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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 13-1325

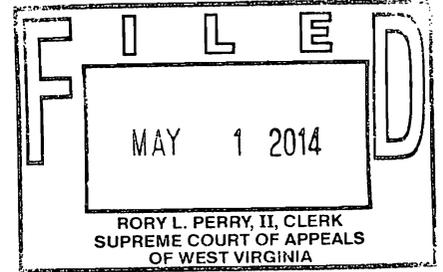
PNGI CHARLES TOWN GAMING, LLC,  
d/b/a Hollywood Casino at Charles Town Races,

Plaintiff Below, Petitioner,

v.

WEST VIRGINIA RACING COMMISSION

Defendant Below, Respondent.



**RESPONDENT'S BRIEF**

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**Plaintiff Below, Petitioner,**

v.

**WEST VIRGINIA RACING COMMISSION**

**Defendant Below, Respondent.**

**RESPONDENT'S BRIEF**

I.

**INTRODUCTION**

Comes now the Respondent, the West Virginia Racing Commission, by counsel, Kelli D. Talbott, Senior Deputy Attorney General and David A. Stackpole, Assistant Attorney General, and responds to the Brief of the Petitioner. This appeal continues the saga of litigation between PNGI and the West Virginia Racing Commission regarding the issue of the Commission's review and oversight of PNGI's ejection of racing permit holders from racetrack property.

In *PNGI Charles Town Gaming, LLC v. Reynolds*, 229 W. Va. 123, 727 S.E.2d 799 (2011), this Court held that an ejection of a permit holder by a racetrack is subject to review by the West Virginia Racing Commission pursuant to its plenary authority to regulate racing as expressly stated in West Virginia Code § 19-23-6 and the specific language of its legislative rule, 178 W. Va. C.S.R.

1, § 6.1.<sup>1</sup>, which states that racing permit holders who are ejected have the right of appeal to the Racing Commission. This Court held that the consequence of the Legislature’s enactment of § 6.1., is to allow the Commission to reverse an ejection or order an ejection of lesser duration, if the Commission “disagrees.” *Reynolds* at 132, 808. Simply put, this Court held that PNGI does not have an “unfettered” common law right to eject permit holders. *Id.* at 131-132, 807-808.

In an ongoing effort to upend this Court’s decision in *Reynolds*, PNGI brought the underlying lawsuit in the Circuit Court of Kanawha County. PNGI seeks to gut certain procedural rules promulgated by the Racing Commission in the aftermath of *Reynolds* to govern its review hearings requested by ejected permit holders. The rules in question, designed to establish an orderly procedure for the adjudication of such matters, identify the burden of proof or burden of going forward in ejection hearings and establish the procedures by which stay requests will be handled by the Racing Commission.

PNGI’s arguments against such rules exhort a reading of *Reynolds* that renders this Court’s holding virtually unrecognizable and interprets it as leaving PNGI’s right to eject permit holders unchanged, with the Commission’s review limited to Human Rights Commission-like hearings where the only thing that is reviewed is whether the permit holder can show that he or she was ejected due to race, creed or color. In fact, PNGI continues to make the argument (rejected in *Reynolds*) that it is a private landowner and can do what it wants, when it wants and is answerable to no one; except to concede that it cannot use a permit holder’s protected class as a basis for an ejection. PNGI’s position not only fundamentally ignores the Racing Commission’s central mission of policing racing

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<sup>1</sup> At the time that the *Reynolds* case arose, the rule in question was located at 178 W. Va. C.S.R. 1, § 4.7. (2007).

and ensuring its integrity, as opposed to adjudicating protected class discrimination claims; but also monumentally misreads this Court's holding in *Reynolds*.

PNGI also plainly ignores the language of legislative rule 178 W. Va. C.S.R. 1, § 6.2. which expressly empowers both the Stewards employed at the racetrack by the Commission and the racetrack itself to eject persons "acting improperly or whose behavior is otherwise objectionable." The Commission's procedural rule, which PNGI contests in this appeal, requires the racetrack whose ejection is being contested by a permit holder to bear the burden of going forward first and putting on preponderant evidence of the improper action and/or objectionable behavior which led to the ejection. 178 W. Va. C.S.R. 6, § 4.7.d. The procedural rule merely restates the burden placed upon the racetrack in the legislative rule, 178 W. Va. C.S.R. 1, § 6.2. – a standard already sanctioned by the West Virginia Legislature.

Moreover, PNGI's stance ignores that this Court held in *Reynolds* that the Commission has the plenary right and authority to outright overturn or modify a permit-holder ejection, which necessarily implicates the right and authority to temporarily stay an ejection pending the disposition of an appeal. The Racing Commission's authority to stay an ejection pending a hearing does not derive from its procedural rule, it derives from its plenary statutory authority. The Commission's procedural rule merely sets forth the procedure by which the Commission shall handle and dispose of such stay requests. 178 W. Va. C.S.R. 6, § 4.3. The promulgation of such standards in a procedural rule are squarely within the ambit of procedural rule-making.

II.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS AND PROCEDURAL HISTORY GIVING RISE TO THIS APPEAL.

On November 18, 2011, this Court issued an Opinion in the *Reynolds* case in which it held that the Racing Commission has the right and authority to review the ejection of permit holders by a licensed racetrack. In the wake of *Reynolds*, on January 19, 2012, the Commission put out for public comment proposed amendments to its procedural Due Process and Hearings Rule, 178 W. Va. C.S.R. 6, as required by West Virginia Code § 29A-3-5. (J.A. 0075.) Such amendments were proposed to provide a procedural framework in which to adjudicate ejection hearings. (J.A. 0075.)

