

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Juan Carlos Guerrero,	:
	:
Petitioner	:
	:
v.	: No. 1378 C.D. 2012
	: Argued: May 16, 2013
Department of Agriculture,	:
Pennsylvania State Horse	:
Racing Commission,	:
	:
Respondent	:

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: December 13, 2013

Juan Carlos Guerrero (Petitioner) appeals the June 21, 2012 order of the Department of Agriculture, State Horse Racing Commission (Commission), affirming a December 20, 2011 Notice of Ejection (Notice) issued pursuant to Section 215(c) of the Horse Racing Industry Reform Act (Act)¹ by Philadelphia Park Racetrack and Casino d/b/a Parx (Parx)² that directed Petitioner's ejection

¹ Act of December 17, 1981, P.L. 435, as amended, 4 P.S. §§ 325.200 – 325.237.

² Philadelphia Park is now called Parx Racetrack. Parx is an intervenor in this case.

from and denial of admission to any part of the grounds, facilities, enclosures and/or properties under the management of Parx for a term of ten (10) years.

The Notice served on Petitioner by Parx alleged the following as the basis for ejection:

On Wednesday, November 16, 2011, you physically assaulted a 22-year-old female Licensee while in the racetrack's administration building. There is a similar accusation from a female jockey of unlawful sexual harassment. This pattern of conduct is not in the best interest of racing and is undesirable per § 165.93³ of the rules of racing.

(Ejection Notice, Reproduced Record (R.R.) at 1a.) Petitioner appealed the Notice to the Commission and a hearing was held before a hearing officer on January 17, 2012. (Commission Hearing Transcript (H.T.)) The hearing officer subsequently issued an adjudication that was accompanied by an order issued by the Commission affirming the Notice.

Petitioner is licensed by the Commission as a trainer.⁴ (Hearing Officer Findings of Fact (F.F.) ¶1.) At the time of Petitioner's ejection, he had been a self-employed trainer within the race grounds and enclosure operated by Parx for approximately sixteen years, and was the leading trainer (in terms of total winnings). (F.F. ¶¶2, 3.)

³ 58 Pa. Code § 165.93 provides: "A person whether a licensee, participant or patron whose conduct is deemed detrimental to the best interest of racing, or who is deemed an undesirable person, may be excluded or expelled from the track."

⁴ See 4 P.S. § 325.213.

On November 16, 2011, Stephanie Nicole Smith encountered Petitioner in the hallway of the Administration Building located within the race grounds and enclosure operated by Parx. (F.F. ¶¶37-38.) Ms. Smith is an outgoing and affectionate person, who frequently exchanges hugs and kisses with people she greets, and she had a friendly, joking relationship with Petitioner, whom she met a few months after she began working in the Administration Building for the Pennsylvania Thoroughbred Horseman's Association (PTHA). (F.F. ¶¶28, 33-35.) Petitioner questioned Ms. Smith as to whether she was going into one of the nearby offices, suggested she do so, and then pushed her into the empty office by placing his hand on her back. (F.F. ¶¶40-43.) Petitioner, standing between Ms. Smith and the door, next put his arm around her, held her face and kissed her, and groped her buttock. (F.F. ¶¶44-45.) Ms. Smith protested and pulled away from Petitioner, the two exchanged words, and Ms. Smith returned to her office. (F.F. ¶¶45-49.)

Unsure of how she should go about reporting Petitioner's sexual misconduct, Ms. Smith informed a co-worker. (F.F. ¶¶50-51.) When Ms. Smith's direct superior, Michael Ballezzi, the President of the PTHA, returned to the office on November 25, 2011, Ms. Smith informed him about what had transpired with Petitioner. (F.F. ¶¶ 31, 54.) In response, Mr. Ballezzi contacted the Chief Executive Officer of Parx, the Director of Security Lance Morell, the PTHA, and the police. (F.F. ¶55.) When Mr. Morell returned to the office from vacation, he contacted PTHA and was informed that an appointment had been scheduled for that afternoon to discuss the matter with the Bensalem Township Police Department. (F.F. ¶¶57-58.)

