STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

AGENCY: CALIFORNIA HORSE RACING BOARD	)	DECISION OF DISAPPROVAL OF EMERGENCY REGULATORY ACTION
	)	(Gov. Code, sec. 11349.6)
ACTION: Adopt section 1920.1 of Title 4 of the California Code of Regulations	)	OAL File No. 05-1025-02 E

DECISION SUMMARY

On October 25, 2005, the California Horse Racing Board (Board) submitted to the Office of Administrative Law (OAL) the proposed emergency action which would have subjected any horse, stable, or trainer on the premises to heightened surveillance during the period of ten days immediately preceding, and during, any race meeting. On November 4, 2005, OAL notified the Board that OAL disapproved the emergency regulatory action because the record did not demonstrate that the proposed regulation is necessary for the immediate preservation of the public peace, health and safety, or general welfare, a provision in the regulation was unclear, and a form required by the Department of Finance was not completely filled out.

DISCUSSION

The regulation adopted by the Board dealing with the racetrack surveillance must be adopted pursuant to the APA unless a statute expressly exempts or excludes it from APA requirements. (Government Code[1] sections 11340.5 and 11346). No express statutory exemption applies to this emergency regulation. Thus, before it may become effective, it must be reviewed and approved by OAL for compliance with the APA. Compliance requires satisfaction both of the substantive requirements of Government Code section 11349.1, and the emergency standard of section 11349.6.

The adoption of an emergency regulation by the Department must satisfy requirements established by Government Code section 11346.1, which provides in part:

"(b) [I]f a state agency makes a finding that the adoption of a regulation or order

1 Unless stated otherwise, all California Code references are to the Government Code.

> of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal. Any finding of an emergency shall include a written statement which contains . . . a description of the specific facts showing the need for immediate action. . . ."

Government Code section 11349.6 governs OAL's review of emergency regulations. It provides in part:

> "(b) Emergency regulations adopted pursuant to subdivision (b) of Section 11346.1 shall be reviewed by the office within 10 calendar days after their submittal to the office. The office shall not file the emergency regulations with the Secretary of State if it determines that the regulation is not necessary for the immediate preservation of the public peace, health and safety, or general welfare, or if it determines that the regulation fails to meet the standards set forth in Section 11349.1 . . . ."

1. THE FINDING OF EMERGENCY DID NOT DEMONSTRATE THAT THE ADOPTION OF SECTION 1920.1 IS NECESSARY FOR THE IMMEDIATE PRESERVATION OF THE PUBLIC PEACE, HEALTH AND SAFETY, OR GENERAL WELFARE.

Emergency regulations are disfavored under the APA. They must meet an additional level of justification, since the use of emergency regulations obviates one of the key purposes of the APA – public participation in the rulemaking process. Since the adoption of emergency regulations requires the regulated public to obey rules that it had little opportunity to provide input on, the APA limits emergency regulations only to defined, justified circumstances. In the absence of persuasive evidence that the regulation is necessary for the immediate preservation of public peace, health and safety, or general welfare, OAL will disapprove the proposed emergency regulation.

OAL does not evaluate the wisdom of regulations. In fact, OAL is expressly prohibited from "substitut[ing] its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations." (Gov. Code, sec. 11340.1.) OAL's disapproval of this regulation does not, in any way, reflect a judgment upon the benefits or advisability of the proposed rule.

With respect to determining whether or not a regulation may be appropriately adopted as an emergency, OAL makes a separate and independent determination. The rulemaking agency is required, pursuant to Government Code section 11346.1, to make its determination that the proposed regulation is "necessary for the immediate preservation of the public peace, health and safety, or general welfare." OAL applies this same legal standard pursuant to Government Code section 11349.6, but the OAL's determination on this issue is separate and independent. Under section 11349.6 the OAL is directed that it "shall not file the emergency regulations with the

Secretary of State if it determines that the regulation is not necessary for the immediate preservation of the public peace, health and safety, or general welfare." Although the only statutory direction to OAL under Government Code section 11349.6 is to "not file" a disapproved emergency regulation, by necessity and practice OAL also issues a formal Notice of Disapproval and Decision of Disapproval in the manner used for nonemergency regulations pursuant to Government Code section 11349.3.