The procedural rule that the Racing Commission first proposed regarding the burden of proof required the racetrack to prove by a preponderance of the evidence that the ejected permit holder's "presence or conduct is detrimental to the best interests of racing or to the orderly conduct of a race meeting." (J.A. 0047.) PNGI participated in the public comment period by filing a comment on February 20, 2012. (J.A. 0045-0053.) PNGI commented on the burden of proof rule:

State law does not, for instance, provide that racing associations may exclude for "conduct detrimental to racing" or for interference with the "orderly conduct of a race meeting." Instead, the Thoroughbred Racing rules, part of the substantive law of this state, provide that racing associations "have the power to exclude . . . persons acting improperly or whose behavior is otherwise objectionable. 178 W. Va. Code of State R. § 1-6.2 (effective July 10, 2011). Racing associations maintain the right to exclude anyone, including permit holders, for violations of the associations internal rules, whether or not those rules relate to racing. It is the broadest possible expression of the property right.

(J.A. 0047.)

Public comments were also received by the Commission both in support of and in opposition to the rules proposed with regard to the handling of stay requests from ejected permit holders. (J.A. 0077.) Of course, PNGI took the position that the Commission should not have any procedural rules governing the handling of stay requests, inasmuch as PNGI claims that the Commission has no power to grant stays. (J.A. 0077.)

The public comment period ended on February 21, 2012. (J.A. 0075.) Before PNGI even had the opportunity to see whether or not its comments on the burden of proof rule or its comments on other rules were honored, or what changes the Commission had made to the rule amendments as a result of public comment, it issued a February 29, 2012 pre-suit notice to the Racing Commission pursuant to West Virginia Code § 55-17-3 indicating that it was going to sue the Commission over the procedural rules. (J.A. 0151-0152.)

On March 22, 2012, the Racing Commission final filed with the Secretary of State the procedural rule with modifications made as a result of public comment. (J.A. 0030-0031.) As a result of PNGI's public comment, the Racing Commission changed the burden of proof rule to conform it precisely to the standard set forth in the legislative rule, 178 W. Va. C.S.R. 1, § 6.2. (J.A. 0042 (*see* § 4.7.d.), 0076-0077, 0080.) The Racing Commission responded to PNGI's comment that "[t]his standard does not require proof that the permit holder actually violated a rule of racing promulgated by the Commission. . . . as long as it can be demonstrated that the permit holder acted improperly or engaged in behavior that is otherwise objectionable" (J.A. 0077.)

The Racing Commission made some changes to its stay procedural rules as a result of public comment. (J.A. 0079.) But, ultimately, the rule that was final filed established a procedure for handling stay requests which includes a requirement for written stay applications to be filed with the

Commission's Executive Director; a procedure whereby the racetrack is notified of the stay request and given an opportunity to respond; the factors<sup>2</sup> to be weighed by the Racing Commission or one of its members in granting or denying a stay; and, a requirement for a written order issued to the parties. (J.A. 0039-0040.)

The procedural rule amendments were designated to become effective on April 21, 2012. (J.A. 0030-0031.) On March 28, 2012, after the procedural rules were final filed with the Secretary of State, the Racing Commission issued a notice of hearing to be held on April 27, 2012 to review the ejection appeals of two permit holders who had been ejected by PNGI about a month after this Court issued the *Reynolds* decision. (J.A. 0095-0099.) That date of that hearing was subsequently continued upon agreement of the parties until May 3, 2012. (J.A. 0100-0101.)

On April 25, 2012, after the procedural rule amendments went into effect, the Commission noticed three more hearings for May 30, 2012 to review the ejection appeals of permit holders who were ejected by PNGI. (J.A. 0102-121.)

On April 27, 2012, PNGI filed a Petition for Writ of Prohibition and Complaint for Declaratory Relief against the Racing Commission in the Circuit Court of Kanawha County seeking to stop the Commission's noticed ejection hearings and seeking a declaration that its burden of proof rule and stay rule were unlawful.<sup>3</sup> (J.A. 0001-0028.)

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<sup>2</sup> The factors to be weighed are the permit holder's likelihood of prevailing upon the merits of his ejection appeal; the likelihood of irreparable harm to the permit holder if a stay is denied; the likelihood of irreparable harm to the racetrack if a stay is granted; the public interest; and, any other information deemed relevant by the Commission or the member designated to rule upon stay requests. (J.A. 0039-0040.)

<sup>3</sup> PNGI also sought to invalidate a procedural rule that requires the racetrack to give a written reason for the ejection to the permit holder. (J.A. 0011.) However, that claim was later deemed

(continued...)

On May 1, 2012, the Racing Commission responded in opposition to PNGI's pleading, (J.A. 0081-0094), and on May 2, 2012, the parties appeared in Circuit Court for a hearing on the matter (J.A. 0355). Thereafter, the Circuit Court entered a final order in which it denied the issuance of a writ and refused to stay the ejection hearings that were scheduled by the Commission for May 3 and 30, 2012. (J.A. 0355-0359.) The Court further dismissed the case from its docket. (J.A. 0359.)

On or about May 16, 2012, PNGI filed a Rule 59(e) Motion to Alter or Amend, requesting that the Circuit Court reinstate the lawsuit. (J.A. 0360-0374.) The Racing Commission responded in opposition to the motion, and a hearing on the motion was scheduled and held on February 26, 2013. J.A. 0375-0394.

The Court ordered on March 5, 2013 that PNGI's declaratory judgment claim would be reinstated and could proceed to adjudication. (J.A. 0395-0396.) A briefing schedule was entered on March 19, 2013 which required the parties to brief the remaining legal issues raised in PNGI's declaratory judgment action. (J.A. 0398.) No further hearings were held and no evidence was taken. (J.A. 0396.)

