West Virginia Racing Commission at pages 2-4). In response to that comment, the West Virginia Racing Commission revised the burden of proof rule so that it mirrored, *verbatim*, the standard for ejections set for in its legislative rules, 178 W. Va. C.S.R. 1 § 6.2. (governing Thoroughbred Racing) and 178 W. Va. C.S.R. 2, § 6.2. (governing Greyhound Racing), which have the force and effect of law. (Exhibit 2 to Racing Commission's Cross-Motion for Summ. J. and Resp. to PNGI Charles Town Gaming's Mot. for Summ. J; Response to the Comments at page 2-3 and Amendments Made to the Rule as a Result of Public Comments at page 2). Specifically, the ~~standard for ejections in the Commission's legislative rules is that "persons acting improperly or whose behavior is otherwise objectionable"~~ may be excluded from the stands and grounds by the racetrack. 178 W. Va. C.S.R. 1, § 6.2. and 178 W. Va. C.S.R. 2, § 6.2. Consistent with that, the Commission promulgated the above-described procedural rule placing the burden of proof on the racetrack in ejection hearings to demonstrate the improper or otherwise objectionable behavior that led to the ejection. 178 W. Va. C.S.R. 6, § 4.7.d. Despite the Commission's responsiveness to PNGI's request, which grounded the standard in law and which adopted a standard with legislative

approval, PNGI filed this lawsuit and still claims that the Commission's burden of proof rule requires legislative approval.

II.

STANDARD

The West Virginia Rules of Civil Procedure provide that summary judgment is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). Both PNGI and the Commission agree that PNGI's claims raise no issue of material fact and this matter presents purely legal questions about the validity of two procedural rule provisions. *See Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (observing that "[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question"). Therefore, this matter is appropriate for disposition by summary judgment.

III.

**THE RACING COMMISSION'S DECISION TO PROMULGATE A PROCEDURAL
RULE PLACING THE BURDEN OF PROOF ON THE RACETRACK IS A PROPER
EXERCISE OF ITS DISCRETION.**

It is an accepted rule of administrative law that "an agency with rulemaking authority has the discretion to allocate the burden of proof in an administrative hearing if the authorizing statute is silent regarding the issue, as long as the chosen allocation is consistent with the legislative scheme." 2 Am. Jur. Administrative Law § 354 (2004); *see also Bunce v. Secretary of State*, 607 N.W.2d 372, 378 (Mich. App. 1999) (administrative agency had discretion to place the burden of proof on the driver in a license reinstatement hearing where it was consistent with legislative scheme).

Applying this administrative law principle, it is clear that the Commission's statutes are silent regarding the burden of proof in ejection hearings before the Racing Commission. The authorizing statute simply provides a broad jurisdictional grant to the Racing Commission. West Virginia Code § 19-23-6 ("[t]he racing commission has full jurisdiction over and shall supervise all horse race meetings, all dog race meetings and all persons involved in the holding or conducting of horse or dog race meetings and in this regard, it has plenary power and authority."). The parties have not identified any statute that establishes the burden of proof in a permit holder's ejection hearing.

Because the statute is silent, the Racing Commission's allocation of the burden of proof is within its discretion so long as it is "consistent with the legislative scheme." Addressing the legislative scheme for ejection hearings, our Legislature has enacted rules that are on point. 178 W. Va. C.S.R. 1, § 6.1. and 178 W. Va. C.S.R. 2, § 6.1. provide the right of appeal and provide that "all occupational permit holders who are ejected have the right of appeal to the Racing Commission." The remaining rules that are pertinent define the contours for the right of ejection and state in relevant part that the stewards/judges [the Commission's employees at the horse and dog tracks] or the association [the racetrack] "have the power to suspend or exclude from the stands or grounds persons acting improperly or whose behavior is otherwise objectionable." 178 W. Va. C.S.R. 1, § 6.2 and 178 W. Va. C.S.R. 2, § 6.2.