On November 28, 2011, Detective McMullin of the Bensalem Township Police Department, Special Victims Unit, interviewed Ms. Smith about

what had occurred on November 16, 2011 and opened an investigation into the incident. (F.F. ¶¶61-62.) Ms. Smith was also interviewed by Detective Knowles of the Bucks County District Attorney's Office. (F.F. ¶65.) Subsequently, Detectives McMullin and Knowles arranged for Ms. Smith to meet with Petitioner in her car at the race grounds while wearing an electronic recording device. (F.F. ¶¶63, 65.) Although Ms. Smith met with Petitioner as arranged, the recording device malfunctioned and failed to capture the exchange. (F.F. ¶¶68-71.) That same day, Detective McMullin contacted Petitioner and Petitioner agreed to come to the police station for an interview. (F.F. ¶¶72, 74.) Petitioner admitted to Detective McMullin that he had groped Ms. Smith on November 16, 2011 and that he had met with Ms. Smith earlier in the day to apologize. (F.F. ¶¶74, 76-77.) Detective McMullin filed a misdemeanor charge of indecent assault against Petitioner that was later withdrawn by the Office of the District Attorney. (F.F. ¶78.)

On December 7, 2011, Mr. Morell began an internal investigation for Parx. (F.F. ¶79.) Mr. Morell interviewed Ms. Smith about what had transpired on November 16, 2011. (F.F. ¶80.) At or about this time, Mr. Morell was contacted by Carie Kifer, who had been employed by Petitioner as an apprentice jockey for approximately eight months beginning in January 2010. (F.F. ¶¶8, 11, 81-82, 85.) Ms. Kifer informed Mr. Morell that in August 2010 and again in October 2010, Petitioner took advantage of a hug between colleagues by rubbing her back, buttocks, and attempting to kiss her. (F.F. ¶¶12-14, 17-18.) In both instances, Ms. Kifer communicated to Petitioner that his sexual touching was unwelcome, unconsented to, and inappropriate, and that she was there as a professional to ride horses. (*Id.*)

Following his investigation, Mr. Morell spoke with the Chief Executive Officer of Parx and the Assistant General Counsel, Francis E. McDonnell. (F.F. ¶¶87-88.) After speaking with Mr. Morell, Mr. McDonnell consulted with the Chief Operating Officer for Parx, and decided that Petitioner should be served with a Notice for a ten year period of ejection, because in Mr. McDonnell's view Petitioner's conduct amounted to an indecent assault of Ms. Smith. (F.F. ¶89.) Petitioner was then served with the Notice.

Both Ms. Smith and Ms. Kifer testified at the hearing and the hearing officer found their testimony credible. (Hearing Officer Discussion (Discussion) at 24.) The hearing officer did not find Petitioner's testimony credible. (F.F. ¶103.) The hearing officer concluded that Petitioner's "conduct and its attending circumstances are undesirable, reflect negatively on the sport of racing as a whole and cannot be tolerated," and that Parx's "decision to eject and deny access to [Petitioner] from any part of the grounds, facilities, enclosures and Off Track Wagering Facilities of [Parx] for a term of 10 years is reasonable and just and finds ample support in the record." (Hearing Officer Conclusions of Law, ¶¶6-7.) In reaching the conclusion that the ten year ejection was reasonable, the hearing officer relied upon the testimony of Mr. McDonnell. (Discussion at 29.) Based on the hearing officer's adjudication, the Commission issued a June 21, 2012 order affirming Petitioner's ejection for a ten year term. Petitioner filed a timely appeal with this Court.⁵

⁵ This Court will only disturb an order of the Commission where constitutional rights have been violated, where an error of law has been committed, or where necessary findings of fact are not supported by substantial evidence. *Boyce v. State Horse Racing Commission*, 651 A.2d 656, 658 (Pa. Cmwlth. 1994). Furthermore, our review of a decision committed to the Commission's discretion will only be overturned where there was a manifest abuse of discretion. *Bedford* **(Footnote continued on next page...)**

