

PUBLIC PROTECTION CABINET
Kentucky Horse Racing Commission
(New Administrative Regulation)

810 KAR 8:050. International Medication Protocol as a Condition of a Race.

RELATES TO: KRS 230.210, 230.215, 230.240, 230.260, 230.290, 230.320

STATUTORY AUTHORITY: KRS 230.215, 230.240, 230.260, 230.290, 230.320

NECESSITY, FUNCTION, AND CONFORMITY: KRS 230.215(2) authorizes the Kentucky Horse Racing Commission to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in Kentucky. KRS 230.240(2) requires the commission to promulgate administrative regulations restricting or prohibiting the administration of drugs or stimulants or other improper acts to horses prior to the horse participating in a race. This administrative regulation authorizes licensed racing associations to require adherence to International Medication Protocol, as defined, as a condition of entry in a particular race.

Section 1. Definition. "International Medication Protocol" means a condition of a race that all horses nominated or entered to compete in the race shall not be administered furosemide less than twenty-four (24) hours prior to post time for the race.

Section 2. Notwithstanding any other provision of KAR Title 810 to the contrary, an association may require adherence to the International Medication Protocol as a condition of a particular race. The association shall publish the requirement in its condition book or otherwise make the requirement known to all licensees participating in its race meeting. The horses entered to compete in an International Medication Protocol race shall not be eligible to receive furosemide less than twenty-four (24) hours prior to post time for the race. All matters related to sample collection, ownership, storage, shipment, chain of custody, testing, and reporting and other applicable provisions shall be done in accordance with 810 KAR 8:010, 810 KAR 8:030, and 810 KAR 8:060.

Section 3. Penalties. If the commission laboratory determines the presence of furosemide at a concentration of greater than 1,000 picograms/ml in a serum sample, derived post-race from a horse that is not eligible to receive furosemide pursuant to this administrative regulation, it shall be prima facie evidence that furosemide was administered to the horse in violation of this administrative regulation. Violations of this administration regulation shall be subject to the penalties provided for Class C drug violations in 810 KAR 8:030 Section 4(3).

Section 4. To the extent of any conflict between a provision in this administrative regulation and a provision in any other administrative regulation contained in KAR Title 810, the provisions in this administrative regulation shall supersede.

FRANKLIN S. KLING, JR., Chairman

K. GAIL RUSSELL, Acting Secretary

APPROVED BY AGENCY: November 13, 2018

FILED WITH LRC: November 15, 2018 at 9 a.m.

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on December 27, 2018 at 10:00 a.m., at the office of the Kentucky Horse Racing Commission, 4063 Iron Works Parkway, Building B, Lexington, Kentucky 40511.

Individuals interested in being heard at this hearing shall notify the Kentucky Horse Racing Commission in writing by no later than five (5) working days prior to the hearing of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through 11:59 p.m., December 31, 2018. Please send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person below.

CONTACT PERSON: John L. Forgy, General Counsel, Kentucky Horse Racing Commission, 4063 Iron Works Parkway, Building B, Lexington, Kentucky 40511, phone (859) 246-2040, fax (859) 246-2039, email John.Forgy@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: John L. Forgy

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation establishes a procedures by which licensed racing association may opt to run races without the use of furosemide (Lasix).

(b) The necessity of this administrative regulation: This administrative regulation is necessary to clearly establish requirements and prohibitions concerning the use of medications during race meetings.

(c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 230.215(2) and 230.260(8) authorize the Commission to promulgate administrative regulations prescribing the conditions under which racing shall be conducted in Kentucky. KRS 230.240(2) authorizes the commission to promulgate administrative regulations restricting or prohibiting the use and administration of drugs or stimulants or other improper acts to horses prior to horses participating in a race. This administrative regulation establishes the requirements, prohibitions, and procedures pertaining to the use of medications on racing days during horse race meetings in Kentucky.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation ensures that medications are used appropriately on racing days and in a manner that is consistent with the integrity of racing.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: This is a new administrative regulation.

(b) The necessity of the amendment to this regulation: This is a new administrative regulation.