Our State Supreme Court has recognized that these rules "make[] clear that a racing association's right to eject a person from its grounds is not unfettered." *Reynolds*, 229 W. Va. at 131, 727 S.E. 2d at 807. Furthermore, the ejected permit holder's right to appeal to the Racing Commission emanates from our Legislature's recognition that occupational permit holders have a sufficient property interest in their Commission-issued occupational permit to invoke the Due

Process Clause. *Id.* at 132, 808. To the extent there was any doubt, *Reynolds* makes it clear that the West Virginia Legislature is concerned with (1) tempering an association's common law right to eject occupational permit holders and (2) providing ejected occupational permit holders, who have a recognized Due Process property interest, with an adequate procedural mechanism for challenging a racetrack's decision. Putting the burden on the association to demonstrate by a preponderance of the evidence that ejected permit holders "acted improperly or engaged in behavior that is otherwise objectionable" is certainly consistent with a legislative scheme that, at its core, is designed to protect the property interests of permit holders.

As further evidence of its consistency with the legislative scheme, the burden of proof rule parrots the language found in the *legislative* rule governing the association's expulsion power. More specifically, the burden of proof rule borrows language from the Thoroughbred and Greyhound Racing Rules found at 178 W. Va. C.S.R. 1, § 6.2 and 178 W. Va. C.S.R. 2, § 6.2.. These rules provide in pertinent part that the stewards/judges or the association [the racetrack] have the power to suspend or exclude from the stands or grounds "*persons acting improperly or whose behavior is otherwise objectionable.*" Again, these rules were not promulgated by the Racing Commission; they were enacted by the West Virginia Legislature. The burden of proof rule thus does nothing more than codify *legislative* rules and this lends further support to the conclusion that the burden of proof rule is consistent with the legislative scheme.

Because the Commission's statutes are silent on the burden of proof, and the Racing Commission's burden of proof allocation is consistent with the legislative scheme, the Racing's Commission acted within its discretion by promulgating a rule that places the burden of proof on the racetracks.

IV.

THE RACING COMMISSION'S BURDEN OF PROOF RULE DOES NOT RUN AFOUL OF THE WEST VIRGINIA ADMINISTRATIVE PROCEDURES ACT AS IT IS A PROCEDURAL RULE THAT NEED NOT BE APPROVED BY THE LEGISLATURE.

PNGI contends that the burden of proof rule was not promulgated as required by the West Virginia's Administrative Procedures Act ("APA"), West Virginia Code §§ 29A-3-1 *et seq.* The Court finds this argument without merit. It is undisputed that an agency's rules must be promulgated in accordance with West Virginia's APA. *Chico Dairy Co. v. West Virginia Human Rights Commission*, 181 W. Va. 238, 243, 382 S.E.2d 75, 80 (1989). Under this Act, rules promulgated by an agency can be characterized as "legislative," "procedural," or "interpretative." West Virginia Code § 29A-1-2(I). Of relevance, the characterization of an agency's rule has significance inasmuch as a "legislative rule" requires the approval of West Virginia's Legislature before it takes effect, while "procedural" and "interpretative" rules do not require legislative approval. West Virginia Code § 29A-1-2(c)(d).

At issue here is whether the Racing Commission's burden of proof rule is a "procedural" or a "legislative" rule. West Virginia's APA defines a "procedural rule" as a rule that "fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency[.]" West Virginia Code § 29A-1-2(g). While the West Virginia Supreme Court has not squarely addressed the issue, there is a significant authority supporting the proposition that a rule or statute that determines who bears the burden of proof in a proceeding is procedural in nature. *Shaps v. Provident Life & Accident Ins. Co.*, 826 So. 2d 250, 254 (Fla. 2002); *Northfield Center Development Corp. v. City of Macedonia Planning Comm'n*, 1998 WL 289675, *4 (Ohio App. 9 Dist. 1998) ("The burden of proof is a procedural matter."); *Sudwischer v. Estate of Hoffpauir*, 705 So. 2d 724, 729 (La. 1997) (stating

that the burden of proof is procedural). The rationale is that because the burden of proof “does not create or deny a benefit, it merely clarifies on whom the burden of proving a case rests[,]” it merely has a procedural effect. *Lavespere v. Niagara Mach. and Tool Works, Inc.*, 920 F.2d 259 (5th Cir. 1990). Here, the burden of proof rule promulgated by the Racing Commission neither creates nor denies any benefit to either the ejected permit holder or the racetrack. The ejected permit holder retains his or her legislatively mandated and judicially recognized right to appeal the ejection decision and the racetrack must demonstrate that the ejected permit holder “acted improperly or engaged in behavior that is otherwise objectionable,” which is consistent with the Commission’s legislative rules governing ejections. Furthermore, the burden of proof rule brings order to the proceeding inasmuch as it provides a structure – the racetrack is the first party to present evidence. The rule also sets an evidentiary standard for establishing facts. *See State v. Marty*, 137 Wis. 2d 352, 363, 404 N.W.2d 120 (Ct. App. 1987) (burden of proof is a rule of evidence that applies to establishing facts, not to determining legal issues). Because the burden of proof rule has no impact on the substantive rights of either the ejected permit holder or the racetrack and instead “fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency,” it is a “procedural rule” under West Virginia’s APA and need not be approved by the Legislature.