After briefing was completed and proposed orders were tendered to the Circuit Court, the Circuit Court entered an Order Granting Summary Judgment to West Virginia Racing Commission on November 14, 2013. (J.A. 0522-0541.) It is this order that PNGI now appeals to this Court. (J.A. 0543-0570.)

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<sup>3</sup>(...continued)  
abandoned by the Circuit Court after PNGI did not argue such claim in its summary judgment filings. (J.A. 0524.)

B. PROCEDURAL HISTORY OF LITIGATION WITH PNGI.

This brief references the “saga” of litigation between PNGI and the Racing Commission pertaining to the Commission’s review of permit holder ejections from the racetrack. *See supra* p. 1. The saga partially predates the *Reynolds* case and may be illuminative to the Court as to the context in which this appeal arises.

The question of the Commission’s authority to hold review hearings requested by ejected permit holders first arose in 2009 when the Commission determined to hold hearings at the request of three permit holders who were ejected by PNGI. (J.A. 0312, 0329.) In March 2009, PNGI filed a writ of prohibition in the Circuit Court of Kanawha County seeking to stop the ejection hearings in the case of *PNGI v. West Virginia Racing Commission, et al.*, Civil Action No. 09-MISC-106. (J.A. 0329.) That case ultimately resulted in an order entered by the Honorable Charles King on September 24, 2009, which held that the Commission had no authority to hold hearings to review permit holder ejections. (J.A. 0312, 0329.)

On or about January 29, 2010, the Commission and the three permit holders appealed Judge King’s order to this Court. (J.A. 0312, 0329.) The appeals were assigned docket numbers 100098 and 100099 by this Court. (J.A. 0329.) On March 30, 2010, this Court entered orders refusing to hear the appeals. (J.A. 0329.)

In April 2009, the litigation that ultimately culminated in this Court’s November 2011 decision in *Reynolds* began in the Circuit Court of Kanawha County. *Reynolds* at 126-127, 803-804. Once this Court’s decision in *Reynolds* was issued, the Commission proceeded with the promulgation of its ejection hearing procedural rules, which led to the underlying lawsuit in this appeal, discussed *supra* pp. 5–7.

On August 22, 2012, while the underlying lawsuit in this appeal was still pending in the Circuit Court of Kanawha County, PNGI filed a second declaratory judgment action and “appeal” in the Circuit Court of Jefferson County in which it raised exactly the same claims that it had raised in Kanawha County pertaining to the validity of the Racing Commission’s procedural rules governing ejection appeal hearings. *PNGI Charles Town Gaming v. West Virginia Racing Commission, Wade S. Sanderson and Patricia M. Sanderson*, Cir. Ct. Jefferson Co., Civil Action No. 12-AA-1. (Pet. for Appeal of Racing Comm. Order and Compl. for Dec. J.)

PNGI raised identical declaratory judgment counts in its Jefferson County Circuit Court action and purported to appeal a decision by the Racing Commission in an ejection appeal in which the Commission had ruled in PNGI’s favor, outright upholding the ejections of permit holders Wade and Patricia Sanderson. *Id.*

The Racing Commission moved to dismiss PNGI’s Jefferson County action on the basis that PNGI could not “appeal” an order of the Racing Commission which was not adverse and that the declaratory judgment action plead therein was already pending in the Circuit Court of Kanawha County. *PNGI Charles Town Gaming v. West Virginia Racing Commission, Wade S. Sanderson and Patricia M. Sanderson*, Cir. Ct. Jefferson Co., Civil Action No. 12-AA-1. (W. Va. Racing Comm. Mot. to Dismiss and Mot. to Quash Summons.)

Ultimately, the Circuit Court of Jefferson County granted the Racing Commission’s motion to dismiss by order entered on December 11, 2012. *PNGI Charles Town Gaming v. West Virginia Racing Commission, Wade S. Sanderson and Patricia M. Sanderson*, Cir. Ct. Jefferson Co., Civil Action No. 12-AA-1. (Order Granting Motion to Dismiss and Motion to Quash Summons.) PNGI did not appeal this order.

Subsequently, as discussed *supra* p. 7, PNGI's declaratory judgment action in the Circuit Court of Kanawha County played out, resulting in an order upholding the Racing Commission's rules. The litigation saga that began five years ago over the Racing Commission's review of permit holder ejections continues on in this appeal.

C. ADJUDICATION OF EJECTION APPEALS POST-*REYNOLDS*.

PNGI has taken the liberty in its brief of characterizing and representing facts about the Racing Commission's adjudication of ejection appeals post-dating the *Reynolds* decision. None of the representations by PNGI in its brief about these appeals are in the record of the underlying proceeding. Therefore, this Court does not have any of the transcripts, exhibits, decisions or orders in these cases to review and examine so that it may judge for itself.

PNGI's description of the post-*Reynolds* ejection appeals does not represent a complete and accurate picture of what has transpired. While the Racing Commission urges this Court to decide this case without considering these off-record matters, it responds to PNGI's characterizations to bring some balance to the presentation.

As of the filing of this brief, the Racing Commission has fully adjudicated fourteen ejection hearings, three of which arose out of ejections by Mountaineer Racetrack and the remainder of which arose out of ejections by PNGI at Charles Town Racetrack. In the very first ejection appeal that the Commission heard, involving permit holders Wade and Patricia Sanderson, it upheld the ejections and did not order PNGI to reinstate the permittees to the track.<sup>4</sup>

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<sup>4</sup> This is the ejection decision that PNGI inexplicably "appealed" to the Circuit Court of Jefferson County, discussed *supra* p. 9, after it prevailed.