(c) How the amendment conforms to the content of the authorizing statute: This is a new administrative regulation.

(d) How the amendment will assist in the effective administration of the statutes: This is a new administrative regulation.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: The Kentucky Horse Racing Commission is affected by this administrative regulation. In addition, Kentucky's licensed thoroughbred race tracks, and all individual participants in horse racing, are potentially affected by this ad-

ministrative regulation's establishment of fundamental rules pertaining to the use of medication in horse racing. In the year 2017, the Commission licensed over 22,000 individuals to participate in horse racing. This number is consistent from year to year.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: Participants in horse racing, and especially owners, trainers and veterinarians, will be required to adhere to the requirements and rules set forth in this administrative regulation pertaining to the use of medication in horse racing.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): No new costs are anticipated to comply with this administrative regulation.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3)? Participants in racing will benefit from clearly defined rules that enhance the integrity of racing.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: There is no initial administrative cost to implement this administrative regulation.

(b) On a continuing basis: There is no continuing cost to implement this administrative regulation.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Kentucky's racing associations are required by KRS 230.240(2) to pay for the cost of testing for prohibited medications. The Kentucky Horse Racing Commission covers other costs of implementing and enforcing this administrative regulation.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: No additional fees or funding are necessary to implement this administrative regulation.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: This administrative regulation does not establish any new fees or increase any current fees to participate.

(9) TIERING: Is tiering applied? Tiering was not applied because this administrative regulation will apply to all similarly situated entities in an equal manner.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? The Kentucky Horse Racing Commission will be impacted by this administrative regulation.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 230.215, 230.225, 230.240, 230.260, 230.290, 230.300.

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? This administrative regulation will not generate revenue for state or local government for the first

year.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? This administrative regulation will not generate revenue for state or local government for subsequent years.

(c) How much will it cost to administer this program for the first year? No funds will be required to administer this regulation for the first year.

(d) How much will it cost to administer this program for subsequent years? No funds will be required to administer this regulation for subsequent years.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): Neutral.

Expenditures (+/-): Neutral.

Other Explanation: None.



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

JACK CONWAY
ATTORNEY GENERAL

OAG 15-017

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December 18, 2015

Subject: Whether the Kentucky Horse Racing Commission may promulgate regulations allowing private racetracks to determine whether to hold furosemide-free races

Requested by: Martin A. Maline, Executive Director
Kentucky Horsemen's Benevolent and Protective Association, Inc.

Written by: Matt James

Syllabus: The Kentucky Horse Racing Commission may not promulgate regulations delegating the authority to determine whether to hold furosemide-free races to private racetracks.

Statutes construed: KRS 230.240(2)

Opinion of the Attorney General

Martin A. Maline, Executive Director of the Kentucky Horsemen's Benevolent and Protective Association, Inc. ("KHBPA"), has requested an opinion of this office on whether the Kentucky Horse Racing Commission ("KHRC") may promulgate regulations delegating the authority to determine whether to have furosemide-free races to individual racetracks. We advise that the KHRC may not delegate the authority to determine whether to have furosemide-free races to individual racetracks.

The KHRC proposed several substantively identical regulations entitled "international medication protocol as a condition of race," now codified at 810 KAR 1:300 (regulating thoroughbred racing), 811 KAR 1:300 (standardbred racing), and 811 KAR 2:300 (quarter horse, appaloosa, and Arabian racing). After



a hearing before the Administrative Regulation Review Subcommittee on Sept. 8, 2015, the subcommittee found the proposed regulations to be deficient.¹ However, on Sept. 28, 2015, the Governor promulgated the regulations notwithstanding the subcommittee's finding of deficiency, and the regulations became effective on Nov. 6, 2015. 810 KAR 1:300 provides in relevant part:

Section 1. Definition. "International Medication Protocol" means a condition of a race that all horses nominated or entered to compete in the race shall not be administered furosemide less than twenty-four (24) hours prior to post time for the race.