Petitioner argues that the Commission erred in concluding that the conduct at issue here can form the basis of an ejection, because the Act was intended to regulate conduct directly related to the horse racing industry and cannot be used to address sexual misconduct, which can occur in any workplace. Petitioner also argues that the evidentiary rulings made by the hearing officer amounted to multiple abuses of discretion that when examined together denied Petitioner his right to procedural due process under the Fourteenth Amendment of the United States Constitution and Article 1, Section 1 of the Pennsylvania Constitution.⁶ Finally, Petitioner contends that the ten year term of the ejection is so grossly excessive as to amount to an abuse of discretion and a violation of his right to substantive due process under Article 1, Section 1 of the Pennsylvania Constitution.

The overriding purpose of the Act is to “foster an image of horse racing that would make the image of that ‘industry’ an irreproachable one, even in the eyes of the skeptical public.” *Helad Farms v. Pennsylvania State Harness Racing Commission*, 470 A.2d 181, 184 (Pa. Cmwlth. 1984). The Act provides under Section 215(c) that:

A licensed corporation may refuse admission to and eject from the enclosure of the race track operated by the corporation, any person

(continued...)

Downs Management Corp. v. State Harness Racing Commission, 592 Pa. 475, 487, 926 A.2d 908, 915 (2007).

⁶ Our review of issues raising constitutional and non-constitutional grounds is guided by the longstanding principle that in such instances “courts must make their decisions on non-constitutional grounds if possible and avoid the constitutional question.” *See, e.g., Dauphin County Social Services for Children and Youth v. Department of Public Welfare*, 855 A.2d 159, 165 (Pa. Cmwlth. 2004)

licensed by the commissions under section 213, [4 P.S. § 325.13] employed at his occupation at the race track, whose presence there is deemed detrimental to the best interests of horse racing, citing the reasons for that determination. The action of the corporation in refusing the person admission to or ejecting him from a race meeting ground or enclosure shall have immediate effect. The person refused admission or ejected shall receive a hearing before the appropriate commission, if requested, pursuant to rules and regulations adopted for that purpose by the appropriate commission and a decision rendered following that hearing.

4 P.S. § 235.15(c). In *Iwinski v. Pennsylvania Horse Racing Commission*, 481 A.2d 370 (Pa. Cmwlth. 1984), this Court concluded that the legal right provided to a licensed corporation by Section 215(c) of the Act to exclude a *licensed* person from a race meeting ground or enclosure depends upon a reasoned determination that his or her presence there is detrimental to the best interests of horse racing. *See also* 58 Pa. Code § 165.93. We have held that in order to eject a licensee, a licensed corporation need not demonstrate that the conduct underlying the ejection is criminal, nor prove that the conduct occurred beyond a reasonable doubt; instead, a licensed corporation's burden of proof is satisfied where it has demonstrated by substantial evidence that the licensee's conduct has an appearance of impropriety. *Kulick v. Pennsylvania State Harness Racing Commission*, 540 A.2d 620, 622 (Pa. Cmwlth. 1988); *Daly v. Pennsylvania State Horse Racing Commission*, 391 A.2d 1134, 1136 (Pa. Cmwlth. 1978). Under Petitioner's theory of the Act the impropriety demonstrated must be directly related to horse racing in order to form the basis of an ejection; essentially, Petitioner argues that an ejection is proper where the conduct at issue is the abuse of horses, but not where it is the abuse of humans, because humans can be mistreated in any setting. We disagree.