Subsequently, the Commission heard a number of ejection appeals in which it upheld PNGI ejections, but modified the length of the ejections. Although PNGI states or implies as much in its brief, in not one single instance has the Racing Commission summarily returned any ejected permit holder to the racetrack. And, it has not outright overturned the ejections at issue in any of the fourteen that it has fully adjudicated. In fact, except for the Sandersons' case which PNGI won, *see supra* p. 9 and note 4, PNGI has not appealed any of the Commission's ejection decisions to Circuit Court, as it has a right to do under West Virginia Code § 29A-5-4. So, while it expresses dissatisfaction in its brief to this Court about the Commission's decisions in which the ejection periods were modified, PNGI has not taken a single one of them to Circuit Court for judicial review.

To illustrate a sample of the ejection modifications handed down by the Commission, in a case involving a jockey, Carlos Castro, the Commission altered his indefinite ejection to an ejection of one year and five months. A trainer's six month ejection was modified by the Commission to shave off fifteen days. Another trainer's ejection was modified from indefinite to five years and one month.

Cliff Tuomisto and Billy Ray Davis, whom PNGI specifically mention in its brief, had their ejections modified by the Commission from indefinite to one year. Stephen Pollard, whom PNGI also mentions, had his ejection modified from indefinite to two years and four months.<sup>5</sup>

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<sup>5</sup> In fact, Pollard is not yet allowed to enter the racetrack under the Commission's decision as his re-entry has not be ordered until December 24, 2014. By that time, he will have been ejected for two years and four months. Moreover, the Court should be aware that if it had the benefit of the record in the Pollard case, it would be revealed that the horse's tongue injury resulted from an improperly applied "tongue-tie" which is sometimes placed upon a horse's tongue to prevent it from getting its tongue over the bit during racing. While no one, least of all the Racing Commission, condones any act that is harmful to an animal, an improperly applied tongue-tie resulting in injury may be viewed by a reasonable trier-of-fact as on a different part of the spectrum of harmful acts to animals compared to willful abuse. Pollard expressed great remorse in the hearing for what had happened to the horse. Certainly, all of this context is important to a fair hearing of the issues.

Robert Bir, a trainer who is characterized by PNGI as having repeatedly neglected horses stabled on track property, was ejected indefinitely for having not enough straw in the floor of a stall in which a horse was housed, on more than one occasion. The Commission found Pollard to have engaged in “improper” and “objectionable” conduct. But, the Commission did not immediately reinstate Bir to track property – it modified his ejection from indefinite to nine months.

PNGI implies that after Bir came back to the track on the order of the Commission it had to intercede and eject him again after he was charged by law enforcement with animal cruelty. If this Court had the full benefit of the Commission’s records, it would be clearly demonstrated that in January 2014, about four months after Bir had returned to the track off of his nine month ejection, the Charles Town Board of Stewards<sup>6</sup> suspended Bir’s racing permit indefinitely and ejected him from racetrack property for other racing rule violations.<sup>7</sup> At the time that PNGI ejected Bir for a “second” time in February 2014, he was not a racing permit holder and was not allowed on racetrack property pursuant to an order of the Stewards. The charges of animal cruelty that arose in February 2014, while of concern, occurred due to alleged<sup>8</sup> incidents off of racetrack property and during a period when Bir had no racing permit and would not have even been allowed on racetrack property to place a bet, let alone train a horse.

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<sup>6</sup> The Stewards are employed by the Racing Commission and are the Commission’s agents on the racetrack responsible for enforcing the rules of racing. 178 W. Va. C.S.R. 1, § 8.3.

<sup>7</sup> Pursuant to 178 W. Va. C.S.R. 1, § 6.2, the Stewards have the power and authority to eject permit holders from racetrack property.

<sup>8</sup> Upon information and belief, Bir has not yet gone to trial for these charges.

The Commission's records will also demonstrate that it has only received stay requests from permit holders ejected by PNGI in four of the adjudicated cases. The Racing Commission did not grant *any* of these stay requests.

If this Court had the benefit of the record of all of the adjudicated ejection proceedings, this Court would have the opportunity to see that the Racing Commission has handled the matters in a proportionate, contextual, fair and even-handed manner. If this Court would desire to have the benefit of the record of these proceedings, the Racing Commission would readily produce them.

### III.

#### SUMMARY OF ARGUMENT

The Circuit Court rightly found that the Racing Commission had the discretion to promulgate a procedural rule placing the burden of proof on the racetracks in appeal hearings in which racing permit holders contest their ejections. Because the burden of proof rule is a rule of evidence or procedure it falls within the definition of a "procedural" rule under West Virginia Code § 29A-1-2(g). Moreover, even if the Commission's burden of proof rule requires legislative approval, it has it. The Commission's procedural rule, 178 W. Va. C.S.R. 6, § 4.7.d., that places the burden on the racetracks, adopts the standard established by the West Virginia Legislature in a legislative rule, 178 W. Va. C.S.R. 1, 6.2. That legislative rule provides that the racetracks may eject persons "acting improperly or whose behavior is otherwise objectionable." The burden of proof procedural rule simply requires a racetrack to come forward first and present the facts supporting its conclusion of "improper" or "objectionable" behavior that led to its ejection.

Because neither the Racing Commission's statutes or its legislative rules expressly identify the burden of proof in ejection proceedings, the Racing Commission had the discretion to set the

burden of proof and to place the burden on the racetracks. Placing the burden on the tracks is consistent with the Commission's legislative scheme and considerations of policy and fairness.

Placing the burden on the racetracks does not impinge upon their right of ejection as this Court delineated it in *Reynolds*. PNGI's reading of *Reynolds* wholly ignores its holding that the racetracks' right of ejection is not unfettered and is subject to review under 178 W. Va. C.S.R. 1, § 6.1. and, more broadly, the Commission's plenary authority to regulate racing established in West Virginia Code § 19-23-6. This Court stated its holding in the context of the Commission reviewing ejection appeals where it is alleged by the racetrack that the permit holder has engaged in bad acts. This Court did not hold that the Commission can only review and disagree with racetrack ejections if the permit holder proves that his or her ejection was based upon protected class discrimination.