The statutory standards for determining whether or not an emergency exists, discussed above, are fairly vague and subjective. While some cases may clearly be "necessary for the immediate preservation of public peace, health and safety, or general welfare," others are far from clear. The statutory law alone does not provide adequate objective guidance to yield unambiguous application in all cases. Court cases evaluating this issue provide additional guidance. Unfortunately, there is not a great deal of case law on this issue. Even so, a review of the relevant cases yields useful guidance.

Prior to the 1979 amendments of the APA[2] the determination that an emergency did or did not exist was mostly a matter of agency discretion. In *Schenley Affiliated Brands V. Kirby* (1971) 21 Cal.App.3d 177, 98 Cal.Rptr. 609, the court said that "[w]hat constitutes an emergency is primarily a matter for the agency's discretion". In practice, this amounts to a presumption that a finding of emergency is valid. However, even then the agency's determination was not conclusive. In *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, for the first time, the court clarified that an emergency was required to "reflect a crisis situation, emergent or actual." (Id. at 942.) In *Poschman*, the board of trustees of the California state colleges adopted an emergency regulation which allowed the Chancellor to amend employment grievance procedures. (Id. at 937.) In the statement of reasons setting out the emergency, the trustees contended that the regulation was necessary to avoid confusion in personnel practices. (Ibid.) On review, the court found the trustee's reasoning in support of the emergency did not reflect a crisis situation. The court held that an emergency had to reflect a "crisis situation, emergent or actual," not merely a declaration of sound policy (Id. at 942). This is the first elucidation of the court's understanding of what qualifies for an emergency under the APA.

Several years after *Schenley* and *Poschman,* the Legislature enacted AB 1111, which amended the APA by, among many other changes, creating OAL and giving it authority to make an independent determination as to whether an agency's emergency regulations comply with the statutory standard.

Neither OAL nor the courts are required to defer to the judgment of the agency in the determination of whether an emergency exists. Each is required under the APA to evaluate this question separately. In the two leading cases that followed *Schenley* and interpreted this provision of the APA, the Court of Appeals upheld the finding of emergency in one case (*Doe v.*

2 Chapter 537, Statutes of 1979 (AB 1111, McCarthy)

Wilson (1998) 31 Cal.App.3d 932, 107 Cal.Rptr. 596) and overturned the finding in the other (*Poschman v. Dumke, supra*).

The most recent appellate decision on this specific issue is *Doe v. Wilson* (*supra*). *Doe* describes an emergency as "an unforeseen situation calling for immediate action." (*Doe v. Wilson* (1997) 57 Cal.App.4th 296, 306.) In *Doe v. Wilson* the court borrowed the reasoning of the court in *Sonoma County Organization of Public/Private Employees, Local 707, SEIU, AFL/CIO v. County Of Sonoma* (1991) 1 Cal.App.4th 267, 276-277, 1 Cal.Rptr.2d 850.

Sonoma County provides the most comprehensive discussion of what constitutes an emergency to be found in case law. In addition to the language identifying it as "an unforeseen situation calling for immediate action", it contains an extensive discussion of the factors that characterize an emergency under the APA (*Sonoma County, supra,* 277-278). Although *Sonoma County* examined a local emergency ordinance and did not interpret the APA, its discussion of the meaning of the "word 'emergency' as used in legislative enactments" is illuminating and its citation in *Doe v. Wilson* demonstrates that the same principles apply to emergency regulations adopted pursuant to the APA.

According to *Sonoma County*:

> It is a considerably harder task to specify identifying characteristics of an emergency, given that "[t]he term depends greatly upon the special circumstances of each case." (*Los Angeles Dredging Co. v. Long Beach* (1930) 210 Cal. 348, 356 [291 P. 839, 71 A.L.R. 161].) Not only must urgency be present, the magnitude of the exigency must factor. We agree with the trial court that an emergency may well be evidenced by an imminent and substantial threat to public health or safety. (… *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564, 586, 592 [214 Cal.Rptr. 424, 699 P.2d 835].) Certainly this is an important-perhaps the most important-criterion if the emergency involves a public sector labor dispute, although we are disinclined to view it as a sine qua non. Without question, an emergency must have "a substantial likelihood that serious harm will be experienced" (*Dow Chemical Co. v. Blum* (E.D. Mich. 1979) 469 F.Supp. 892, 902) unless immediate action is taken. The anticipation that harm will occur if such action is not taken must have a basis firmer than simple speculation. (See *People v. Weiser* (Colo.App. 1989) 789 P.2d 454, 456; *Senn Park Nursing Center v. Miller* (1983) 118 Ill.App. 733, [74 Ill.Dec. 132, 455 N.E.2d 162, 168].) Emergency is not synonymous with expediency, convenience, or best interests (*Hunt v. Norton* (1948) 68 Ariz. 1 [198 P.2d 124, 130, 5 A.L.R.2d 668]; *State v. Hinkle* (1931) 161 Wash. 652 [297 P. 1071, 1072]), and it imports "more ... than merely a general public need." (*Hutton Park Gardens v. Town Council* (1975) 68 N.J. 543 [350 A.2d 1, 13].) Emergency comprehends a situation of "grave character and serious moment." (*San Christina etc. Co. v. San Francisco, supra,* 167 Cal. 762 at p. 773.)

