[Cite as *Beaver v. Ohio State Racing Comm.*, 2015-Ohio-1433.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Christopher Beaver,	:	
Appellant-Appellant,	:	No. 14AP-681 (C.P.C. No. 14CV-004001)
v.	:	(REGULAR CALENDAR)
Ohio State Racing Commission,	:	
Appellee-Appellee.	:	

D E C I S I O N

Rendered on April 14, 2015

Gallagher, Gams, Pryor, Tallan & Littrell, L.L.P., and *James R. Gallagher*, for appellant.

Michael DeWine, Attorney General, and *Yvonne Tertel*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Appellant, Christopher Beaver, appeals from a judgment of the Franklin County Court of Common Pleas affirming the order of appellee, the Ohio State Racing Commission ("the commission") finding Beaver in violation of the commission's horse racing rules, issuing a fine, and directing a return of the purse. For the following reasons, we affirm

I. Facts and Procedural History

{¶ 2} Beaver is a licensed horse owner and trainer. He was the trainer for "Pointe De Vue," one of the winning horses at Scioto Downs on May 9, 2013. Laboratory testing of blood and urine samples collected from Pointe De Vue the day of the race reported a positive finding of methylprednisolone, an anti-inflammatory drug. As a result of the

laboratory test result, the Stewards at Scioto Downs issued a July 12, 2013 ruling finding Beaver violated the following rules: Ohio Adm.Code 3769-18-01(A)(2), 3769-18-01(B)(1), and 3769-18-02(A). The Stewards' ruling disqualified Pointe De Vue, fined Beaver $500 pursuant to Ohio Adm.Code 3769-18-02(B), and ordered Beaver to return the purse pursuant to Ohio Adm.Code 3769-7-45(A).

{¶ 3} On July 13, 2013, Beaver filed a timely appeal to the commission for a hearing. The commission referred the matter to a hearing examiner who conducted the hearing on December 12, 2013.

{¶ 4} At the hearing, Soobeng Tan, the director of the Analytical Toxicology Lab at the Department of Agriculture, testified that the lab contracts with the commission to test blood and urine samples of race horses. Tan explained that Beaver's horse, Pointe De Vu, tested positive for methylprednisolone on May 9, 2013. Tan explained that there is no prohibited level of the drug—a positive test is a violation. According to Tan, he tested horses for methylprednisolone from April 5 to June or July 2013 and had two positive tests. Around mid to late July, the commission's executive director instructed Tan to stop testing for a group of drugs known as corticosteroids, which included methylprednisolone, because the commission was considering adopting standards to allow its use at certain levels.

{¶ 5} Veterinarian Barry Carter testified at the hearing on behalf of Beaver. Dr. Carter explained that approximately 15 years ago, the commission began testing for methylprednisolone. After some positive tests around that time, Dr. Carter spoke with the then-executive director of the commission who "reaffirmed what the standard of care was, which was administration of the drug at five to seven days," before the race, the same standard of care Dr. Carter said had been in place for 25 years. (Dec. 12, 2013 Tr. 111.) Dr. Carter injected Beaver's horse, Pointe De Vue, with Depo-Medrol, another name for methylprednisolone, on May 1, 2013, and Pointe De Vu tested positive eight days later. After learning in July that the commission was testing for Depo-Medrol, Dr. Carter and several other veterinarians met with the executive director of the commission. Dr. Carter testified the executive director told the veterinarians they may continue to use Depo-Medrol "[u]ntil the first of the year until the levels were established." (Dec. 12, 2013 Tr. 128.)

{¶ 6} In a report and recommendation issued January 6, 2014, the hearing examiner determined Beaver violated Ohio Adm.Code 3769-18-01(A)(2), 3769-18-01(B)(1), and 3769-18-02(A) and recommended Beaver pay a $500 fine and that Pointe De Vue be disqualified and Beaver forfeit the purse. Beaver filed timely objections to the hearing examiner's report and recommendation on January 21, 2014.

{¶ 7} On March 27, 2014, the commission adopted the hearing examiner's report and recommendation by unanimous vote. The commission ordered Beaver to return the purse, pay a $500 fine, and forfeit the $500 bond. Pursuant to R.C. 119.12, Beaver appealed the commission's order to the Franklin County Court of Common Pleas. In an August 11, 2014 judgment entry, the common pleas court, after reviewing the record from the hearing, affirmed. Beaver timely appeals.