The Commission's authority to grant a stay of an ejection pending a hearing does not derive from its procedural rule. The Commission's procedural rule complained of by PNGI merely establishes the procedures by which the Commission will handle and dispose of stay requests. The power to stay an ejection derives from the Commission's "plenary" regulatory authority, which this Court recognized in *Reynolds*, and is incidental to its power to outright overturn or modify an ejection, also recognized in *Reynolds*.

#### IV.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Racing Commission does not deem oral argument to be necessary in this case inasmuch as this Court's precedent in *Reynolds* is dispositive of the issues presented. In addition, the facts and the legal arguments in this matter are more than adequately presented in the briefs and the record filed with the Court. Oral argument would not significantly aid the decisional process.

If this Court decides, however, that oral argument is necessary, the Racing Commission stands ready to appear and present its position.

V.

ARGUMENT

A. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE RACING COMMISSION’S DECISION TO PROMULGATE A PROCEDURAL RULE PLACING THE BURDEN OF PROOF ON THE RACETRACK WAS A LAWFUL EXERCISE OF ITS DISCRETION.

1. The Racing Commission’s burden of proof rule is a rule that “fixes procedure, practice or evidence,” which is the very definition of a “procedural” rule under West Virginia Code § 29A-1-2(g) and, otherwise, the rule adopts, verbatim, a standard set forth in a legislative rule that has the approval of the West Virginia Legislature and the force and effect of law.

West Virginia Code § 29A-1-2(g) defines a “procedural rule” as a rule . . . which fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency . . . .”<sup>9</sup> Procedural rules do not require legislative approval. West Virginia Code § 29A-3-8. Procedural rules may be adopted by an agency after compliance with the filing and public comment/public hearing requirements of West Virginia Code §§ 29A-3-4 through 29A-3-8. The burden of proof rule promulgated by the Racing Commission is procedural because it fixes a rule of evidence and/or procedure. *See Berg v. Board of Regents of State Universities*, 40 Wis.2d 657, 662, 162 N.W.2d 653, 656 ( 1968) (“As a part of the process for determination of asserted facts, the allocation of the burden

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<sup>9</sup> A “legislative rule” is a rule that has the force of law; supplies a basis for the imposition of civil or criminal liability; or, grants or denies a specific benefit. It is a rule that is determinative on any issue affecting private rights, privileges or interests. West Virginia Code § 29A-1-2(d).

of proof is a rule of evidence . . . .”) The rule identifies the party who must go forward first to present evidence and what evidence or “facts” have to be produced.

West Virginia has not yet addressed the issue, but there is authority in other states in which it has been found that a rule or statute that determines who bears the burden of proof in a proceeding is procedural in nature.<sup>10</sup> *Shaps v. Provident Life & Accident Ins. Co.*, 826 So. 2d 250, 254 (Fla. 2002); *In re Estate of Cuneo*, 334 Ill.App.3d. 594, 789 N.E.2d 325 (Ill. App. 2d Dist. 2002); *Sudwischer v. Estate of Hoffpauir*, 705 So. 2d 724, 729 (La. 1997) (stating that the burden of proof is procedural) *Northfield Center Development Corp. v. City of Macedonia Planning Com'n*, 1998 WL 289675, \*4 (Ohio App. 9th Dist. 1998) (“The burden of proof is a procedural matter.”). 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).

And, indeed, the burden of proof rule in this matter does not create or deny a benefit. The racetrack retains its ability to eject permit holders for “acting improperly” or engaging in “objectionable behavior” under 178 W. Va. C.S.R. 1, § 6.2. In addition, a permit holder retains the “right of appeal” from his or her ejection under 178 W. Va. C.S.R. 1, § 6.1. The rule is not determinative of any right, privilege or interest. It is not determinative of whether the ejection is right or wrong. The burden of proof rule merely brings order to the proceeding inasmuch as it provides a structure – the racetrack is the first party to present evidence. The rule also establishes an

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<sup>10</sup> There are some federal court decisions in which the issue was whether state or federal law applies in diversity cases that have referred to the burden of proof as substantive. *See e.g. Coastal Plains Feeders, Inc. v. Hartford Fire Insurance Company*, 545 F.2d 448 (5<sup>th</sup> Cir. 1977). However, even if this Court would adopt this line of thinking, the Racing Commission’s burden of proof rule adopts a legislative rule standard passed by the Legislature.

evidentiary standard for establishing facts upon which an ejection is predicated. *See State v. Marty*, 137 Wis. 2d 352, 363, 404 N.W.2d 120 (Wis. Ct. App. 1987) (burden of proof is a rule of evidence that applies to establishing facts, not to determining legal issues).

Fundamentally, the burden of proof rule requires the racetrack to come forward first and demonstrate that it ejected a permit holder within the parameters of a legislative rule, 178 W. Va. C.S.R. 1, § 6.2., that plainly regulates such ejections. Reduced to its essence, PNGI's complaint is that the Racing Commission is requiring it to come forward in ejection hearings and demonstrate adherence to the legislative rule. Such a complaint is illogical and was rightfully rejected by the Circuit Court.