The considerations in evaluating a purported emergency identified by the *Poschman*, *Sonoma County*, and *Doe* courts may be summarized as:

1. The magnitude of the potential harm.
2. The existence of a crisis situation, emergent or actual.
3. The immediacy of the need, i.e., whether there is a substantial likelihood that serious harm will be experienced unless immediate action is taken.
4. Whether the anticipation that harm will occur if the action is not taken has a basis firmer than simple speculation.
5. Whether the basis for believing that an emergency exists is simply expediency, convenience, best interests, or a general public need.
6. Whether the situation is of grave character and serious moment.
7. Whether the situation is unforeseen.

The case law is instructive, but the ultimate test must be based upon the statute. The considerations identified in the case law, therefore, cannot properly be viewed as tests or requirements. Rather, they provide guidance in determining whether a regulation is necessary for the immediate preservation of public peace, health and safety, or general welfare. The existence of all or many of the factors identified in the case law provides a strong indication that the use of emergency regulations is justified. The existence of few or none of these factors leads to a contrary conclusion. Ultimately, however, the rulemaking agency in evaluating its proposed rulemaking, and OAL in its independent review of the file, must use case law as a tool in applying the statutory standard rather than as a set of tests that must be met to justify adoption of a rule as an emergency regulation.

The facts provided in the Finding of Emergency in this filing to demonstrate the need for the immediate adoption of section 1920.1 to preserve the public peace, health and safety, or general welfare are as follows:

> "Stewards and staff of the California Horse Racing Board (Board) who are responsible for monitoring and regulating horse race meetings have recently noted startling facts that suggest, or at a minimum create the perception that, some race horses are receiving medications or other treatments that are prohibited by the California Horse Racing Law, yet such race horses often still do not test positive for prohibited drugs in regularly administered post-race blood or urine testing. There have been, for example, consistent abnormal patterns of race winnings by horses trained by a limited number of trainers. There are other factors that recent ad hoc meetings of expert stewards, Board staff, race horse owners, and trainers have concluded support the fact, or at least the perception, of possible illegal use of drugs on race horses, including abnormal changes in a horses winning patterns, unusually high winning percentages, and routine drug test results that are near a

prohibited level."

(In response to an inquiry by OAL for further information, the Board submitted an "Addendum to Notice of Proposal to add Emergency Regulation 1920.1. Heightened Security." This document explained generally that many medications cannot be detected, that certain horses under the care of a limited number of trainers tested at levels of TCO2 just below the violation level when in competition but within the normal range when out of competition, that certain barns have had remarkable success with claimed horses with otherwise mediocre racing careers, and that horses from certain barns with very little "work" before races have demonstrated remarkable success.)

> "This fact or perception of sophisticated administration of banned drugs to race horses has created a perception by race horse owners and trainers and horse racing fans that there may be an 'uneven playing field' at the race tracks. This perception is, in turn, contributing to a decline in attendance and wagering on horse racing. It is critical that the perception of unfairness be addressed immediately as the survival of horse racing and wagering on horse racing necessarily depends heavily on the fairness of all races. Neither the Board nor the racing associations have resources sufficient to require 24 hours monitoring of all race horses at a racing meeting, thus the critical need for this Rule to enable immediate strategic use of available and added resources to target where violations are, based on extensive horse racing experience, believed to be occurring. . . ."