PNGI insists that the Racing Commission has the authority to place the burden of proof on the ejected permit holder in the appeal as this would create a “procedural rule.” Nevertheless, PNGI maintains that the Racing Commission lacks the authority to place the burden of proof on it as this constitutes a “legislative rule” that is invalid for lack of legislative approval.² Leaving PNGI’s

² PNGI oscillates between these two irreconcilable positions. First, it maintains that the Racing Commission is without the authority to assign the burden of proof because the burden of proof is
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inconsistency aside, under West Virginia's APA, the Racing Commission's burden of proof rule would be a "legislative rule" if it provided a "basis for the imposition of any civil or criminal liability," or if it "grant[ed] or denie[d] a specific benefit[.]" West Virginia Code § 29A-1-2(d). Here, the rule at issue simply establishes that the association [PNGI] has the burden of proof in the ejection proceeding before the Racing Commission. It does not impose any type of civil or criminal liability and, as set forth above, it does not grant or deny a specific benefit.

PNGI also focuses its attention on subsequent language in the statute providing that a "legislative rule" is a "rule which, when effective, *is determinative on any issue affecting private rights, privileges or interests[.]*" West Virginia Code § 29A-1-2(d) (emphasis supplied). PNGI has failed to adequately explain how the Racing Commission's burden of proof rule is "determinative" on an "issue affecting private rights, privileges, or interests." The burden of proof rule is a rule of evidence applicable to the establishment of facts, not the determination of legal issues. *State v. Marty, supra.*

PNGI also suggests that the Racing Commission's burden of proof rule infringes on its "common law right to eject." (Pet. Br. p. 11.) ("[T]he Racing Commission chose to expand [sic]

²(...continued)

"substantive law" that requires legislative approval. (Pet. Br. p. 9.) Taken to its logical conclusion, this argument presumes that the Racing Commission could not assign the burden of proof to any party in a procedural rule and the hearing examiner would just have to create and apply his or her own burden of proof rule absent a legislative directive on the subject. PNGI subsequently maintains, however, that the Racing Commission should have put "the burden of proof on the ejected party to show that the racing association ejected him or her for some unlawful reason." (Pet. Br. p. 11.) PNGI offers no explanation for how the Racing Commission purportedly lacks the authority to create a "legislative rule" allocating the burden of proof to it, yet simultaneously possesses the authority to create a "procedural rule" that places the burden of proof on the ejected party. Furthermore, PNGI's suggestion that it can eject a permit holder for any reason, so long as it is not "unlawful" is inconsistent with West Virginia's legislative rules and completely ignores the West Virginia Supreme Court's decision in *Reynolds*, which held otherwise.

restrict the right to eject by setting up a higher burden of proof.”) However, the Racing Commission’s procedural rule governing the burden of proof does not expand or restrict any right. It is the Commission’s legislative rules enacted by the West Virginia Legislature and the West Virginia Supreme Court’s decision in *Reynolds*, not the burden of proof rule, that have abrogated this right. Conversely, the burden of proof rule does not expand the ejected permit holder’s appellate rights. The West Virginia Legislature, not the Racing Commission, gave the ejected permit holders the right to appeal an ejection decision and this judicially recognized right to an appeal flows from the property interests the ejected individuals have in their Racing Commission-issued permits.