Because the burden of proof procedural rule adopts, verbatim, the standard set forth in the Racing Commission's legislative rule, 178 W. Va. C.S.R. 1, § 6.2., it has legislative approval, to the extent that it is required. The burden of proof rule does nothing more than adopt and incorporate a *legislative* rule. It simply restates the legislatively established standard as the standard that the track must meet in ejection hearings. Specifically, it states:

In any hearing on an appeal by a permit holder of an ejection by an association, the association shall have the burden of proving by a preponderance of the evidence that the permit holder acted improperly or engaged in behavior that is otherwise objectionable pursuant to 178CSR1, §6.2. or 178CSR2, §6.2.<sup>11</sup>

178 W. Va. C.S.R. 6, § 4.7.d.

Accordingly, the standard adopted by reference from the Commission's legislative rule to its procedural rule, has the full force and effect of law and the imprimatur of the West Virginia

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<sup>11</sup> 178 W. Va. C.S.R. 2 is the Greyhound Racing legislative rule. It contains the same standard for ejection of greyhound racing permit holders as does 178 W. Va. C.S.R. 1, the Thoroughbred Racing legislative rule applicable to horse racing permit holders.

Legislature. See *Smith v. West Virginia Human Rights Commission*, 216 W. Va. 2, 9, 602 S.E.2d 445, 452 (2004) (“A regulation that is proposed by an agency and approved by the Legislature . . . has the force and effect of law.”)

2. The Racing Commission had the discretion to set the burden of proof in its administrative ejection proceedings and placing the burden on the racetrack is consistent with the legislative scheme and considerations of policy and fairness.

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. 2d *Administrative Law* § 354 (2014); see also *Bunce v. Secretary of State*, 239 Mich. App. 204, 217, 607 N.W.2d 372, 378 (Mich. Ct. 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 evident that the Commission’s decision to impose the burden is consistent with the legislative scheme. The Commission’s statutes are silent regarding the burden of proof in ejection hearings before the Racing Commission. However, our Legislature has specifically addressed the scheme for ejection hearings by the enactment of two legislative rules. The first rule provides the right of appeal to ejected permit holders, 178 W. Va. C.S.R. 1, § 6.1., and the second authorizes the Stewards and the racetracks to eject if a person acts improperly or engages in objectionable behavior, 178 W. Va. C.S.R. 1, § 6.2. Moreover, as this Court recognized in *Reynolds*, the Commission’s ultimate authority to review a track’s ejections of permit holders derives from West Virginia Code § 19-23-6, which gives the Racing Commission “plenary

power and authority” and “full jurisdiction” over horse and dog racing and the persons involved in the holding or conducting of horse and dog racing. *Id.* at Syllabus Pt. 3. The regulation of horse and dog racing is ultimately exercised by the Commission under the State’s police power, which has been described by this Court as “broad and sweeping.” *State ex rel. Morris v. West Virginia Racing Commission*, 133 W. Va. 179, 192, 55 S.E.2d 263, 270 (1949).

This Court recognized in *Reynolds* that the Commission’s legislative rules “make[] clear that a racing association’s right to eject a person from its grounds is not an unfettered right as argued by [PNGI].” *Reynolds* at 131, 807. And, this Court recognized that an 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<sup>12</sup> in their Commission-issued occupational permits to invoke the Due Process Clause. *Id.* at 132, 808. To the extent that there was any doubt, *Reynolds* enunciates the principle that when the Legislature enacted the Commission’s legislative rules, it was concerned with (1) tempering an association’s right to eject occupational permit holders and (2) providing ejected occupational permit holders, who have a recognized due process property interest, with an adequate mechanism for challenging a racetrack’s decision.

Putting the burden on the racetrack 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. In fact, the procedural rule literally adopts the “legislative scheme” by repeating the legislative standard for ejections.

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<sup>12</sup> In *Barry v. Barchi*, 443 U.S. 55, 99 S.Ct. 2642 (1979), the United States Supreme Court held that there is a property interest in a license or permit issued by a state racing commission.

Other principles apply in examining the Commission’s choice of the party to bear the burden of proof. It is not axiomatic, as PNGI suggest that the party seeking relief in civil actions, must always bear the burden of proof.<sup>13</sup> It is important to note that administrative proceedings, while certainly civil in nature, are decidedly a unique subset of civil proceedings that are often distinct from civil suits brought 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, despite the fact that they are not the claimant. *See Hardy v. B.H.*, 228 W. Va. 334, 719 S.E.2d 804 (2011) (in which this Court held that the burden of proof is on DHHR to prove by a preponderance of the evidence that its adverse action of terminating Medicaid waiver program eligibility was correct, despite the fact that DHHR was not the “appealing party” and there was no presumption to entitlement to benefits); *Peery v. Rutledge*, 177 W. Va. 548, 552, 355 S.E.2d 41, 45 (1987) (in unemployment proceedings burden is upon former employer to demonstrate claimant’s conduct falls within a disqualifying provision of the unemployment compensation statute); 156 W. Va. C.S.R. 1, § 3 (in disciplinary matters grieved before the Public Employees Grievance Board, the employer has the burden of proving that the action taken was

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<sup>13</sup> PNGI cites cases in its brief that are not pertinent to the burden of proof issue in this case. For example, *Boury v. Hamm*, 156 W. Va. 44, 190 S.E.2d 13 (1972) is a car wreck case in Circuit Court where the issue was the plaintiffs’ burden to prove that the defendant was negligent in driving a car. *In re Tax Assessment of Foster Foundation’s Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E.2d 150 (2008) is a case in which a non-profit entity contested their tax assessment in Circuit Court. Tax assessment law creates an express presumption that the assessment is correct. Therefore, the burden was placed on the taxpayer to prove by clear and convincing evidence that the assessment was erroneous. In this matter, there is no such statutory presumption of the correctness of a permit-holder ejection. None of the cases cited by PNGI pertain to administrative proceedings.

justified)<sup>14</sup>; 77 W. Va. C.S.R. 3, § 3.2.1. (burden of proof that accommodations required by an individual’s religious needs impose an undue hardship to the employer’s business is on the employer).