A licensed corporation has the power to eject a licensee because the Act gives the licensed corporation the authority and concomitant responsibility to regulate behavior and enforce order within its race meeting grounds or enclosure. Section 215, 4 P.S. § 325.215. We have previously concluded that the requirement that licensees act in a manner that is not detrimental to the best interests of racing allowed for ejections due to unruly and abusive behavior, past marijuana use and sales, and possession of an unlicensed firearm. *See Russo v. State Horse Racing Commission*, 434 A.2d 857 (Pa. Cmwlth. 1981); *Iwinski; Peterson v. Pennsylvania State Horse Racing Commission*, 449 A.2d 774 (Pa. Cmwlth. 1982).

In *Luzzi v. State Horse Racing Commission*, 548 A.2d 659 (Pa. Cmwlth. 1988), a licensee was ejected from the grounds of Philadelphia Park because a search of his person revealed him to be in possession of cocaine. Before this Court, the licensee argued that the search was not authorized by the Act, because the regulation that permitted the search was limited to a search for drugs that could affect the speed or racing condition of horses. *Id.* at 665. We concluded that whether or not cocaine could be used to affect the speed or racing condition of horses was beside the fact, because licensees “in the possession of illegal drugs do not foster an irreproachable image of horse racing,” which is the express purpose of the Act. *Id.* There, like here, the licensed corporation had authority under the Act to eject the licensee not because of the involvement of horses or races, but because the disreputable conduct at issue was committed by a licensee within the race meeting grounds and enclosure operated by the licensed corporation. The Commission did not err in concluding that Parx had clear authority under the Act to eject Petitioner for sexual misconduct committed within the race meeting grounds and enclosure policed by Parx.

Next, Petitioner contends that evidentiary rulings made by the hearing officer amounted to an abuse of discretion that denied Petitioner a meaningful opportunity to be heard. The Commission's regulations give the hearing officer authority "to rule upon offers of proof or issues of procedure or otherwise regulate the course of the hearing," 58 Pa. Code § 165.183(c), and to "exclude irrelevant, immaterial or repetitious evidence," 58 Pa. Code § 165.183(f). Petitioner argues that the hearing officer's failure to admit the criminal complaint, magistrate transcript, and withdrawal of charges against Petitioner was an abuse of discretion. We disagree. The fact that criminal charges were withdrawn against Petitioner was not in dispute, nor was it determinative of whether his conduct warranted an ejection; moreover, the withdrawal of charges was made clear by the testimony of various witnesses.

Petitioner argues that the exclusion of character evidence in the form of two letters and a petition signed by thirty-four women who worked at Philadelphia Park attesting that he had a good reputation in the racing community was also an abuse of discretion. Petitioner presented the testimony of ten character witnesses; it was clearly within the hearing officer's discretion to exclude two more letters attesting to his character as cumulative. Similarly, the hearsay objection to the petition was properly sustained; the petition was not notarized, none of the alleged signatories were made available at the hearing to verify signatures on the petition, and the petition was timely objected to. *See Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976) (hearsay evidence, properly objected to, is not competent evidence to support a finding of fact in an administrative hearing); *Smith v. State Horse Racing Commission*, 333 A.2d 798, 805 (Pa. Cmwlth. 1975) ("the hearsay rule is not a

‘technical rule of evidence’ to be lightly disregarded by administrative tribunals.”). Because we discern no abuse of discretion in the hearing officer’s evidentiary rulings, Petitioner’s argument that the cumulative effect of the rulings denied him his right to due process is without merit.

However, we must agree with Petitioner that the Commission’s affirmance of the ten year term of the ejection was an abuse of discretion. The hearing officer here made over one hundred findings of fact concerning the sexual misconduct underlying the ejection, but no findings or conclusions of law in support of the term of the ejection. This is particularly troubling because neither the hearing officer nor the Commission cite to previous rulings, published guidelines, or promulgated regulations used to determine whether the length of the ejection was reasonable.

There is testimony in the record that the term was chosen by Mr. McDonnell, because the Commission informed Parx that an ejection could not be indefinite or permanent, which was his preference. Mr. McDonnell stated:

We were advised by the Racing Commission that, well, prior ejections that have been made in the past would not withstand their approval if they were made for indefinite terms or permanent. And we were told that we had to have a finite period of time for your ejections. So based on that, I decided ten years was the minimum.