The Finding of Emergency starts out with the observation that stewards and staff of the Board have "recently noted startling facts" that suggest, or create a perception, that some racehorses are receiving prohibited medication or treatments without testing positive. However, the record is not more specific as to when these events actually occurred, nor when they were discovered by the Board's stewards and staff. More significantly, the Finding of Emergency then goes on to explain that this has created a perception that there may be an "uneven playing field" at racetracks that is ". . . contributing to a decline in attendance and wagering on horse racing . . ." that must be ". . . addressed immediately as the survival of horse racing and wagering necessarily depends on the fairness of all races." Unfortunately the record submitted to OAL is silent on the immediacy of this decline, its severity, how much of this decline can be attributed to this perception, and how a delay of the four months or so necessary to conduct a rulemaking proceeding to adopt section 1920.1 with full public participation will affect "the survival of horse racing and wagering" in California. Although the Finding of Emergency submitted to OAL for the adoption of section 1920.1 does make a strong showing that the adoption of this regulation may well be in the best interests of horse racing and wagering in California, it does not provide facts that demonstrate that the adoption of section 1920.1 as an emergency regulation is necessary for the immediate preservation of the public peace, health and safety, or general welfare.

2. A PROVISION IN SUBSECTION (a) OF SECTION 1920.1 IS UNCLEAR.

The Legislature in establishing OAL, found that regulations, once adopted, were frequently unclear and confusing to the persons who must comply with them. (Gov. Code, sec. 11340(b).) For this reason, OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the "clarity" standard. (Gov. Code, sec. 11349.1(a)(3).) "Clarity" as defined by Government Code section 11349 (c) means "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."

Subsection (a) of section 1920.1 submitted by the Board provides:

> "Any horse, stable or trainer that is on the premises, as defined by Rule 1420(q), shall, **in the sole and absolute discretion of the Board,** be subject to heightened surveillance during the period of ten days immediately preceding, and during, any racing meeting. Such heightened surveillance may include, but need not be limited to: observation by Board staff, stewards, or persons affiliated with or retained by the racing association; requiring any horse to be stabled in a stall that, in the sole discretion of the Board, is better situated for monitoring by enforcement staff; requiring any horse to be stabled in a stall that has within it monitoring device(s), including, but not limited to: audio, video, or any other means determined by the Board, and any or all persons or devices utilized for these purposes may utilize recording devices in connection with such surveillance; having the horse stabled in a stall which has on-premises security." (Emphasis added.)

Certainly, some forms of heightened surveillance described in section 1920.1(a) may be implemented by the Board without the adoption of section 1920.1; for example, observation by Board staff, stewards, etc. However, for the security actions needing authorization pursuant to section 1920.1, a person directly affected by this regulation is entitled to know when these security actions authorized by section 1920.1(a) will be imposed. In the Finding of Emergency, the Board explains when a horse or stable might be subjected to heightened surveillance.

> ". . . The Board may wish to monitor a single horse if that horse displays abnormal changes in its winning pattern, and/or if it tests near the allowed limits for a prohibited drug substance. The same is true of an entire stable if more than one horse in a particular trainer's stable performs outside normal patterns or has high concentrations of unauthorized drug substances . . . "

However, such standards are missing from subsection (a) of section 1920.1, which refers only to the sole and absolute discretion of the Board. A person directly affected by section 1920.1(a) would be unaware of such standards and would not understand from the regulation when additional security actions authorized by section 1920.1(a) will be

imposed. For this reason, subsection (a) of section 1920.1 fails to comply with the "clarity" standard of section 11349.1(a)(3) of the Government Code.

3. THE STANDARD 399 FORM REQUIRED BY THE DEPARTMENT OF FINANCE WAS NOT PROPERLY COMPLETED.

Section 6650 of the State Administrative Manual provides in part:

> ". . . The OAL will not approve regulation filings which do not include a properly completed STD. 399. . ."

The STD 399 Fiscal Impact Statement submitted with this emergency filing apparently by inadvertence did not have a completed part C "Fiscal Effect on Federal Funding of State Programs." This can be easily remedied.

CONCLUSION

For the reasons discussed above, OAL disapproved the emergency regulatory action because the record did not demonstrate that section 1920.1 was necessary for the immediate preservation of the public peace, health and safety, or general welfare, a provision in section 1920.1 is unclear, and the STD. 399 form is incomplete. If you have any questions, please do not hesitate to contact me at (916) 323-6808.

DATE: November 10, 2005

CRAIG S. TARPENNING
Senior Staff Counsel

For: WILLIAM L. GAUSEWITZ
Director

Original: Roy Minami, Assistant Executive Director
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