In fact, it is of significance, that another state racing commission that has the authority to review permit holder ejections has placed the burden of proof on the racetrack. *In Foxboro Harness, Inc. v. State Racing Commission*, 42 Mass. App. Ct. 82, 674 N.E.2d 1322 (Mass. App. Ct. 1997), it was recognized that the Massachusetts Racing Commission placed the burden on the racetrack to demonstrate that its decision to exclude a horse trainer was “reasonable.” *Id.* at 86, 1325. The Appeals Court of Massachusetts rejected the racetrack’s argument that the burden should have been placed on the permit holder – stating that the racetrack had failed to object to the allocation of the burden of proof and that it did not demonstrate that it suffered any harm by bearing the burden.

As in *Foxboro Harness*, PNGI cannot demonstrate any harm from bearing the burden in ejection cases. PNGI concedes in its brief that it has successfully met the burden in every case to date. PNGI’s suggestion that it should be permitted to put on no proof of anything at ejection hearings and still prevail is patently without merit.

The proponent of an issue often bears the burden of proof or persuasion. However, the mere fact that an ejected party requests an administrative hearing does not make the ejected party the “proponent” of the issue. 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[.]” 73A C.J.S. *Public Administrative Law and Procedure* § 240 (2014).

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<sup>14</sup> Notably, 156 W. Va. C.S.R. 1 is a procedural rule promulgated by the Public Employees Grievance Board and the burden of proof in grievance proceedings is stated therein, not in the Grievance Board’s statutes.

Furthermore, courts have recognized that the party who has information relevant to the facts 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, 626, 113 S.Ct. 2264, 2281 (1993); *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4<sup>th</sup> 1147, 78 Cal. Rptr. 3d 572 (Cal. App. 1<sup>st</sup> Dist. 2008); *Sanchez v. Unemployment Ins. Appeals Board*, 20 Cal. 3d 55, 569 P.2d 740 (Cal. 1977); *Peace v. Employment Security Commission of North Carolina*, 349 N.C. 315, 507 S.E.2d 272 (1998); 31A C.J.S. *Evidence* § 196 (2014). The racetracks possess the information upon which an ejection is based. They are the decision-maker regarding the ejection and have the “facts” that support the ejection.

In addition, the ejected permit holders are already at a significant disadvantage going into an ejection proceeding because the majority of them are unrepresented by counsel, often have limited education, and have no experience in appearing before a government agency and navigating its hearing process. In contrast, the racetracks have been represented by legal counsel in every single ejection appeal that has been heard to date by the Racing Commission and they have the full might of the gambling revenues that the State allows them to derive from racing and gaming at their disposal.

This Court held in *Hardy, supra*, that the imposition of the burden of proof on DHHR, the non-appealing party in Medicaid waiver cases, “assists in leveling the inequality of power between the DHHR and the claimant.” *Id.* at 339, 809. That same inequality of power exists between racetracks and racing permit holders. Most permit holders do not have the knowledge, the legal representation or the resources possessed by the racetrack, the entity who operates and owns the racetrack upon which the permit holder must be able to enter to engage in their racing occupation.

3. The burden of proof rule does not conflict with PNGI's right to eject and is consistent with this Court's holding in *Reynolds*.

PNGI insists that the Racing Commission's allocation of the burden of proof in some manner runs afoul of its right to eject. PNGI construes this Court's holding in *Reynolds* as a clarion call to continue its ejections essentially unfettered and for the Commission to be relegated to holding protected class discrimination hearings for ejected permit holders. This reading of *Reynolds* ignores its plain holding that the Commission's legislative rules "make clear that a racing association's right to eject a person from its grounds is not an unfettered right as argued by [PNGI]." *Id.* at 131, 807. There is not one single thing in this Court's decision in *Reynolds* that remotely limits the Commission's power of review of ejections to race, creed, etc.

In fact, this Court decided *Reynolds* in the full light of PNGI's argument that its ejection authority was only limited by a prohibition on ejecting permit holders due to race, creed, etc. (J.A. 0327-0328; PNGI Pet. for Appeal of 9/20/10 in *Reynolds*.) This Court simply did not adopt that argument. To conclude otherwise is to be in denial. This Court stated:

It logically follows that the consequence of the Legislature providing a permit holder the right to appeal an ejection to the Racing Commission is that if the Racing Commission disagrees with the ejection and either reverses it or provides for some lesser punishment, such as a thirty-day suspension, then the racing association must abide by the Racing Commission's decision. To allow a racing association, such as [PNGI], to eject a permit holder . . . notwithstanding any measures taken by the Racing Commission upon an appeal of the permit holder would render the Legislative rule meaningless. In other words if the Legislature intended for a racing association to have an unfettered right to eject the permit holder there would have been no reason for the Legislature to add the language "[h]owever, all occupational permit holders who are ejected have the right of appeal to the Racing Commission[.]" . . . Thus, by

providing the permit holder with a right to appeal an ejection, the Legislature necessarily conditions the racing association's ability to eject a permit holder on a review by the Racing Commission.

*Id.* at 132, 808.

And, this Court further commented that while “[i]t is understandable that a racetrack would want to eject a permit holder for conduct that is alleged to be fraudulent or corrupt . . . the Legislature has expressly placed plenary power and authority concerning such alleged conduct involving permit holders with the Racing Commission. *See* W. Va. Code § 19-23-6 and W. Va. C.S.R. § 178-1-4.7. [now 178-1-6.1.]” *Id.* at 132, 808 n.26.