Additionally, PNGI ignores case law from the United States Supreme Court addressing a federal agency’s authority to allocate the burden of proof. Instead, it references a United States Supreme Court decision that rests on statutory language not at issue in this action. More specifically, PNGI ignores *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983), in which the United States Supreme Court deferred to the National Labor Relations Board’s burden of proof allocation where there was no statutory language prohibiting that allocation. *Id.* at 400. Under *Transportation Management*, it is clear that an agency that has broad general powers has the authority to adopt a burden of proof allocation, absent a statutory prohibition. *See Port Authority of New York v. Dept. of Transp.*, 479 F.3d 21, 42 (D.C. Cir. 2007) (“[S]ince the statute does not resolve the ambiguity, the agency is free to choose which party bears the burden of proof.”); *see also Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984) (Under *Transportation Management*, an agency like the Federal Mine Safety and Health Review Commission has power to shift the burden to defendant to show plaintiff would have been discharged even absent plaintiff’s engaging in protected activity). Consistent with *Transportation Management*, the Racing Commission is free

to allocate the burden of proof to the racetracks as there is no statutory prohibition on such an allocation.

Rather than concede that there is authority from the United States Supreme Court suggesting that the Racing Commission was within its discretion when it allocated the burden of proof in its procedural rule, PNGI asserts that there is Supreme Court precedent “directly on point” and cites the United States Supreme Court’s decision in *Director, Office of Workers’ Compensation Programs v. Greenwich Colliers*, 512 U.S. 267 (1994). PNGI’s representation that this case is “directly on point” is incorrect.

In *Greenwich Colliers*, the Supreme Court addressed a specific statutory provision, namely § 7(c) of the federal Administrative Procedure Act which places the “burden of proof” on the proponent of an order. Relying on this statutory provision, the Court struck down a Labor Department rule placing the burden of persuasion on the party opposing a claim for benefits. As the Court explained, “[u]nder the Department’s true doubt rule, when the evidence is evenly balanced the claimant wins[; however,] [u]nder § 7(c) [of the federal Administrative Procedures Act] when the evidence is evenly balanced, the benefits claimant must lose.” 512 U.S. at 282. The Court’s holding that an agency improperly allocated the burden of proof was rooted in statutory language that conflicted with the proposed allocation, not a distinction between procedural and substantive rules as PNGI suggests in its brief. Unlike *Greenwich Colliers*, and as discussed *supra*, here there is no statutory language that conflicts with the Racing Commission’s proposed allocation of the burden of proof and therefore, this case does not support PNGI’s position.³

³ *Greenwich Colliers* is probative, however, to the extent that it reaffirmed the Supreme Court’s decision in *Transportation Management* that an agency has the authority to adopt a burden of proof

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V.

**ALLOCATING THE BURDEN OF PROOF ON THE RACETRACKS IS CONSISTENT
WITH WEST VIRGINIA LAW AND CASE LAW HOLDING THAT
THE PARTY THAT CONTROLS THE EVIDENCE SHOULD BEAR
THE BURDEN OF PROOF.**

PNGI cites the general proposition that under West Virginia law “*in civil actions* the party seeking relief must prove his right thereto.” (Pet. Br. pp. 8-9.) (cited authority omitted) (emphasis supplied). According to PNGI, because the ejected permit holder is the party seeking relief, the permit holder must bear the burden of proof as “West Virginia law mandates that the burden of proof lie with the party seeking relief.”

While PNGI’s cited authority references “civil actions,” it does not recognize that the matters at issue in this case are administrative proceedings and not civil suits in a court of law. In administrative proceedings in West Virginia, it is not uncommon for the corporate or governmental entity to bear the burden of proof. *See Peery v. Rutledge*, 177 W. Va. 548, 552, 355 S.E.2d 41, 45 (1987) (in unemployment proceedings burden of persuasion is upon the former employer to demonstrate that the claimant’s conduct falls within a disqualifying provision of the unemployment compensation statute); West Virginia Code § 18-29-6 (“In any grievance involving disciplinary or discharge actions . . . the burden of proof is on the employer[.]”); 77 W. Va. C.S.R. 3, § 3.2.1. (“the burden of proof that the accommodations required by the individual’s religious needs impose an undue hardship to the conduct of the employer’s business, is on the employer.”). Accordingly, the

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allocation absent conflicting statutory language. 512 U.S. at 278. (“[A]lthough we reject Transportation Management’s reading of § 7(c) [statute at issue], the holding in that case remains intact [T]he NLRB place[d] the burden of persuasion on the employer as to its affirmative defense.”).

fact that the Racing Commission's rule places the burden on the association is consistent with pertinent West Virginia law which lends no support to PNGI's position pertaining to civil suits.