Well, I just felt it was a minimum. I mean my preference would’ve been a permanent ejection, but I didn’t feel we could do that.

(H.T. at 216-217). While this testimony suggests that the Commission has established some guidelines concerning the length of ejections, the Commission has failed to inform this Court or the public what those guidelines may be. Under

the prior act, the Commission represented to this Court that the ejection of a licensee did not extend beyond the session in which it was issued. *Daly*, 391 A.2d at 1135 & n.2. The Commission has not addressed why its current interpretation of the statute differs so markedly from its past interpretation, though the language has scarcely changed. *See* Section 12.1 of the Act of December 11, 1967, P.L. 707, *added by* Act of July 24, 1970 P.L. 634, *as amended*, 15 P.S. § 2662.1(c) (repealed).⁷ In *Heland Farms* we concluded that:

The duty of the Commission to avoid conduct, as stated in *Daly*, which would reflect negatively on the sport includes the obligation to avoid preferential treatment among horse owners whether wittingly or unwittingly. A preference, whether innocently or culpably granted, is generally the same in the eyes of the skeptic, and to the skeptical world is the equivalent of intentional preference. Such a preference, regardless of how effected, is unacceptable and, we believe, outside the scope of the Commission's discretion.

Heland Farms, 470 A.2d at 184. The duty entrusted to the Commission to act in the best interests of racing extends to its adjudicative role, where it has an obligation to ensure that the parties that come before it, whether they are owners, licensed corporations or licensees, stand on equal footing.

This lack of transparency is compounded by the hearing officer's failure to address testimony in the record that the term of the ejection was motivated by bias. Detective Knowles testified that when he telephoned Mr.

⁷ Section 12.1, 15 P.S. § 2662.1(c) (repealed), stated: "An association licensed by the commission may refuse admission to and eject from the enclosure of the race track operated by the association any person licensed by the State Horse Racing Commission pursuant to Section 11, employed at his occupation at such race track, whose presence there is deemed detrimental to the best interests of horse racing, citing the reason or reasons for such determination."

Morell to inform him that Detective Knowles was sending Ms. Smith onto the grounds and enclosure of the racetrack wearing an electronic recording device that:

Basically, he cut me off and began to tell me how pleased he was that we were targeting [Petitioner]. And he told me that [Petitioner] was—has won—he named a multi-million dollar number, four million, four and a half million—I couldn't be certain—that this man has won the couple million dollars of racing money in the last couple years, that he has tested his horses and his horses have come in clean. He's tested for, like, masking agents, and they've come in clean, and he said that he's glad we're going to get this guy.

(H.T. at 228-229.) In his testimony, Mr. Morell denied that he ever spoke with Detective Knowles. (H.T. at 192.) Although the hearing officer relied on both the testimony of Mr. Morell and Detective Knowles in making findings of fact, the hearing officer did not resolve the conflict in their testimony or make credibility determinations. (F.F. ¶¶56, 58, 62-69, 71, 79-87.) Similarly, the record contained testimony that the use of an ejection to deal with sexual misconduct was a deviation from the past practice of Parx. Mr. Morell testified that in response to sexual harassment allegations made against another trainer, Parx forwarded a report to the Board of Stewards, and did not eject the trainer. (H.T. at 207-208.) In that instance, the trainer was issued a \$1,500 fine. (H.T. at 208.) Mr. Morell also testified that there had been other instances of sexual misconduct where Parx had issued an ejection, but that he could not recall any specifics, including the length of the ejection. (H.T. at 207-208.) It is clear from the record that Petitioner engaged in serious and offensive sexual misconduct that warranted an ejection. It is also clear from the Act that an ejection is a very powerful sanction that places a tremendous burden on a licensee's ability to practice his or her profession in the

Commonwealth and that the term of an ejection need therefore be neither arbitrary nor capricious and must be free from bias.