II. Assignments of Error

{¶ 8} Beaver assigns the following error for our review:

> The Ohio State Racing Commission's Arbitrary Enforcement of Its Rules against Beaver Relative to the Use of the Anti-Inflammatory Medication, Depo Medrol, Constitutes Selective Enforcement, And Is A Deprivation of Beaver's Rights Of Due Process And Equal Protection Under The Law.

III. Standard of Review

{¶ 9} In reviewing an order of an administrative agency under R.C. 119.12, a common pleas court must consider the entire record to determine whether reliable, probative, and substantial evidence supports the agency's order and whether the order is in accordance with law. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110 (1980). The common pleas court's "review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Veterinary Med. Bd.*, 2 Ohio App.3d 204, 207 (1st Dist.1981), quoting *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 280 (1955). The common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but "the findings of the agency are by no means conclusive." *Conrad* at 111. On questions of law, the common pleas court conducts a de novo review, exercising its independent judgment in determining whether the

administrative order is " 'in accordance with law.' " *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471 (1993), quoting R.C. 119.12.

{¶ 10} An appellate court's review of an administrative decision is more limited. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). The appellate court is to determine only whether the common pleas court abused its discretion. *Id.*; *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 218 (1983). On review of purely legal questions, however, an appellate court has de novo review. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶ 15 (10th Dist.).

IV. Discussion

{¶ 11} Beaver's sole assignment of error argues the commission arbitrarily enforced its rule regarding foreign substances when it selectively enforced the rule against Beaver.

{¶ 12} Ohio Adm.Code 3769-18-02(A), commonly known as the absolute insurer rule, provides that "[t]he trainer shall be the absolute insurer of, and responsible for, the condition of the horse entered in a race, regardless of the acts of third parties. Should the chemical or other analysis of urine or blood specimens prove positive, showing the presence of any foreign substance not permitted by rule 3769-18-01 of the Administrative Code, the trainer of the horse * * * may, in the discretion of the commission, be subjected to penalties provided in paragraph (B) of this rule."

{¶ 13} "The absolute insurer rule imposes strict liability on the trainer for the presence of drugs in a horse." *Belcher v. Ohio State Racing Comm.*, 10th Dist. No. 02AP-998, 2003-Ohio-2187, ¶ 16, citing *O'Daniel v. Ohio State Racing Comm.*, 37 Ohio St.2d 87, 90 (1974); *Sahely v. Ohio State Racing Comm.*, 10th Dist. No. 92AP-1430 (Apr. 6, 1993). A trainer's level of care does not affect the trainer's liability for a violation of the absolute insurer rule. *Belcher* at ¶ 16, citing *Dewbre v. Ohio State Racing Comm.*, 16 Ohio App.3d 370, 373 (12th Dist.1984). The only evidence necessary to establish a violation of Ohio Adm.Code 3769-18-02(A) "is a positive test for a prohibited substance." *Id.*

{¶ 14} Here, it is undisputed that the horse Beaver trained, Pointe De Vue, tested positive for the presence of methylprednisolone, a foreign substance under the definition set forth in Ohio Adm.Code 3769-18-01(A)(2). However, Beaver argues the findings

against him are contrary to both common law and state and federal constitutional law. Specifically, Beaver is not challenging the constitutionality of the law or regulations on their face; rather, Beaver is challenging the law and regulations as applied to him, arguing selective enforcement.

{¶ 15} The Supreme Court of Ohio has created a two-part test necessary to satisfy a defense of selective prosecution. *State v . Flynt*, 63 Ohio St.2d 132, 134 (1980). The court explained:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

Id., quoting *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir.1974). Though the above quoted language comes from a criminal case, this court has applied the same standard to claims of selective enforcement in administrative proceedings. *See, e.g.*, *Brownlee v. State Med. Bd.*, 10th Dist. No. 13AP-239, 2013-Ohio-4989, ¶ 31; *Founder's Women's Health Ctr. v. Ohio State Dept. of Health*, 10th Dist. No. 01AP-872, 2002-Ohio-4295, ¶ 78.

{¶ 16} In this case, Beaver has failed to satisfy either prong of the test for selective enforcement. Beaver asserts that because the commission did not test other winning horses for Depo-Medrol before April 5 or after mid-July 2013, the commission treated Beaver differently than other similarly situated trainers. However, the commission tested all race horse winners between April 5 and mid-July 2013. Based on the testimony of Tan, there was at least one other horse that tested positive during the same time frame and was sanctioned similarly but chose not to appeal those sanctions. Because Beaver was treated the same as all trainers whose horses the commission tested during the specific time frame, Beaver has not demonstrated that the commission treated him differently than anyone similarly situated.