While it is true that a proponent of an issue often bears the burden of persuasion, the mere fact that an ejected party requests an administrative hearing does not make the ejected party the proponent of the issue who is required to bear the burden of persuasion. Indeed, "[t]he burden [of proof] is on the one making the charges in disciplinary proceedings or where the issue is whether the party charged has committed an illegal or improper act[.]" CJS Administrative Law § 240 Burdens of Proof. Here, because PNGI is the party invoking its right to eject and alleging that the permit holder has engaged in improper or objectionable behavior justifying ejection under 178 W. Va. C.S.R. 1, § 6.2. and 178 W. Va. C.S.R. 2., § 6.2., it is appropriate that PNGI bear the burden of proof.⁴

The United States Supreme Court has recognized that the party that controls the evidence should bear the burden of proof. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993) (observing that "[i]t is indeed entirely sensible to burden the party more likely to have information relevant to the facts."). The compelling reason for this standard is a consideration of which of the parties is in the greater position of power in the administrative proceeding and can therefore more easily bear the burden of going

⁴ PNGI's proposal to shift the burden of proof to the ejected permit holder makes little sense as a matter of procedure. To shift the burden of proof as PNGI proposes would require the ejected permit holder to prove that he or she did not "act improperly or engage in behavior that is otherwise objectionable" under the legislative rules. The ejected permit holder would thus be required to prove a negative. Additionally, the ejected permit holder, who is not in possession of the evidence that formed the basis of the ejection decision, would go first in the proceeding before the hearing examiner and be tasked with presenting evidence of his or her lack of improper/objectionable conduct in the administrative hearing before even knowing what evidence formed the basis of the ejection decision.

forward first. Indeed, the burden of proving facts is often placed upon the party that has the best and easiest access to the relevant information in the case. This promotes the goal of procedural efficiency.

In these matters, where it is the racetrack who has taken the ejection action, it is the racetrack who is in a greater position of power and who is infinitely knowledgeable about the reasons for the ejection. The Racing Commission's burden of proof rule is consistent with this principle, as PNGI controls the evidence and should accordingly bear the burden of proof.

VI.

THE RACING COMMISSION HAS THE INHERENT AUTHORITY TO ISSUE A STAY OF A RACETRACK'S EJECTION DECISION.

As recognized in *Reynolds*, the Racing Commission's authority to hold ejection hearings emanates from, *inter alia*, its plenary statutory authority under West Virginia Code § 19-23-6 and its legislative rules providing in pertinent part that "all occupational permit holders who are ejected have the right of appeal to the Racing Commission." 178 W. Va. C.S.R. 1, § 6.1 and 178 W. Va. C.S.R. 2, § 6.1. Consistent with this legislative grant of jurisdiction, the Racing Commission promulgated a procedural rule governing the disposition of stay requests that may be made by permit holders seeking preliminary relief prior to a full adjudication of an ejection appeal on the merits.

As the United States Supreme Court has observed, where appellate jurisdiction is granted the power to issue a stay is incidental to that appellate power and need not be expressly conferred by statute. *Sampson v. Murray*, 415 U.S. 61, 74, (1974). Moreover, when appellate jurisdiction is granted, the power to stay will not be denied absent a statutory prohibition. *Arrow Transportation Company v. Southern Railway Company*; see also *Williams v. U.S. Merit Systems Protection Board*,

15 F.3d 46, 49 (4th Cir.1994), (a federal court's power to issue a stay will be curtailed only by express language from Congress). The notion that an agency possesses incidental powers not expressly granted is likewise recognized in West Virginia law. *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975) (Commissioner "may exercise not only the powers expressly granted the office by statute, but also such additional powers of a procedural or administrative nature as are reasonably implied as a necessary incident to the expressed powers of the office.")

In light of this authority, because there is a grant of plenary jurisdiction to the Racing Commission and there is no statutory prohibition on the issuance of a stay, the Racing Commission's power to issue a stay is incidental to its power of review. Accordingly, PNGI's suggestion that there must be an express grant of authority for a stay to flow from the Racing Commission's expressly-granted plenary review power is not consistent with this long-standing authority.⁵

In support of its position that the Racing Commission lacks the requisite authority to promulgate a stay provision, PNGI cites a statute that has no applicability to ejection proceedings and governs the suspension or revocation of a license or permit. West Virginia Code § 19-23-16. This statute requires, among other things, that stewards or judges enter an order if they suspend or revoke a permit. § 19-23-16(b). The next section provides that the Racing Commission may stay this "order of the stewards or judges" if a permit holder makes a written request. § 19-23-16(c). According to PNGI, the absence of any reference in this "permitting" statute to the Racing

⁵ PNGI insists that the Legislature must expressly grant the Racing Commission authority to issue a stay. PNGI has not provided a single case where a state agency's procedural rule governing requests for provisional relief, such as the stay provisions here, has been struck down as *ultra vires*.