Our duty is to determine whether constitutional rights have been violated, whether errors of law have been committed, and whether necessary findings of fact are supported by substantial evidence. It is not within the province of this Court to resolve conflicts in the evidence, attribute weight to the evidence, or make findings of fact. *Boyce v. State Horse Racing Commission*, 651 A.2d 656, 660 (Pa. Cmwlth. 1994). In carrying out our review, we are cognizant of the mission entrusted to the Commission by the General Assembly and the Commission's expertise in the area of horse racing, and we defer to the Commission's interpretation of the Act. Our review is not possible, however, where necessary findings of fact are not made and conclusions of law are not drawn from the Act. Therefore, we vacate the ten year term imposed by the Commission's order, and remand this matter to the Commission for consideration of a new term of ejection.⁸

⁸ At the close of his brief Petitioner argues that the Commission arbitrarily and capriciously refused his request to supplement the record prior to issuance of the Commission's adjudication. The Commission argues that Petitioner was required to file an appeal from the denial of the petition to reopen within 30 days and that because he failed to do so, he cannot raise the issue here; we conclude that under *K.H. v. J.R.*, 573 Pa. 481, 826 A.2d 863 (2003), the issue is subsumed within the Commission's final order and properly before us for review. The decision to grant a petition to reopen is one of agency discretion. *Stevenson v. State Employees' Retirement Board*, 711 A.2d 533, 539 (Pa. Cmwlth. 1998). Petitioner requested to introduce into evidence phone records for impeachment purposes, arguing that the records proved that a material change of fact had occurred since the conclusion of the hearing. *See* 1 Pa. Code § 35.231(a). The records demonstrate that a phone call was placed, but not who participated in the call or what was discussed. The records therefore bore on the likelihood of events but alone do not demonstrate that one witness' version of events was fact and another's fiction. As a result, we find no abuse of discretion in the Commission's conclusion that the records do not prove a material change in fact.

Accordingly, we affirm the Commission's order to the extent that it ejected Petitioner and we vacate the Commission's order to the extent that it imposed a ten year term of ejection. This matter is remanded to the Commission with directions that it reconsider the term imposed and issue a reasoned decision in support of the newly ordered term of ejection. In its reasoned decision, the Commission should attempt to differentiate why, under past practices, sexual misconduct committed by a non-employee licensee was referred to the Board of Stewards and dealt with by the imposition of a \$1,500 fine, whereas in the instant matter, Petitioner received a ten year ejection from the race track grounds and enclosure, which is tantamount to a lifetime suspension given the practicalities of the horse racing industry.

JAMES GARDNER COLINS, Senior Judge

Judge Leadbetter dissents.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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	:	
Petitioner	:	
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v.	:	No. 1378 C.D. 2012
	:	
Department of Agriculture,	:	
Pennsylvania State Horse	:	
Racing Commission,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 13th day of December, 2013, the June 21, 2012 adjudication of the Department of Agriculture, Pennsylvania State Horse Racing Commission (Commission) in the above-captioned matter is affirmed in part and vacated in part, and the record is remanded to the Commission to issue a new adjudication.

The order of the Commission is affirmed to the extent that it affirmed Juan Carlos Guerrero’s ejection from and denial of admission to any part of the grounds, facilities, enclosures and/or properties under the management of Philadelphia Park Racetrack and Casino d/b/a Parx; the order is vacated to the extent that it affirmed that Juan Carlos Guerrero’s ejection from and denial of admission to any part of the grounds, facilities, enclosures and/or properties under the management of Philadelphia Park Racetrack and Casino d/b/a Parx extend for a term of ten years; and the record is remanded to the Commission to reconsider the

term of Juan Carlos Guerrero's ejection, prepare a reasoned decision in support of the reconsidered penalty consistent with the attached opinion, and issue a new adjudication.

Jurisdiction relinquished.

JAMES GARDNER COLINS, Senior Judge