{¶ 17} Beaver's reliance on two cases from the Fourth District, *State v. Sturbois*, 4th Dist. No. 09CA12, 2010-Ohio-2492, and *Fagan v. Boggs*, 4th Dist. No. 10CA17, 2011-Ohio-5884, for the proposition that the administrative regulation is unconstitutional as applied to Beaver is without a basis. Both *Sturbois* and *Fagan* reiterate the general requirement in selective enforcement and equal protection arguments that, as a threshold matter, the complaining party must demonstrate that he or she was treated differently than other persons under like circumstances. *Sturbois* at ¶ 24-25; *Fagan* at ¶ 30. However, neither one supports Beaver's argument of selective enforcement here because, as we stated above, other horses were tested and found to be in violation of the regulation during the time frame in which Beaver's horse tested positive for Depo-Medrol.

{¶ 18} Beaver also fails to satisfy the second *Flynt* prong. " '[A] defendant must demonstrate actual discrimination due to invidious motives or bad faith.' " *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 532 (1999), quoting *State v. Freeman*, 20 Ohio St.3d 55, 58 (1985). "Absent some demonstration of an invidious motive, [a] court will not presume intentional or purposeful discrimination from a mere showing of different treatment." *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶ 46, citing *Freeman* at 58. Beaver does not argue an invidious motive. Rather, Beaver argues that it is unfair to enforce the law against him when the commission did not test other horses one month before, or a few months after, Pointe De Vu was tested. Alleged "unfair treatment" is not sufficient to satisfy the second prong of the *Flynt* test.

{¶ 19} Without dissimilar treatment and an invidious motive, Beaver's claim of selective enforcement fails. Accordingly, we overrule Beaver's sole assignment of error.

V. Disposition

{¶ 20} The common pleas court did not abuse its discretion in affirming the commission's order that Beaver violated Ohio Adm.Code 3769-18-01 and 3769-18-02. Having overruled Beaver's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

DORRIAN, J., concurs.
BROGAN, J., dissents.

BROGAN, J., dissenting.

{¶ 21} I must respectfully dissent from the majority opinion. While I agree that Beaver failed to prove his claim of "selective enforcement," he did prove that he was denied due process in his prosecution by the Ohio State Racing Commission ("the commission").

{¶ 22} There is an old Italian proverb that states, "not enforcing a law is worse than no law at all." The evidence is uncontroverted that Depo-Medrol is a commonly used "standard of care" anti-inflammatory medication for race horses. It is also uncontroverted that the commission had not tested for "trace" amounts of Depo-Medrol for 15 years prior to the testing of Pointe De Vue in May 2013. Dr. Barry Carter testified he has been in practice as a racehorse veterinarian for over 25 years and has been a clinical instructor in equine surgery for The Ohio State University. He testified in his personal practice he has injected the joints of three to four racehorses per day with Depo-Medrol for the past 25 years. He also testified that the commission was fully aware of the widespread use of the medication and had been for years. Dr. Carter confirmed that no notice was given to racehorse owners, trainers, or veterinarians that the commission would begin testing for trace amounts of Depo-Medrol and that was inconsistent with the procedures of the commission and those of any other state where he was licensed. (Dec. 12, 2013 Tr. 117-18.)

{¶ 23} "Fair notice" is a fundamental requirement of due process. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Recently, the United States Supreme Court reminded federal regulatory agencies that due process required "fair notice" of agency interpretations. *See Christopher v. SmithKline Beecham Corp.* __ U.S. __, 132 S.Ct. 2156 (2012) and *F.C.C. v. Fox Television Stations, Inc.* __ U.S. __, 132 S.Ct. 2307 (2012). The court noted that when an agency announcement of its interpretation of a statute or regulation is preceded by a very lengthy period of "conspicuous inaction" in terms of government enforcement actions, "the potential for unfair surprise is acute." *Christopher* at 2168.

{¶ 24} The commission's conspicuous inaction for 15 years regarding the widespread use of Depo-Medrol laid a trap for the unwary. Beaver fell into the trap. He

was denied due process and I would reverse the decision of the Franklin County Court of Common Pleas and enter judgment for Beaver.

BROGAN, J., retired, formerly of the Second Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).

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