Commission's ability to grant a stay to a permit holder affected by a racetrack's ejection decision indicates that the state Legislature did not wish to grant the Racing Commission this authority.

PNGI's reliance on § 19-23-16 is misplaced. This statute governs permit suspensions, not ejection proceedings. One would not expect our Legislature to address the Racing Commission's stay of a racetrack's ejection decision in a statute that governs the revocation of permits. Accordingly, this statute has no bearing on the question of the validity of the Racing Commission's procedural rule governing the issuance of a stay in an ejection proceeding.

VII.

THE RACING COMMISSION'S PROCEDURAL RULE GOVERNING THE ISSUANCE OF STAYS HAS ADEQUATE PROCEDURAL SAFEGUARDS TO PROTECT PNGI.

From a review of PNGI's brief, which fails to discuss the content of the stay provisions at issue, one could be left with an impression that the racetrack's decision to eject a permit holder is stayed by the Racing Commission as a matter of course. That is not the case. The procedural rule provides that the "granting of a stay [by the Racing Commission] is an extraordinary remedy." 178 W. Va. C.S.R. 6, § 4.3.f. Indeed, the Racing Commission has not stayed a single one of PNGI's ejection decisions in the period since the rule was adopted.⁶

Furthermore, there are notice provisions in the rule governing the Racing Commission's issuance of a stay that are designed to protect PNGI's interests as (1) the ejected permit holder is required to apply for a stay in writing and it is filed with the Racing Commission, (2) the Racing

⁶ The Racing Commission represented to this Court, and PNGI did not contest, that since the procedural rule has been in effect, the Racing Commission has only stayed one ejection decision at Mountaineer Racetrack and has stayed no ejection decisions made by PNGI. Notably, Mountaineer has not joined PNGI in its efforts to invalidate the stay provisions.

Commission gives a copy of the stay request to the racetrack, and (3) the racetrack is afforded an opportunity to respond in writing to the request. Offering even more protection to PNGI than the notice provisions, however, is the fact that a stay is only issued after considering and balancing the following factors: (1) the likelihood that the permit holder will prevail on the merits of the ejection appeal; (2) the likelihood of irreparable harm to the permit holder if the stay is not granted; (3) the likelihood of irreparable harm to the racetrack if the stay is granted; (4) the public interest; and (5) any other potentially relevant information. It is thus readily apparent that the Racing Commission took PNGI's interests into consideration when promulgating the stay provisions and set forth a high hurdle for permit holders who seek the issuance of a stay.

VIII.

THE RACING COMMISSION'S STAY PROVISIONS ARE A PROCEDURAL RULE THAT NEED NOT BE APPROVED BY THE WEST VIRGINIA LEGISLATURE.

In light of *Reynolds*, it is plain that the Racing Commission has the authority to overrule a racetrack's ejection decision. If a permit holder makes the required showing under the procedural rule and a stay is granted, the Racing Commission has simply done what is authorized to do by our legislature – overturn or modify a racetrack's ejection decision (at least temporarily). Unlike a “legislative rule,” the stay framework neither grants nor denies the permit holder or the racetrack any right. It merely provides a framework for the permit holder to expeditiously request and receive provisional relief that the Commission was already authorized to grant under our legislative scheme.⁷

⁷ PNGI cites *Chico Dairy Co. v. West Virginia Human Rights Commission*, *supra*, in support of its position. There, the West Virginia Human Rights Commission promulgated a rule defining “handicap” to include a person who is regarded as having a handicap. *Id.* at 242, 79. The West Virginia Supreme Court observed that the Human Rights Commission's extension of the statutory definition of “handicap” formed “the basis for the imposition of civil sanctions “ and “confer[ed] a right not provided (continued...)”

See West Virginia Code § 29A-1-2(g). (“procedural rule” is a rule that “fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency”).

IX.