Section 2. Notwithstanding any other provision of 810 KAR Chapter 1 to the contrary, an association may require adherence to the International Medication Protocol as a condition of a particular race. The association shall publish the requirement in its condition book or otherwise make the requirement known to all licensees participating in its race meeting. The horses entered to compete in an International Medication Protocol race shall not be eligible to receive furosemide less than twenty-four (24) hours prior to post time for the race. . . .²

¹ 810 KAR 1:300 § 5, 811 KAR 1:300 § 5, and 811 2:300 § 5 each provide that "this administrative regulation was found deficient by the Administrative Regulation Review Subcommittee on September 8, 2015."

² 810 KAR 1:300 § 3 provides that "if the commission laboratory determines the presence of furosemide at a concentration of greater than 1,000 picograms/ml in a serum sample, derived post-race from a horse that is not eligible to receive furosemide pursuant to this administrative regulation, it shall be prima facie evidence that furosemide was administered to the horse in violation of this administrative regulation." KHBPA argues that "the concentration levels for furosemide of 1000 picograms appears to have no basis in scientific research as confirmed by Dr. Clara Fenger during the Rules Committee Session." However, KHRC responded that "the threshold was established pursuant to an administration study conducted by Dr. Richard A. Sams According to Dr. Sams, the recommended threshold was based on the results of a 20 horse administration study in which 500 milligrams of furosemide as Salix® was administered to each horse."

"Administrative agencies are vested with a great deal of discretion in exercising their authority. However, there are standards and limits which must be observed. . . . 'Rules and regulations must be reasonably adapted to secure the end in view, and are invalid if shown to bear no

810 KAR 1:300 provides that individual racetracks may adopt the "international medical protocol" providing that horses may not be administered furosemide less than twenty-four hours prior to a race as a condition of a particular race. KRS 230.240(2) provides that "the racing commission shall promulgate administrative regulations for . . . restricting or prohibiting the use and administration of drugs or stimulants or other improper acts to horses prior to the horse participating in a race." KRS 230.240(2) commits the power to restrict the administration of drugs to horses to KHRC. At issue is whether KHRC can delegate the authority to determine which furosemide rules apply to individual racetracks.

The question of what powers an administrative agency may delegate appears to be a question of first impression in Kentucky.³ "An administrative body's powers are defined and limited by the agency's enabling statute." *Ky. Real Estate Comm'n v. Milgrom*, 197 S.W.3d 552, 554 (Ky. Ct. App. 2005). "When a statute prescribes the procedures that an administrative agency must follow, the agency may not add or subtract from those requirements." *Pub. Serv. Comm'n of Ky. v. Attorney Gen. of Commonwealth*, 860 S.W.2d 296, 298 (Ky. Ct. App. 1993). "In general, administrative officers and bodies cannot alienate, surrender, or abridge their powers and duties, and they cannot legally confer on their employees or others authority and functions which under the law may be exercised only by them or by other officers or tribunals." 73 C.J.S. *Pub. Admin. Law and Procedure* § 159. "An agency delegates its authority when it shifts to another party almost

reasonable relation to the purposes for which they are authorized to be made." *Portwood v. Falls City Brewing Co.*, 318 S.W.2d 535, 536 (Ky. 1958) (citations omitted). "The invalidity of an administrative rule or regulation must be made so manifest by the one attacking it that the court has no choice except to hold that the administrative agency has exceeded the authority delegated. Thus he must show that such rule or regulation is clearly inconsistent with statute, or that it is clearly unreasonable, or that it is clearly inappropriate to carry out the end specified in the statute it is intended to implement." *Hohnke v. Commonwealth*, 451 S.W.2d 162, 166 (Ky. 1970). KHRC's determination of the concentration levels for furosemide is supported by a scientific study, and KHBPA does not establish in the limited record before us that it is clearly unreasonable or inappropriate.

³ KHRC refers to *Legislative Research Comm'n By & Through Prather v. Brown*, 664 S.W.2d 907 (Ky. 1984) for guidance on delegation. However, *Brown* dealt with delegation by the legislature to an administrative agency, and not delegation by an administrative agency to private actors, and while informative, is not determinative.

the entire determination of whether a specific statutory requirement . . . has been satisfied, or where the agency abdicates its final reviewing authority." *La. Forestry Ass'n Inc. v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653, 672 (3d Cir. 2014) (quoting *Fund for Animals v. Kempthorne*, 538 F.3d 124, 133 (2d Cir. 2008)).

