

OAG 15-017

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 KHBPA 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.

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