THE RACING COMMISSION’S PROCEDURAL RULE GOVERNING THE ISSUANCE OF STAYS IS CONSISTENT WITH THE DUE PROCESS CLAUSE AS IT PROVIDES A PROMPT POST-DEPRIVATION MECHANISM TO PROVIDE PRELIMINARY RELIEF TO A PERMIT HOLDER, IF JUSTIFIED.

In the context of New York’s horse racing regulations, the United States Supreme Court has held that a suspension of horse trainer’s license violated the Due Process Clause because the trainer was not given a prompt post-suspension hearing. *Barry v. Barchi*, 443 U.S. 55 (1979). The Court emphasized the need for a speedy resolution because “even a temporary suspension can be severe” on the permit holder, who is likely losing his or her sole source of income. *Id.* at 66. Applying *Barry*, which was cited with approval by the West Virginia Supreme Court in *Reynolds*, a federal district court judge found that there was an applied Due Process violation where a state racing board’s regulatory framework resulted in the permit holder not receiving a post-deprivation hearing until twenty days after his constructive ejection from racetrack grounds by a racetrack. *Moreno v.*

Penn Nat. Gaming, Inc., 2012 WL 5508236, *9 (M.D. Pa. 2012).

The Racing Commission’s stay provision recognizes the importance of having a procedural rule that governs the disposition of preliminary relief to protect the Due Process right of a permit holder. In the absence of a stay mechanism, a racetrack could make a blatantly unwarranted ejection

⁷(...continued)

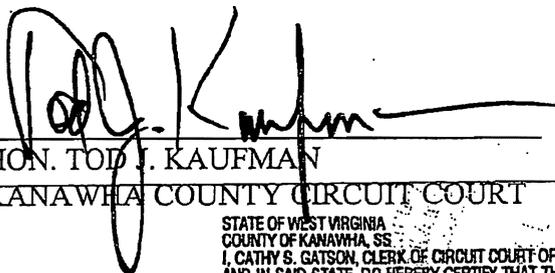
by law.” *Id.* at 244, 81. Accordingly, the Court found that Human Rights Commission’s expansion of the term “handicap” was a “legislative rule” that should have been submitted to and approved by the Legislature. *Id.* *Chico Dairy* is easily distinguishable from this matter as the Racing Commission’s stay rules do not extend any statutory definitions that would give the ejected permit holders a right or form the bases for the imposition of civil liability against a racetrack.

and the ejected permit holder would have no relief until a hearing could be held and a decision rendered, which, even PNGI concedes, could take "months." The stay provisions simply provide a mechanism to avoid such a harsh result. And, upholding the Racing Commission's ability to award provisional relief furthers the purpose of our state's racing regulatory scheme, over which the Racing Commission has "plenary" authority. West Virginia Code § 19-23-6.

ORDER

WHEREFORE, based upon the foregoing, the Court does hereby **ORDER** that the West Virginia Racing Commission's motion for summary judgment is **GRANTED** and this case is **DISMISSED** from the Court's docket **WITH PREJUDICE**. The Clerk is **ORDERED** to issue a copy of this Order to counsel of record.

ENTERED THIS 14th DAY OF November, 2013.

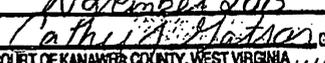


HON. TODD J. KAUFMAN
KANAWHA COUNTY CIRCUIT COURT

Prepared by:



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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 19th
DAY OF November 2013


CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA UHM

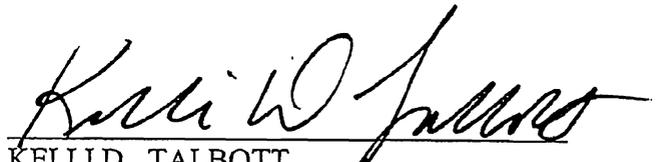
CERTIFICATE OF SERVICE

FILED

2013 NOV 14 PM 3:40

I, Kelli D. Talbott, Senior Deputy Attorney General for the State of West Virginia, do hereby
certify that a true and exact copy of the foregoing Order Grating Summary Judgment to West
Virginia Racing Commission was served by depositing the same postage prepaid in the United
States Mail, this 11th day of October, 2013, addressed as follows:

Stuart A. McMillan, Esq.
Bowles, Rice, McDavid, Graff & Love
Post Office Box 1386
Charleston, WV 25325-1386


KELLI D. TALBOTT