It is without doubt that this Court did not say that the Commission can only “disagree” with a racetrack ejection if protected class discrimination is proven in a hearing. In fact, as quoted above, this Court expressly couched such potential disagreements in the context of alleged bad acts by a permit holder. This Court described the Legislature as having “placed the ultimate decision” over ejections in the Commission’s hands. *Id.* at 132, 808. In sum, this Court said that the Commission is the final arbiter of such alleged permit holder conduct. Indeed, the underlying facts in *Reynolds* involved allegations that seven jockeys failed to declare that they were overweight in terms of the weight assigned to the horses that were scheduled to ride, and the track’s desire to eject the jockeys on that basis. *Id.* at 126-127, 802-803. It is the type of conduct engaged in by the jockeys of which this Court said the Commission was the decider.

Therefore, it is entirely consistent with this Court’s holding in *Reynolds* and 178 W. Va. C.S.R. 1, §§ 6.1. and 6.2. for the Commission to require the track to identify the bad acts, *i.e.* the “improper” acts or “objectionable” behavior, the track alleges led to the ejection, so that it can judge the appeals of ejected permit holders. Fundamentally, the Racing Commission’s statutory and

regulatory charge is to ensure the integrity of racing. *See Johnson v. Board of Stewards of Charles Town Races*, 225 W. Va. 340, 693 S.E.2d 93 (2010) (*per curiam*); *State ex rel. Spiker v. West Virginia Racing Commission*, 135 W. Va. 512, 63 S.E.2d 831 (1951); *State ex rel. Morris v. West Virginia Racing Commission*, 133 W. Va. 179, 55 S.E.2d 263 (1949). That mission necessarily informs the context in which the Commission reviews ejection appeals.

Exercising “plenary” authority to ensure the integrity of racing cannot reasonably be confined to hearing claims of protected class discrimination by permit holders. Taken to its logical conclusion, PNGI’s stance would dictate that it could eject all permit holders who wear brown jackets to the racetrack, and the Commission could not “disagree” because there is no protected class discrimination at issue. Far worse, if PNGI’s position prevails, it could eject a permit holder who is the competitor of another permit holder whom it favors, and perhaps influence the outcome of races. But, such an ejection would not be subject to review or disagreement by the Commission because the ejection does not involve race, creed or color discrimination. That cannot be and is not what the Legislature meant when it enacted legislative rules that allow racetracks to eject those engaging in “improper” or “objectionable” behavior and gave the Commission the right to review those ejections upon appeal by the permit holder. The Legislature obviously meant that the Commission would review such appeals to ensure that the justification for the ejection was in the interests of protecting the integrity of racing. To conclude otherwise, is to neuter the Commission’s authority over racetrack ejections and to render this Court’s decision in *Reynolds* a nullity. This Court cannot countenance such an outcome.

B. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE RACING COMMISSION HAS THE INHERENT POWER TO STAY AN EJECTION AND THAT ITS PROCEDURAL RULES GOVERNING THE DISPOSITION OF STAY REQUESTS ARE AN APPROPRIATE EXERCISE OF ITS RULEMAKING AUTHORITY.

PNGI contends that the Commission has no authority to stay its ejections pending an appeal hearing simply because there is no express statute or rule which provides for a stay. However, PNGI's argument ignores that the Commission has the "plenary" authority to regulate racing. West Virginia Code § 19-23-6. "Plenary" is defined as "[f]ull; complete; entire[.]" Black's Law Dictionary (9<sup>th</sup> ed. 2009). In discussing this "plenary" authority, this Court said in *Reynolds* that the Commission has the authority to reverse or provide for some lesser punishment if, upon review, the Commission disagrees.

If the Racing Commission is authorized to reverse or modify an ejection, it logically flows that it can temporarily stay one, if justification is found. Certainly, as a government agency, the Racing Commission has not only those powers that are expressly granted by statute, but also those powers as are necessarily implied. *McDaniel v. West Virginia Division of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003); *Walker v. West Virginia Ethics Commission*, 201 W. Va. 108, 492 S.E.2d 167 (1997); *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975). The power to stay an ejection is necessarily implied as part of the Commission's review and supervision over ejection appeals.<sup>15</sup>

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<sup>15</sup> PNGI suggests that the Commission only has the power to stay suspensions or revocations imposed by the Stewards as specified in West Virginia Code § 19-23-16(c). That statute, however, is inapposite. The statute has nothing to do with ejections by racetracks and cannot reasonably be read to limit the Commission's power to stay racetrack ejections.

The Commission's procedural rule pertaining to stays recognizes that the granting of a stay is an "extraordinary remedy." 178 W. Va. C.S.R. 6, § 4.3.f. As stated previously, *supra* p. 13, the Commission has not stayed any of PNGI's ejections. PNGI's interests are protected by the stay rules inasmuch as the permit holder is required to make a stay request in writing; the racetrack is afforded an opportunity to respond in writing; a stay is not granted if the permit holder is unlikely to prevail on the merits; the relative harm to the parties is weighed, as well as the public interest; and, the Commission is required to dispose of stay requests through written order. These procedural safeguards inure to the racetracks' benefit and have obviously inured directly to PNGI's benefit.

Ultimately, the Commission's stay authority derives from its plenary regulatory authority, not from its procedural rule. Granting stays, within the confines of the procedures established to handle them, provides a mechanism for the Commission to grant provisional relief in furtherance of the Commission's authority.

V.

#### CONCLUSION

WHEREFORE, based upon the foregoing, the Racing Commission respectfully requests that this Court affirm the Circuit Court's November 14, 2013 Order Granting Summary Judgment to West Virginia Racing Commission.

Respectfully submitted,

WEST VIRGINIA RACING COMMISSION  
By Counsel

PATRICK MORRISEY  
ATTORNEY GENERAL

A handwritten signature in black ink, reading "Kelli D. Talbott". The signature is written in a cursive style and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

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 Respondent's Brief was served by depositing the same postage prepaid in the United States Mail, this 18<sup>th</sup> day of May, 2014, addressed as follows:

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