The general rule is that administrative agencies may delegate ministerial tasks, but may not delegate discretionary powers. "While an administrative body cannot delegate quasi-judicial functions, it can delegate the performance of administrative and ministerial duties." *Krug v. Lincoln Nat. Life Ins. Co.*, 245 F.2d 848, 853 (5th Cir. 1957); *Anderson v. Grand River Dam Auth.*, 446 P.2d 814, 818 (Okla. 1968) ("Administrative officers and bodies . . . may delegate merely ministerial functions . . . , they cannot delegate powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment."); 2 AM. JUR. 2D *Admin. Law* § 65 ("Merely administrative and ministerial functions may be delegated to assistants whose employment is authorized, but there generally is no authority to delegate acts discretionary or quasi-judicial in nature."); 73 C.J.S. *Pub. Admin. Law and Procedure* § 84 ("The agency cannot, however, delegate the legislative power itself to the private entity."); see also *Legislative Research Comm'n By & Through Prather v. Brown*, 664 S.W.2d 907, 915 (Ky. 1984) ("Delegation, of legislative power, to be lawful, must not include the exercise of discretion as to what the law shall be. In addition, such delegation must have standards controlling the exercise of administrative discretion. Finally, the delegating authority must have the right to withdraw the delegation.").

In *Shearer v. Hall*, 399 S.W.2d 701 (Ky. 1965), the court described the ministerial/discretionary distinction:

An official duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts; that a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in its nature. Discretionary or judicial duties are such as necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one or two or more ways, either of which would be lawful, and

where it is left to the will or judgment of the performer to determine in which way it shall be performed.

Id. at 704. An act is ministerial when it is certain and imperative, involving execution of a specific act arising from fixed facts; it is discretionary when the act may be performed in multiple ways, and is left to the judgment of the performer.

As applied to KHRC's international medical protocol regulations, the regulations vest discretionary power in the individual racetracks. The racetracks are given the option to determine whether to apply the international medical protocol or not, and KHRC has surrendered its final reviewing authority over that decision. As such, the regulations are an unconstitutional delegation to private actors of KHRC's administrative authority to promulgate regulations governing the administration of drugs to horses. Accordingly, we advise that the international medical protocol regulations promulgated by KHRC, which allow individual racetracks the option to determine which furosemide administration rules apply, are an invalid delegation of administrative rulemaking authority to private actors.

Determination of whether a race is furosemide-free cannot be left solely to individual racetracks. Should KHRC wish to promote furosemide-free races, it may do so through an administrative framework which retains final approval of whether a race is furosemide-free with KHRC, and specifies procedures for that approval.

In summary, we advise that KHRC may not delegate to private actors its authority to determine which regulations for the administration of drugs to horses apply to a particular race, as setting regulations for the administration of drugs to horses is a discretionary function committed by statute to KHRC.

JACK CONWAY
ATTORNEY GENERAL



Matt James
Assistant Attorney General

810 KAR 1:300. International medication protocol as a condition of a race.

RELATES TO: KRS 230.210, 230.215, 230.240, 230.260, 230.290, 230.320

STATUTORY AUTHORITY: KRS 230.215, 230.240, 230.260, 230.290, 230.320

NECESSITY, FUNCTION, AND CONFORMITY: KRS 230.215(2) authorizes the Kentucky Horse Racing Commission to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in Kentucky. KRS 230.240(2) requires the commission to promulgate administrative regulations restricting or prohibiting the administration of drugs or stimulants or other improper acts to horses prior to the horse participating in a race. This administrative regulation authorizes licensed racing associations to require adherence to International Medication Protocol, as defined, as a condition of entry in a particular race.

Section 1. Definition. "International Medication Protocol" means a condition of a race that all horses nominated or entered to compete in the race shall not be administered furosemide less than twenty-four (24) hours prior to post time for the race.

Section 2. Notwithstanding any other provision of 810 KAR Chapter 1 to the contrary, an association may require adherence to the International Medication Protocol as a condition of a particular race. The association shall publish the requirement in its condition book or otherwise make the requirement known to all licensees participating in its race meeting. The horses entered to compete in an International Medication Protocol race shall not be eligible to receive furosemide less than twenty-four (24) hours prior to post time for the race. All matters related to sample collection, ownership, storage, shipment, chain of custody, testing, and reporting and other applicable provisions shall be done in accordance with 810 KAR 1:018, 810 KAR 1:028, and 810 KAR 1:130.

Section 3. Penalties. If the commission laboratory determines the presence of furosemide at a concentration of greater than 1,000 picograms/ml in a serum sample, derived post-race from a horse that is not eligible to receive furosemide pursuant to this administrative regulation, it shall be prima facie evidence that furosemide was administered to the horse in violation of this administrative regulation. Violations of this administrative regulation shall be subject to the penalties provided for Class C drug violations in 810 KAR 1:028, Section 4(3).

Section 4. To the extent of any conflict between a provision in this administrative regulation and a provision in any other administrative regulation contained in 810 KAR Chapter 1, the provisions in this administrative regulation shall supersede.

Section 5. This administrative regulation was found deficient by the Administrative Regulation Review Subcommittee on September 8, 2015. (41 Ky.R. 2699; Am. 42 Ky.R. 1192; eff. 1192; eff. 11-6-2015.)



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September 28, 2015

Ms. Becky Harilson, Interim Co-Director
Mr. Steve Collins, Interim Co-Director
Legislative Research Commission
700 Capitol Avenue, Room 300
Frankfort, KY 40601

Ms. Donna Little
Administrative Regulations Compiler
Administrative Research Commission
702 Capitol Avenue, Room 29
Frankfort, KY 40601

RE: 810 KAR 1:300; 811 KAR 1:300; 811 KAR 2:300

Dear Ms. Harilson, Mr. Collins and Ms. Little:

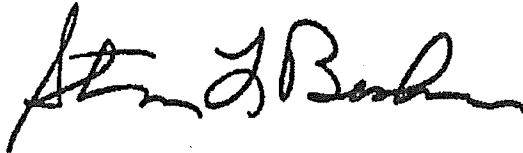
I am in receipt of correspondence dated September 18, 2015, from Senator Ernie Harris and Representative Mary Lou Marzian, co-chairs of the Administrative Regulation Review Subcommittee, relating to the subcommittee's finding of deficiency with respect to the above-referenced regulations, promulgated by the Kentucky Horse Racing Commission. The regulations relate to allowing licensed racetracks to use the international medication protocol as a condition of a race.

Under the international medication protocol, furosemide cannot be administered to a horse less than 24 hours prior to post time for a race. Allowing tracks to use the international medication protocol as a condition of race would permit – but not require – racing associations to schedule furosemide-free races. Likewise, no owner or trainer is required to run a horse in a race with such conditions. Racing associations currently have the flexibility to schedule different types of races with various conditions to attract competitive fields. Authorizing tracks to offer this option to interested horsemen under the parameters set forth in the regulations falls well within the Commission's broad regulatory authority.

MS. BECKY HARILSON
MR. STEVE COLLINS
MS. DONNA LITTLE
September 28, 2015
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Therefore, as provided by law, 810 KAR 1:300 as amended, 811 KAR 1:300 as amended, and 811 KAR 2:300 as amended shall become effective notwithstanding the findings of deficiency.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven L. Beshear". The signature is fluid and cursive, with the first name "Steven" and last name "Beshear" clearly distinguishable.

Steven L. Beshear

cc: The Honorable Ernie Harris, State Senator
The Honorable Mary Lou Marzian, State Representative
Robert Jenkins, Deputy Director, Legislative Research Commission
Ambrose Wilson, IV, Secretary, Public Protection Cabinet
John T. Ward, Jr., Executive Director, Kentucky Horse Racing Commission